

ORISSA HIGH COURT: CUTTACK

WRIT PETITION (CIVIL) No.12961 of 2010

In the matter of an application under Articles 226 of the Constitution of India.

Cambridge School

.....

Petitioner

-versus-

Regional Provident Fund Commissioner,
Bhubaneswar and another

.....

Opposite parties

For petitioner : M/s.P.Panda, B.B.Mahanty & K.C.Rath

For Opp.Parties : Mr. S.S.Mohanty

P R E S E N T :

THE HONOURABLE DR. JUSTICE B.R.SARANGI

Date of hearing: 04.03.2015 : Date of judgment : 31.03.2015

Dr. B.R.Sarangi, J. The petitioner, which is an educational institution, files this petition seeking to quash the order dated 28.8.2003 passed by the Regional Provident Fund Commissioner in Annexure-3 imposing damages for the delayed payments amounting to Rs.3,69,173/- under Section 14-B along with interest of Rs.2876 under Section 7-Q of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and the consequential dismissal of appeal vide order dated 23.3.2010 passed by the Presiding Officer, EPF Appellate Tribunal, New Delhi in ATA No.666(10)04 in Annexure-7.

2. The short fact of the case, in hand, is that the petitioner-establishment, which is an educational institution in the name and style of "Cambridge School" situated at Cantonment Road, Cuttack, is imparting education up to Standard-X having been affiliated to Indian Council of Secondary Education (I.C.S.E.), New Delhi. It is purely a private unaided English Medium school managed by St.Gabriel Brother Society since 1993. The school was established in the year 1961 by the Orissa Public School Society having registered under the Societies Registration Act, 1984. The Employees Provident Fund and Miscellaneous Provisions Act, 1952, hereinafter to be referred to as "the Act", in short, was made applicable to the petitioner-establishment with effect from 19.2.1982 having P.F. Code No.OR2020. The erstwhile management made regular deposit of dues and returns, which were being submitted from time to time. Subsequently, it failed in its obligation under exigencies of situations. The present management has been discharging its obligation since it has taken over with effect from 1993. A show cause notice was issued on 18.7.2003 in P.D.Case Nos.461, 462 and 483 asking the petitioner to show cause in the matter of determination of dues and to appear on 28.7.2003 for belated payment of E.P.F. dues in respect of the institution covering the period from 3/88 to 12/2001. Pursuant to the said notice, the petitioner appeared through the authorized representative on 28.7.2003 and filed its written show cause stating, inter alia, that the delay in payment of the E.P.F. dues has been caused due to the circumstance beyond the control of the present Management since the School was under the Management of the

Orissa Public School Society till 1993. Under the acute financial crisis and administrative chaos, the then management could not run the School to the best satisfaction of the students and parents. Therefore, the management was taken over by St.Gabrial Brother Society. Such taking over of the management was purely an act of charity and benevolence to advance education in the State of Orissa. Therefore, due to acute financial crisis and lack of students' strength and source of income of the Institution, there was delay in payment of the E.P.F. dues. But after taking over the management and administration of the School, the present management is trying to regularize the above deficiencies. Therefore, in the peculiar facts and circumstances of the case, the petitioner requested the opposite parties for waiver of penal damages imposed to the tune of Rs.3,69,173/- under Section 14-B and interest of Rs.2876 under Section 7-Q of the Act, 1952, as demanded by the Regional Provident Commissioner vide order dated 28.08.2003 in Annexure-3. Since the request of the petitioner for waiver of the penal damages imposed in Annexure-3 has not been acceded to, being aggrieved by the said order the petitioner preferred an appeal before the E.P.F. Appellate Tribunal, New Delhi in ATA No. 666(10)04 on 31.08.2004 under Section 7-1 of the Act, 1952 with a prayer to set aside the impugned demand raised by the Regional Provident Commissioner in Annexure-3. But the learned Tribunal considering the materials available on record and after hearing the learned counsel for the parties dismissed the claim of the petitioner on 23.02.2010 in Annexure-7. Hence, this writ petition.

3. Mr. P. Panda, learned counsel for the petitioner states that in the peculiar facts and circumstances of the case admittedly there was delay in deposit of the legitimate dues but that delay cannot be attributable to the petitioner alone in view of the change of management, low income and reduction of the students' strength of the School and therefore, after taking over of the school by the new management, all initiative has been taken for deposit of the amount admissible in accordance with law within the time specified. As such, the petitioner neither disputes the delay in remittance of the E.P.F. dues for the period in question nor disputes the payability of the contribution for that period. But the reasons for delay being beyond its control, the petitioner seeks for quashing of the penal demand as claimed by the opposite parties. It is further stated that total demand of Rs.3,69,173/- along with interest of Rs.2876/- comes to Rs.3,72,049/- in Annexure-3 on 20.04.2004 order was passed in W.P.(C) No. 9629 of 2004 that if the petitioner deposits a sum of Rs.1,00,000/- without prejudice to the rights and contentions raised in the appeal, no coercive action shall be taken till disposal of the appeal by the Tribunal. Accordingly the petitioner deposited a sum of Rs. 1,00,000/-. He further submitted that if Rs.1,00,000/- is excluded, the balance of Rs.2,72,049/- is the liability of the petitioner to pay to the opposite parties. In support of his contention, Mr. Panda has relied upon the judgments in **H.P. State Forest Corporation v. Regional Provident Fund Commissioner** (Civil Appeal No. 5717 of 2001 disposed of on 03.04.2008) wherein the apex Court has held that the inaction on the part

of the Commissioner to initiate proceedings within a reasonable time has to be deplored. Mr. Panda urged that the demand for the period 3/88 to 11/90, 1/91, 2/91, 4/91 to 10/91, 12/91, 3/92, 5/92, 3/94 to 8/94, 11/94 to 1/95, 3/97 to 4/97, 6/97, 9/97 to 12/97, 3/2000 to 7/2000 and 12/2001 has been raised pursuant to the order in Annexure-3 dated 28.3.2003 imposing penal damage under Section 14-B of the Act, 1952 to the tune of Rs.3,69,173/- along with interest of Rs.2876/-, totaling Rs.3,72,049/-. The opposite parties having not raised the demand within a reasonable time, imposition of penalty under Section 14-B of the Act, 1952 cannot be sustained in the eye of law and as such, the same is barred by limitation as it is purely a money claim made by the opposite parties.

4. Mr.S.S.Mohanty, learned counsel for the opposite parties strenuously refuted such allegations and justified the order passed by the authorities and stated that the provisions of Limitation Act is not applicable to the present context and as such, the authorities having discharged their duties in conformity with the statutory provisions contained in the Act, 1952, the petitioner is liable to pay the amount as demanded by the opposite parties. It is further urged that the petitioners having admitted the liability, cannot turn around and say that the authorities should exercise its power for waiver of penal damages and that ipso facto is not permissible and as such, the petitioner admittedly being an educational institution imparting education, is liable to pay the demand raised by the authority pursuant to Annexure-3, which has been confirmed in appeal in Annexure-7. In order to substantiate his contention, he has relied upon the

judgments in **Regional Provident Fund Commissioner v. M/s.K.T.Rolling Mills Pvt. Ltd.**, AIR 1995 SC 493, **Hindustan Times Ltd. v. Union of India and others**, (1998) 2 SCC 242= AIR 1998 SC 688, and **M/s.Easkey Machinery (P) Ltd., Mancheswar represented through its Managing Director v. Regional Provident Fund Commissioner, Orissa**, 86(1998) CLT, 619.

5. On the basis of the facts pleaded above, it is admitted case of the parties that the petitioner-establishment is an educational institution imparting education to the students affiliated to I.C.S.E., New Delhi. It is purely a private unaided English Medium School to which the Act, 1952 is made applicable with effect from 19.2.1982 having EPF Code No. OR2020. It is the further admitted case that after being covered within the fold of Act, 1952, the petitioner was depositing the P.F. contribution of its employees before the E.P.F. Commissioner. It is also further admitted that there was delay of the contribution for the periods 3/88 to 11/90, 1/91, 2/91, 4/91 to 10/91, 12/91, 3/92, 5/92, 3/94 to 8/94, 11/94 to 1/95, 3/97 to 4/97, 6/97, 9/97 to 12/97, 3/2000 to 7/2000 and 12/2001 and therefore, there is delay in deposit of all the dues for which after giving due opportunity by issuing notice of show cause and on receipt of the reply thereof and on consideration of the same, penal damage under Section 14-B has been imposed amounting to Rs.3,69,173/- and after adding interest under Section 7-Q to the tune of Rs.2876/-, the total demand comes to Rs.3,72,049/-. The reasons stated by the petitioner for the delay in depositing the dues were not sufficient to waive the penal damages.

Admittedly, penal damages were levied at the rate prescribed in Part-32-A of the E.P.F. Scheme, 1952, Para 5 of Employees' Pension Scheme, 1995 and Para 8A of EDLI Scheme, 1976. In view of the provisions contained in the Act, 1952 and the schemes governing the field, the authority is duty bound to levy damages at the rate prescribed under the Scheme. Therefore, levy of damages under Section 14-B cannot be and could not be at the caprices and whims of the opposite parties, rather, the opposite parties are discharging their duties in consonance with the provisions contained in the Act, 1952 and schemes governing the field. The reliance placed by the learned counsel for the petitioner on **H.P. State Forest Corporation (supra)** where it was pleaded that although there was no limit prescribed under the Act within which the proceeding under Section 7-A can be initiated, but under the broad principle that a reasonable period ought to be read into the Statute, the present delay of 16 years from 1982 could not be justified. Considering such contention, the apex Court held that the inaction on the part of the Commissioner to initiate a proceeding within the reasonable time has to be deplored. But the apex Court further held that as the Corporation has itself submitted that it was covered under the Act, 1952 and in view of the limited relief granted by the authorities, the apex Court disinclined to interfere with the matter at that stage and therefore, dismissed the appeal with a direction that the amount due from the Corporation will be determined only in respect of those employees, who are identifiable and whose entitlement can be proved on the evidence and that in the event the record is not available with the Corporation, it

would not be obliged to explain its loss, or that any adverse inference be drawn on that score. With the said modification, the appeal preferred by **H.P. State Forest Corporation (supra)** has been dismissed by the apex Court. In view of the judgment of the apex Court in **H.P. State Forest Corporation(supra)**, reasonable period neither has been explained nor has been clarified by the apex Court. Therefore, the said ratio is not applicable to the present context.

6. In **M/s.K.T.Rolling Mills Pvt. Ltd., (supra)**, the apex Court has considered as to when power under Section 14-B of the Act, 1952 should be allowed to be used and whether it would be in consonance with the object sought to be achieved by the Act if the delay in invoking the power is allowed to stand on the way. In the K.T.Rolling reference was made to what apex Court said in **Organo Chemical Industries v. Union of India**, AIR 1979 SC 1803. In **Organo Chemical Industries (supra)**, the apex Court was called upon to decide the constitutionality of Section 14-B, which was challenged as violative of Article 14 having conferred unguided power. The same was rejected by the apex Court. It also spelt out the purpose of imposition of damages stating that the same was meant to penalize defaulting employer, as also to provide reparation for the amount of loss suffered by the employees. It was pointed out that it is not only a warning to employers in general not to commit a breach of the statutory requirements, but at the same time it is meant to provide compensation or redress to the beneficiaries, i.e. to recompense the employees for the loss sustained by them. It is further considered that the

order of the Commissioner came to be challenged before the Bombay High Court by the M/s.K.T.Rolling Mills Pvt. Ltd., which has set aside the order solely on the ground that the proceeding was bad because of unreasonable delay in initiating the same. The Court pointed out that though Section 14-B has not laid down any period of limitation, the power has to be exercised within reasonable time. As the default related to the period from July, 1968 to October, 1977, relating to which proceedings came to be initiated in 1985, the High Court regarded the delay as unreasonable, and so, fatal. The Regional Provident Fund Commissioner preferred the aforesaid appeal with the aid of Article 136 of the Constitution. The apex Court held that there can be no dispute in law that when a power is conferred by statute without mentioning the period within which it could be invoked, the same has to be done within reasonable period, as all powers must be exercised reasonably, and exercise of the same within reasonable period would be a facet of reasonableness. But the apex Court took into consideration that the delay was of 12 years viewed generally and was 1½ years qua the case at hand. Though the general period of delay is quite long, unreasonably long, but if it is borne in mind that in view of large number of establishments in the State of Maharashtra, default at hand come to notice only in April, 1985, the killing effect of delay gets eroded. Therefore, the apex Court did not think it appropriate to strike down the order of the Commissioner levying demands on the ground of delay when it has also kept in mind that the default related even to the contribution of the employees, which money the M/s.K.T.Rolling Mills Pvt. Ltd.(after

deducting the same from the wages of the employees) must have used for its own purpose and that too without paying any interest, at the cost of those for whose benefit it was meant. Any different stand would encourage the employers to thwart the object of the Act, which cannot be permitted. So holding the apex Court set aside the judgment of the Bombay High Court.

7. In **Hindustan Times Ltd. (supra)**, the apex Court has taken into consideration the explanation submitted for imposition of penal charges under Section 14-B and it was held that 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 cheques or drafts, cannot be justifiable grounds for the employer to escape liability. More so, it is further held that delay in initiating the proceeding cannot itself be treated as an amount of waiver. But the authorities under Section 14-B have to apply their mind to the facts of the case and the reply to the show-cause notice and pass a reasoned order after following the 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. The apex Court further held that fourteen years' delay in initiating action under Section 14-B did not vitiate the consequential order.

8. In **M/s.Easkey Machinery (P) Ltd.** (supra), this Court has already held that the Act, 1952 does not contain any provision prescribing a period of limitation for assessment or recovery of damages. The monies payable into the fund are for the estimate benefit of the employees can directly recover these amounts. The power of computation and recovery are both vested in the Regional Provident Commissioner or other officers as provided in Section 14-B. Recovery is not by way of suit. Initially it was provided that the arrears could be recovered in the same manner as arrears of land revenue. But by Act 37/53, Section 14-B was amended providing for a special procedure under Section 8-B to 8-C. By Act 40/73 Section 11 was amended by making the amount a first charge on the events of the establishment if the arrears of employees' contribution were for a period of more than 6 months. By Act 33/83, the charge was extended to the employee's share of contribution as well. Therefore, there is no iota of any doubt that the authority is incompetent to impose penal damage under Section 14-B of the Act, 1952. The provisions of limitation Act is not applicable to the provisions of Act, 1952 and therefore, there is no bar on the way of the E.P.F. Commissioner to impose default damages under Section 14-B for the simple reason that the employees' contribution having been deducted by the employer, it should have been immediately remitted to the Provident Fund Commissioner account and instead of remitting the same if the same is utilized for the purpose other than the purpose for which it has been deducted, then the Commissioner is empowered under the Statute to impose penal damages to secure and

ensure the deposit of the employee's share to the Commissioner within a reasonable time. If the same is not complied with, then major penalty can be imposed in compliance to the provisions of Section 14-B of the Act, 1952 and the rates of penal damages have been incorporated by the Government of India under Para 32-A of the EPF Scheme, 1952 and Para-5 of the Employees' Pension Scheme, 1995 and Para 8A of the EDLI Scheme, 1976. Therefore, any delay in remittance of the employee's share deducted by the employer is liable to penal damages under Section 14-B of the Act, 1952 and as per the terms and conditions mentioned in the above schemes.

9. Taking into consideration the provisions of law discussed above, no case is made out before this Court that the Regional Provident Fund Commissioner is not competent to impose penal damages under Section 14-B rather in paragraph 12, the petitioner admits as follows :

"12. That the petitioner neither disputes the delay in remittance of the E.P.F. dues for the period in question under the predecessors management nor disputing the pay ability of contribution for that period and more so the petitioner made all possible efforts and endeavors since the since the time of taking over the school Administration to clean up the back dues for which the School has incurred a heavy loan from a Nationalized Banks. It is very much pertinent to note here that the petitioner have been discharging the liability very honestly and diligently which would be evident from the chart showing the deposit made by the petitioner towards arrear dues, showing its bonafideness and innocence hence imposing penalty on account of belated of the dues payment to the extent of 90% even of 100% of the dues is a stringent punishment and as such the same is unwarranted when the present management is co-operative rather than evading the payment of statutory dues."

10. Considering the above admission of the petitioner to the extent that the petitioner neither disputed the delay in remittance of the E.P.F. dues for the period in question under the predecessor management nor disputed the payability of the contribution for that period, this Court is of the view that the petitioner is liable to pay the penal damages under Section 14-B. So far as quantum is concerned, the same having been fixed under various schemes mentioned above, there is no dispute that the petitioner is not liable to pay the said amount, which has been determined in conformity with the provisions of law.

11. In the above factual background of the case in hand, the penal damages imposed by the Commissioner in Annexure-3 is wholly and fully justified and therefore, no irregularities or illegalities have been committed by the appellate Tribunal in dismissing the appeal and upholding the order passed by the Commissioner in imposing penalty under Section 14-B of the Act, 1952 itself. Therefore, this Court is not inclined to interfere with the imposition of penal charges levied by the Commissioner in the impugned order in Annexure-3, which has been made confirmed by the appellate authority in Annexure-7.

12. Before parting with the case, this Court would like to observe that by virtue of the interim order passed by this Court in W.P.(C) No.9629 of 2004, an amount of rupees one lakh has already been deposited without prejudice to the rights and contentions raised in the appeal pursuant to which there was direction that no realization of the amount shall be made

till disposal of the appeal. Therefore, deducting the amount already deposited and adjusting the same, the Commissioner may proceed for realization of the balance amount by way of installment, if it is so permissible in accordance with law.

13. With the aforesaid observation and direction, the writ petition stands disposed of.

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Dr.B.R.Sarangi, J.

Orissa High Court, Cuttack
The 31st March, 2015/ **PKSahoo**