Serial No.01
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HIGH COURT OF MEGHALAYA
AT SHILLONG

WA No.52/2024

Date of CAV : 25.02.2025
Date of pronouncement : 28.03.2025

Regional Provident Fund Commissioner II, Office of the Employees Provident Fund Organization, N.E.R., Barik, Near BSNL Office, Shillong-793001. ..... Appellant

Vs.

North Eastern Electric Power Corporation Employees Provident Fund Trust, NEEPCO Ltd., Brookland Compound lower new Colony, Shillong-793003, represented by its Secretary. ..... Respondent

Coram:

Hon'ble Mr. Justice I.P. Mukerji, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Ms. P. Bhattachrjee, Adv

For the Respondent : Mr. S. Jindal, Adv with
Mr. I. Kharmujai, Adv

i) Whether approved for reporting in Law journals etc.: Yes

ii) Whether approved for publication in press: Yes/No

Note: For proper public information and transparency, any media reporting this judgment is directed to mention the composition of the bench by name of judges, while reporting this judgment/order.

JUDGMENT

(*Delivered by the Hon'ble, the Chief Justice*)

North Eastern Electric Power Corporation Limited (the respondent) is an establishment covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act), the Employees' Provident Funds Scheme, 1952, Employees' Deposit-Linked Insurance Scheme, 1976 and Employees' Pension Scheme, 1995 framed thereunder. The respondent was required to remit the contribution along with the administrative charges within 15 days of the close of every month.

They did not do so.

Under Section 14B of the Act on such default, it became liable to pay penalty in the form of damages not exceeding the arrear at the rates specified in Para 32A of the EPF Scheme, 1952, Para 5 of the EPS, 1995 and 8A of EDLI Scheme, 1976, at the following rates:

Period of delay	Rate upto 25/09/2008	Rate from 26/09/2008
Less than two months	17%	5%
2 months and above and less than 4 months	22%	10%
4 months and above and less than 6 months	27%	15%
6 months and above	37%	25%

The respondent was also liable to pay interest under Section 7Q of the Act on such delayed payment. There was default on the part of the respondent from 1st April, 1996 to 31st March, 2014.

The office of the Regional Provident Fund Commissioner SRO, Shillong made a detailed calculation of such delay, interest and damages. On 21st October, 2021, the Commissioner issued a show cause notice to the respondent. They were asked to appear before the authority on 29th October, 2021.

Hearings were given by the appellant to the respondent on or from 29th October, 2021.

From what appears in the averments in the writ petition, the respondent pleaded that the deposit of contribution beyond time was unintentional. As the period covered was about 25 years, the records were not available. Then a plea was made before the adjudicating authority that the demand was for a long period of time and that great prejudice would be caused to the respondent if it had to pay the damages computed for this whole period. A reasonable stand be taken by the adjudicating authority, citing judgments of the Supreme Court and High Court.

Finally on 6th February, 2023, the Regional Provident Fund Commissioner-II, Shillong by an order directed the respondent to pay damages of ₹60,57,874/-.

By the instant writ petition, the respondent challenged this adjudication order.

Upon filing of affidavits it came up for consideration before a learned single judge of this Court. By the impugned judgment and order dated 5th August, 2024 he set aside the show cause notice dated 21st October, 2021 and 3rd February, 2023.

This appeal involves interpretation and application of Section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

Section 14B is inserted below:

> "**14B. Power to recover damages.**– Where an employer makes default in the payment of any contribution to the Fund [the [Pension] Fund or the Insurance Fund] or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, [the Central Provident Fund Commissioner or such other officer as may be authorized by the Central Government, by notification in the Official Gazette, in this behalf] may recover [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:]

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

[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.]"

The questions to be determined are (i) whether under this section, the adjudicating authority has any power to reduce or remit all together the penalty?

(ii) Whether the Regional Provident Fund Commissioner ought to have wholly or partially remitted the penalty imposable under the section?

(iii) Whether this Court in the exercise of its writ jurisdiction could be moved to challenge the impugned show cause notice and the adjudication orders?

First I will deal with the question about the maintainability of this writ application, the contention being that the said Act provides a party aggrieved by a determination under Section 14B, a remedy of appeal under

Section 7-I of the said Act to the Industrial Tribunal constituted under Section 7D thereof.

Section 7-I and Section 7D are inserted below:

> "**7-I. Appeals to Tribunal**.–(1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub-section (3), or sub-section (4) of section 1, or section 3, or sub-section (1) of section 7A, or section 7B [except an order rejecting an application for review referred to in sub-section (5) thereof], or section 7C, or section 14B, may prefer an appeal to a Tribunal against such notification or order.
> (2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed."
>
> **7D. Tribunal**.–The Industrial Tribunal constituted by the Central Government under sub-section (1) of Section 7A of the Industrial Disputes Act, 1947 (14 of 1947) shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Tribunal for the purposes of this Act and the said Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act."

If one examines Article 226 of the Constitution, one will find that the power of the court to issue a writ or writs to any authority or person in respect of any cause of action within the jurisdiction of the court, is unlimited. The Supreme Court and High Courts, by various pronouncements, from time to time since the coming into force of the Constitution have

limited the exercise of this power by laying down some very salutary principles.

A writ is maintainable inter alia when the petitioner seeks enforcement of a fundamental right or there is violation of the principles of natural justice with the impugned adjudication proceedings or where the proceedings are wholly without jurisdiction or where the vires of an Act is under challenge. The landmark case in this area is ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & ors***: ***(1998) 8 SCC 1*** decided by the Supreme Court on 26th October, 1998.

If there is proper exercise of jurisdiction and the adjudicating authority, while exercising its jurisdiction, commits any error of fact or of law, the appellate authority could rectify it. The writ court would refrain from exercising its jurisdiction and leave the aggrieved party to approach the appellate forum. If there is failure to exercise the jurisdiction vested in the authority or exercise of jurisdiction which is not conferred on him or misuse of jurisdiction, it transgress the statute creating it. There is little or no purpose in asking the aggrieved party to prefer an appeal because what has been considered and decided was not within the statute or the jurisdiction of

the appellate authority and the appellate authority has only the authority to decide what has been decided within the statute and its jurisdiction.

Hence, if the essential or fundamental facts are not considered or the applicable law not applied, there is failure to exercise jurisdiction on the *Whirlpool* principle.

The writ court would not refrain from exercising its jurisdiction to correct the error.

If one peruses the writ petition, one finds that the complaint against the Regional Provident Fund Commissioner is that he refused to make a detailed enquiry into the facts of the case as well as failed to appreciate the law on the subject which he was required to do. The allegation also is that the Regional Provident Fund Commissioner was very brusque and did not hear the respondent.

In this case, one would notice from the discussion made hereafter on the second issue that the question whether the respondent was entitled to remission of damages on application of the law laid down by the Courts was not properly considered at all by the Regional Provident Fund Commissioner. Therefore, he failed to exercise his jurisdiction which was vested in him.

Secondly, there is a serious allegation of breach of the principles of natural justice by the adjudicating authority by not giving a fair hearing to the respondent or considering the submission made by it fairly and judiciously.

More importantly, when a writ has been admitted, heard and decided even if the writ was not maintainable for the existence of an alternate remedy, at the appellate stage, it would be most unjust on the part of the Court to relegate the respondent-writ petitioner to the alternate remedy.

For all those reasons, I am in complete agreement with the view of the learned single judge that the instant writ is maintainable.

Now, I come to the second point.

Section 14B has fallen for determination by both the Supreme Court and High Courts over the years.

The Court has the power to remit a part of the damages or penalty to be imposed under Section 14B but it cannot remit the whole of it. (*See* ***Regional Provident Fund Commissioner v. S.D. College, Hoshiarpur & ors*** reported in ***AIR 1997 SC 3645***).

The use of the word "may" and "not" in the section plainly suggests that the exercise of jurisdiction to award damages or penalty in the manner specified in the scheme is directory and not mandatory. (See ***Hooghly Mills Co. Ltd. & anr v. Regional Provident Fund Commissioner*** reported in ***(2009) 4 CHN 774*** and ***Arambagh Hatcheries Ltd. v. Employees' Provident Fund Organization*** reported in ***(2013) 5 CHN 108***).

In ***Organo Chemical Industries & anr v. Union of India & ors*** reported in ***AIR 1979 SC 1803*** cited by learned counsel for the appellant, the Supreme Court opined that adjudicatory powers granted to the Regional Provident Fund Commissioner under this Section are required to be exercised judiciously and damages or penalty granted within the limit fixed by the statute, taking into consideration factors such as number of defaults, the period of delay, the frequency of default and the amount involved.

In the computation of interest payable by the employer under Section 7Q no right of hearing is given to him. In Section 14B a right of hearing is given. This is for the simple reason that under Section 7Q, the calculation is mathematical from ascertained figures and hence, there is no scope of any decision being made on hearing, inasmuch as the decision can only be one. This right is given to the employer under Section 14B because

in determining the damage or penalty payable, adjudication of the right to get partial remission of the damage or penalty payable under Section 14B is involved. (*See* ***Tepcon International (I) Ltd. v. Regional Provident Fund Commissioner & ors*** along with connected matters reported in ***2015 SCC Online Cal 6193*** cited by learned counsel for the respondent).

In adjudicating the issue of full or partial recovery of damages or penalty, the Regional Provident Fund Commissioner is enjoined with the duty to examine each case fairly and judiciously.

In ***Hindustan Times Limited v. Union of India & ors*** reported in ***AIR 1998 SC 688*** cited by learned counsel for the appellant, the Supreme Court took a very conservative view with regard to the claim for damages and penalty.

First of all, it ruled that a proceeding under the said Section is not a suit and hence three years limitation under Indian Limitation Act, 1963 did not apply. It also refused to rule that arrear damages had to be recovered within reasonable time. It said that when within the stipulated period the money was not deposited by the employer, it may have made good use of it and enjoyed the "boon of delay" which is "so dear". However, in paragraph 28 of the judgment relied upon by the respondent the defence of

irretrievable prejudice caused to the employer on the ground of delay in recovery of damages, was open to him. He had to prove that because of the delay he altered his position to his detriment resulting in irretrievable prejudice.

In ***Assistant Provident Fund Commissioner, EPFO & anr v. Management of RSL Textiles India Pvt. Ltd.*** reported in ***(2017) 3 SCC 110***, the Supreme Court relying on its earlier decision in ***Mcleod Russel India Ltd. v. Regional Provident Fund Commissioner Jalpaiguri & ors*** reported in ***(2014) 15 SCC 263*** cited by learned counsel for the respondent opined that "in the absence of a finding relating to *mens rea/actus reus* on the part of employers, action under Section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, cannot be sustained".

Although the Supreme Court has said that the Limitation Act 1963 does not apply to a provident fund claim, in my opinion, any inordinate delay on the part of the provident fund authority to lodge its claim for damages might be presumed to cause irretrievable prejudice to the employer. A statutory authority cannot enjoy greater rights, that too in quasi-judicial proceedings before the provident fund authority than the

government which has thirty years' time under Article 112 of the Limitation Act, 1963 to file a suit. A statutory authority, not being government has three years' time to do so, under Article 113. Therefore, any claim by the provident fund authority, not being government, beyond three years should be presumed to cause irretrievable prejudice to the employer unless this presumption is rebutted by the provident fund authority.

The Provident Fund Commissioner in passing the impugned order has not addressed these issues at all.

In the circumstances, the Regional Provident Fund Commissioner is directed to ascertain the amount of penalty or damages payable by the respondent for the above period i.e. three years preceding the issuance of demand with show cause notice dated 21st October, 2021 only on the basis of the above observations.

If the respondent is willing to pay the damages or penalty under the said Act for a period of three years preceding the issuance of the demand with show cause notice dated 21st October, 2021 well and good. No hearing is required. Only damages or penalty amount may be computed by the Regional Provident Fund Commissioner. If the respondent wants a remission of that amount on any of the grounds mentioned above, it may write in this

behalf to the Regional Provident Fund Commissioner within four weeks of communication of this order. In that event, the Regional Provident Fund Commissioner shall start a proceeding, give the respondent an opportunity to file a written statement of its case with legal submissions and an opportunity of being heard and pass a reasoned order within three months of communication of the respondent's intention to seek partial remission of the claim amount for damages or penalty.

The impugned judgment and order is set aside.

The appeal is partly allowed to the above extent and disposed of accordingly. No order as to costs.

(W. Diengdoh)
Judge

(I.P. Mukerji)
Chief Justice