HVPMS Degree College Of Physical Education, Amravati Thr. Secretary Shri. Ravindra G. Khandekar Vs Assistant Commissioner Of Provident Fund, Sub Divisional Provident Fund Office, Akola And Others

Writ Petition No.3424 Of 2017

Court: Bombay High Court (Nagpur Bench)

Date of Decision: Sept. 11, 2018

Acts Referred:
Employees Provident Funds and Miscellaneous Provisions Act, 1952 â€" Section 7A, 7I, 7Q, 14BSick Industrial Companies (Special Provisions) Act, 1985#Coal Mines Provident Fund and Bonus Scheme Act, 1948 â€" Section 10F#Constitution of India, 1950 â€" Article 136, 226

Citation: (2018) 09 BOM CK 0016

Hon'ble Judges: ROHIT B. DEO, J

Bench: Single Bench

Advocate: K.H. Deshpande, A. J. Deshpande, H.N. Verma, N.S. Rao

Judgement

[1] Heard Shri K.H. Deshpande, the learned Senior Counsel for the petitioner, Shri H.N. Verma, the learned Counsel for respondent 1 and Shri N.S.

Rao, the learned Assistant Government Pleader for respondents 2 and 3.

[2] Rule. Rule made returnable forthwith by consent of the learned Counsels for the parties.

[3] This petition questions the order dated 26.10.2016 passed by the respondent 1 Ã¢â‚¬" Assistant Provident Fund Commissioner, Akola in exercise of

powers under section 7Ã‚A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (Ã¢â‚¬Å“ActÃ¢â‚¬ for short) imposing damages under

section 14Ã‚â€‹B and interest under section 7Ã‚â€‹Q of the Act.

[4] The learned Counsel Shri Verma for respondent 1 raises a preliminary objection predicated on the existence of statutory remedy of appeal under

section 7Ã‚â€‹I of the Act.

[5] Paragraph 25 of the petition reads thus:

25. Though the Act provides for a remedy of appeal before the Appellate Tribunal which is constitute under section 7Ã‚I of the Act, However, the

Tribunal which is situated at New Delhi is vacant and no presiding officer has been appointed as yet. As such the remedy provided under section 7Ã‚I

cannot be termed as an alternate remedy. It is pertinent to note that the remedy provided for by the statute is illusory. The present case is one where

the so called alternate remedy is not at all equally efficacious. In order to avail the remedy, the petitioners will have to deposit 75% of the damages

awarded by the authority below, which would cause an undue hardship on the petitioner society, which in turn will result in shutting down of the

college. The remedy provided encumbers the petitioners society excessive burden of paying 75% of damages when on the contrary the petitioner

society is not responsible for paying the damages. It is further submitted that where the alternative remedy is onerous and there has been a palpable

injustice, then merely for availability of an alternate remedy, exercise of writ jurisdiction need not be denied.

[6] The first ground on which writ jurisdiction is invoked without availing the statutory remedy is no longer available since concededly the Appellate

Tribunal is functioning. The second ground that the statutory remedy is illusory in view of the condition of preÃ‚deposit of 75% of the damages needs

consideration only for rejection in view of the settled position of law that such a condition can be validly imposed by the legislature and the alternate

remedy is not rendered either illusory or not equally efficacious.

[7] The learned Senior Counsel Shri K.H. Deshpande would however, submit that the failure of the authority to consider the written submissions of

the petitioner and to record reasons for imposing maximum damages and awarding interest is a jurisdictional error and the alternate remedy ought not

to preclude this Court from exercising writ jurisdiction.

[8] Perusal of the order impugned would reveal that the petitioner Ã¢â‚¬" establishment has paid the interest under section 7Ã‚Q in entirety, which is noted

by the respondent 1 authority, and the order impugned is restricted to damages of Rs.4,95,375/Ã‚â€‹.

[9] The submission of the learned Senior Counsel Shri K.H. Deshpande that no reasons are recorded by the authority for imposing the maximum

damages under section 14Ã‚B of the Act, is not without substance. The petitioner avers in ground (b) that a written reply dated 04.08.2016 was filed in

the proceedings on 05.08.2006 which is at AnnexureÃ‚C. Perusal of AnnexureÃ‚C would reveal that the same is a communication dated 08.09.2016

along with which the cheque dated 08.09.2016 for the interest component was enclosed. However, AnnexureÃ‚E to the petition is a communication

dated 29.09.2016 addressed by the Secretary of the institution showing cause why damages may not be imposed under section 14Ã‚B of the Act. The

said communication finds no reference much less consideration in the order impugned. Be it noted, that the respondent 1 authority has not filed an

affidavitÃ‚â€‹inÃ‚â€‹reply controverting the averments in the petition.

[10] The learned Senior Counsel Shri K.H. Deshpande invites my attention to a decision of a learned Single Judge of this Court in Shree Hanuman

Vyayam Prasarak Mandal, Amravati and another vs. Regional Provident Fund CommissionerÃ‚II, Employees Provident Fund Organisation Sub

Regional Office, Nagpur and another reported in 2015(6) Mh.L.J. 428 in which a similar order was subjected to judicial review in writ jurisdiction and

the proceedings were remitted to the authority to reconsider the imposition of damages. Perusal of the said order would reveal that the petitioner was

permitted to invoke writ jurisdiction without being relegated to the statutory remedy. The learned Counsel Shri Verma points out that no objection was

raised that petition ought not to be entertained in view of the existence of statutory remedy of appeal.

[11] Shri Verma is right in submitting that in the decision relied upon by the learned Senior Counsel Shri K.H. Deshpande no objection was raised that

the petition ought not to be entertained in view of the existence of an alternate and equally efficacious statutory remedy.

[12] It is well settled, inter alia by a relatively recent decision of the Apex Court in Authorized Officer, State Bank of Travancore and another v.

Mathew K.C. reported in (2018) 3 SCC 85 that the normal rule is that writ petition under Article 226 of the Constitution ought not to be entertained if

alternate statutory remedy is available. It would be apposite to refer to paragraph 5 of the said decision which reads thus:

5. We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction under Article 136 of the Constitution is

loath to interfere with an interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest

injustice or abuse of the process of the court. In the present case, the facts are not in dispute. The discretionary jurisdiction under Article 226 is not

absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under

Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the wellÃ‚defined

exceptions as observed in CIT v. Chhabil Dass Agarwal, as follows: (SCC p. 611, para 15)

Ã¢â‚¬Å“15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority

has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has

resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the

proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a

petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the

action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is

created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.Ã¢â‚¬â€‹

[13] The issue which arises for determination is, in essence, whether the irrefutable facts fall within the well defined exceptions culled out in CIT v.

Chhabil Daas Agrawal reported in (2014) 1 SCC 603 or categorizes akin to those carved out by the Apex Court. The exceptions culled out in CIT v.

Chabilaldas Agrawal would appear to be illustrative and not exhaustive.

[14] Section 14Ã‚â€‹B of the Act read thus:

14Ã‚B. Power to recover damages. Ã¢â‚¬" Where an employer makes default in the payment of any contribution to the Fund the [Pension] Fund or the

Insurance Fund] or in the transfer of accumulations required to be transferred by him under subÃ‚section (2) of section 15 [or subÃ‚section (5) of

section 17] or in the payment of any charges payable under other provision of this Act or of [any Scheme or Insurance Scheme] or under any of the

conditions specified under section 17, [the Central Provident Fund Commissioner or such other officer as may be authorised by the Central

Government, by notification in the Official Gazette, in this behalf] recover [from the employer by way of penalty such damages, not exceeding the

amount of areas, 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 sick

industrial company and in respect of which a Scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction

established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may

be specified in the Scheme.]Ã‚ Ã‚

[15] The expression Ã¢â‚¬Å“may recoverÃ¢â‚¬ indicates the legislative intent that the authority is not obligated to impose damages in every case of default.

Even if the authority comes to the conclusion that the default warrants imposition of damages, the authority is vested with the discretion to determine

the quantum subject to the ceiling of the amount of arrears. The authority must necessarily apply its mind to the facts and circumstances of the case

and pass a reasoned order. Implicit in the application of mind is the duty to note, consider and appreciate the explanation or justification which may be

given by the establishment for the failure to deposit the amount of contribution.Ã‚

[16] In The Commissioner of Coal Mines Provident Fund, Dhanbad and others v. J.P. Lalla and Sons reported in (1976) 1 SCC 964, while considering

a similar provision in the Coal Mines Provident Fund and Bonus Scheme Act, 1948 the Apex Court observed thus:

11. The provisions contained in Section 7B of the Act indicate first that the Coal Mines Provident Fund Commissioner may determine the amount due

from the employer, and, second, for this purpose he may conduct such enquiry as he may deem necessary. Therefore, an enquiry is contemplated.

Section 7B(3) speaks of reasonable opportunity being given to an employer to represent his case. The provisions in Section 10F of the Act also

indicate that determination of damages is not a mechanical process. The words of importance in Section 10F of the Act are Ã¢â‚¬Å“such damages not

exceeding 25 per cent of the amount of arrears as it may think fit to imposeÃ¢â‚¬. Here the two important features are these. First, the words of

importance are Ã¢â‚¬Å“damages not exceeding 25 per centÃ¢â‚¬. These words show that the determination of damages is not an inflexible application of a

rigid formula. Second, the words Ã¢â‚¬Å“as it may think fit to imposeÃ¢â‚¬ in Section 10F of the Act show that the authorities are required to apply their mind

to the facts and circumstances of the case.

[17] In Hindustan Times Ltd. vs. Union of India and others reported in (1998) 2 SCC 242, in the context of the provisions of section 49Ã‚B of the Act.

The Apex Court observed thus:

15. In Commr. of Coal Mines Provident FundÃ‚ vs. J.P. Lala & Sons, interpreting section 10Ã‚F of the Coal Mines Provident Fund and Bonus

Scheme Act, 1948, it was stated by this Court that by the use of the words 'may levy damages', in case of default in payment of contribution, and the

words 'as it may think fit to impose', it was clear that the determination was not based on the inflexible application of a rigid formula and that by these

words, the authorities were to apply their mind to the facts and circumstances of the case. As a duty was judicially imposed on the authority, principles

of natural justice were implied. In Organo Chemical Industries v. Union of India where the vires of the Act were upheld, this Court laid down that

while passing orders under section 14Ã‚B, the authority was acting in a 'quaisÃ‚judicial' capacity and was bound to give reasons for its orders. The levy

was not necessarily proportionate to the loss incurred by the employee inasmuch as it was partly compensatory and partly penal.

17. As to the manner in which the authority concerned could arrive at the 'damages', A.P. Sen, J. stated that the authority usually takes into

consideration, Ã‚ as was done in that case Ã‚ the number of defaults, the period of delay, the frequency of defaults and the amounts involved. The

damages were to be compensatory and penal as well and hence principles of estimation of damages under the law of Contract or Torts, were not

applicable.

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

The authority under Section 14Ã‚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 realisations of amounts paid by the cheques or

drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action

for recovery of damages under section 14Ã‚B. The fact that proceedings are initiated or demand for damages is made after several years cannot by

itself be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings under section 14Ã‚B would be

taken; mere delay in initiating action under section 14Ã‚B cannot amount to prejudice in as much as the delay on the part of the department, would

have only allowed the employer to use the monies for his own purposes or for his business especially when there is no additional provision for charging

interest. However, the employer can claim prejudice if there is proof that between the period of default and the date of initiation of action under

section 14Ã‚B, he has changed his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice

to him is of an ""irretrievable"" nature: he might also claim prejudice upon proof of loss of all the relevant records and/or nonÃ‚availability of the

personnel who were, several years back in charge of these payments and provided he further establishes that there is no other way he can reconstruct

the record or produce evidence; or there are other similar grounds which could lead to ""irretrievable"" prejudice; further, in such cases of ""irretrievable

prejudice, the defaulter must take the necessary pleas in defence in the reply to the show cause notice and must satisfy the concerned authority with

acceptable material; if those pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that

effect.

In Mcleod Russel India Limited v. Regional Provident Fund Commissioner, Jalpaiguri and others reported in (2014) 15 SCC 263, the Apex Court

emphasized that mens rea and actus reus are necessary ingredients for levy of damages. It would be apposite to refer to the enunciation of law in

paragraph 11 of the said decision, which read thus:

11. In HMT Ltd., this Court noted the beneficial nature of the ESIC Act; that subordinate legislation must conform to the provisions of the parent Act.

Despite giving due regard to the use of the words ""may recover damages by way of penalty"", and mindful that mens rea and actus reus to contravene

a statutory provision are necessary ingredients for levy of damages, this Court set aside the interference of the High Court visÃ‚Ã*f* Ã‚vis the imposition

of damages and further held that imposition of damages by way of penalty was not mandated in each and every case. The dispute was remitted back

to the High Court for fresh consideration, i.e. to proceed on the premise that the levy of penalty under the Act was not a mere formality, a foregone

conclusion or an inexorable imposition; and that the circumstances surrounding the failure to deposit the contribution of the employees concerned

would also have to be cogitated upon. This decision does not prescribe that damages or penalties cannot or ought not to be imposed. Further, the

presence or absence of mens rea and/or actus reus would be a determinative factor in imposing damages under Section 14Ã‚B, as also the quantum

thereof since it is not inflexible that 100 per cent of the arrears has to be imposed in all the cases. Alternatively stated, if damages have been imposed

under Section 14Ã‚B it will be only logical that mens rea and/or actus reus was prevailing at the relevant time. We may also note that this Court had

yet again reiterated the wellÃ‚known but oft ignored principle that High Courts or any Appellate Authority created by a statute should not substitute

their perspective of discretion on that of the lower adjudicatory authority if the impugned order does not otherwise manifest perversity in the process

of decision taking. HMT Ltd. does not prescribe imposition of damages; that would negate the intent of the legislature. The submission of the

petitioner before us is that the liability was of the erstwhile management and since the petitioner was not the ""employer"" at the relevant time, default

much less deliberate and wilful default on the part of the petitioner was absent. However, it seems to us that once these damages have been levied,

the quantification and imposition could be recovered from the party which has assumed the management of the establishment concerned. Mcleod

Russel India Limited is followed by the Apex Court in Assistant Provident Fund Commissioner v. Management of RSL Textiles India Pvt. Ltd.

through its Director reported in 2017(4) Mh.L.J. 674.

[18] If the order of levy of damages under section 14Ã‚B of the Act is scrutinized on the anvil of the enunciation of law by the Apex Court, it is

evident that the said order is in flagrant violation of the statutory scheme. The authority, who was irrefutably acting in quasi judicial capacity was duty

bound to consider the material on record and then to pass a reasoned order spelling out the reasons for (a) concluding that imposition of damages is

warranted and (b) imposition of maximum damages permissible in law. The explanation of the establishment is not even referred to much less

considered. No reasons are given for imposing the maximum damages permissible. The order impugned clearly falls foul of the letter and spirit of the

statutory provision, the scope and ambit of which is considered by the Apex Court in the decision referred to supra.

[19] I have given my anxious consideration to the submission that in view of the existence of the statutory remedy of appeal, no interference in writ

jurisdiction is warranted. In my opinion, considering that the order impugned fails to even refer to much less consider the explanation of the

establishment and no reasons are recorded for imposing damages and that too the maximum damages permissible in law, directing the petitioner

establishment to approach the Appellate Tribunal would only be a ritualistic formality. Shri K.H. Deshpande, the learned Senior Counsel for the

petitioner establishment is right in contending that illegality is writ large on the face of the order and an exceptional case is made out for entertaining

the petition notwithstanding the existence of the statutory remedy.Ã‚ Ã‚ Ã‚

[20] In the result, the order impugned is quashed and set aside and the proceedings are remitted to Assistant Provident Fund Commissioner, Akola for

fresh decision in accordance with law. The respondent 1 authority shall give an opportunity of hearing to the petitioner establishment and pass a

reasoned order, in accordance with law.

[21] Needless to record, the petition is entertained in the glaring facts of the case.

[22] Rule is made absolute in the aforeÃ‚â€‹stated terms.