

SUPREME COURT OF INDIA

Mcleod Russel India Limited

Vs.

REG. Provident Fund Commissioner, Jalpaiguri

C.A.No.5927 of 2014

(T.S.Thakur and Vikramajit Sen JJ.)

02.07.2014

JUDGMENT

VIKRAMAJIT SEN,J.

1. Leave granted.

2. This Appeal assails the judgment of the Division Bench of the High Court at Calcutta which had allowed the Appeal preferred against the judgment of the learned Single Judge, who in turn had applied and implemented the opinion of the Division Bench as expressed in Darjeeling Dooars Plantation Ltd. vs Regional Provident Fund Commissioner, 1995 ILLJ 939 Cal. In the impugned Order, the present Division Bench had the advantage of perusing the view taken by a Special Bench of three learned Judges of the Calcutta High Court in Dalgaon Agro Industries Ltd. vs Union of India, (2006) 1 CALLT 32 (HC), which was decided on 24.06.2005. The Special Bench was constituted in view of a reference submitted by a Single Judge in Writ Petition No. 16037(W), who had entertained an opinion which differed with three earlier decisions rendered by Single Judges in three separate matters. Along with the aforestated writ petition, an appeal pending before a Division Bench against one of those Single Judge decisions was also taken up by the Special Bench. In this Appeal, therefore, we have primarily to consider whether the exposition of law by the Special Bench in Dalgaon Agro Industries Ltd. is the logical and acceptable view.

3. The factual matrix obtaining in the case at hand, succinctly stated, is that M/s. Mathura Tea Estate, P.O. Mathura Bagan, District Jalpaiguri, West Bengal, owned by Saroda Tea Company Ltd., indubitably an establishment covered by the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (~the EPF Act for brevity), had defaulted in remitting the contributions and accumulations payable under the EPF Act and the sundry Schemes formulated under that statute. It was in those circumstances that the Regional Provident Fund Commissioner (~RPF Commissioner for brevity), Jalpaiguri, West Bengal, had issued notices to M/s. Mathura Tea Estate enabling it to show cause against the imposition of ~damages as envisaged under Section 14B of the EPF Act. M/s. Mathura Tea Estate requested for a waiver of damages, which request came to be rejected on the predication that the said establishment was neither a sick unit nor the subject of any scheme for rehabilitation sanctioned by the Board for Industrial and Financial Reconstruction. In the duration of those proceedings, the management of M/s. Mathura Tea Estate under the erstwhile ownership of Saroda Tea Company Ltd. was taken over by Eveready Industries (India) Ltd, which thereafter discharged the liability of entire principal sum of Provident Fund dues to the tune of Rs.75,76,000/- pertaining to the period prior to the takeover in consonance with the Memorandum of Understanding entered into between it and Saroda Tea Company Ltd. Significantly, the said Memorandum of Understanding also included a clause to the effect that any damages payable for the failure to deposit the dues and accumulations under the EPF Act would be the exclusive liability of Saroda Tea Company Ltd making it palpably evident that the appellant was fully alive to this liability. It is in these premises that Eveready Industries (India) Ltd. undauntedly contended before the RPF Commissioner, Jalpaiguri, in the event in futility, that proceedings under Section 14B of the EPF Act against it were unjustified as it was not the employer defined under Section 2(e) of the EPF Act, which defaulted in paying contributions. The RPF Commissioner has recorded that M/s. Mathura Tea Estate had defaulted in payment of dues for the period from March, 1989 to February, 1998, which assertion of fact is not in dispute. It held that on a conjoint reading of Sections 14B and 17B of the EPF Act it was clear that damages under Section 14B were recoverable jointly and severally from Saroda Tea Company Ltd. as well as Eveready Industries (India) Ltd. After tabulating the rates of damages, i.e. percentage of arrears per annum depending on the period of default, damages were assessed at Rs.70,37,950; and it was further directed that failure to deposit penal damages within the stipulated period would attract the provisions of Section 7Q of the EPF Act, thereby enhancing the liability to include simple interest at the rate of 12 per cent per

annum on the damages. It was this Order of the RPF Commissioner that failed to find favour with the learned Single Judge of the High Court at Calcutta, who set aside the Commissioners Orders and directed the said Authority to reconsider the issues within a period of three months. The learned Single Judge had drawn reliance from the ruling reported as *The Regional Provident Fund Commissioner, Mangalore vs Karnataka Forest Plantations Corporation Ltd., Bangalore, 2000 (1) LLJ 1134*, which had ruled that on an interpretation of Section 17B the transferee employer would be liable to pay all outstanding contributions even for the period preceding the transfer, but it could not be fastened with punitive liability for acts of omission or commission of the previous employer for the period anterior to the transfer. It will bear reiteration that in terms of the judgment of the Division Bench impugned before us, the decision of the learned Single Judge in its own turn was reversed on the application of the dictum of the Special Three-Judge Bench in *Dalgaon Agro Industries Ltd.*

4. The Special Bench of the High Court of Calcutta in *Dalgaon Agro Industries Ltd.* has rendered a detailed judgment on the conundrum before us. Succinctly stated, the Special Bench has opined that (a) the transferor and the transferee managements remain jointly and severally liable under Sections 14B and 17B of the Act for all sums due including damages; (b) the transferors indebtedness comes to a halt on the date of the transfer but includes the sums computed under both these Sections till the date of transfer; (c) the transfer does not bind either the employees or the Fund; (d) the transferee stands cautioned by virtue of Sections 1(3) and 17B that the erstwhile as well as the current employer remain responsible for liabilities under both the Sections as a consequence of liability being that of the establishment in question of which employers are merely fictional representatives to facilitate recovery of dues; (e) recovery of any amount due is protected under Section 11(2) of the Act, which grants priority to the amount so due over all other debts under any other statute as being the first charge on the assets of the establishment; (f) the Act has innovated radical and effective modes of recovery as evident from Sections 8B and 8F, which further reinforces the fact that liability to pay dues is of the establishment recoverable through the employer; (g) liability under Section 14B admits no waiver except as provided; (h) damages could be recovered regardless of any reasonable period of prescription; (i) the covenants in the Transfer Deed are irrelevant for determination and recovery of dues and damages; and (j) criminal liability would be attracted only in the event the outstandings are not completely recovered.

5. For facility of reference, the relevant provisions of the EPF Act are reproduced:-

An Act to provide for the institution of provident funds, pension fund and deposit-linked insurance fund for employees in factories and other establishments.

Section 1(3) Subject to the provisions contained in section 16, it applies -

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government may, after giving not less than two months notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification.

Section 2(e) employer means “

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under clause (f) of sub-section (1) of section 7 of the Factories Act, 1948 (63 of 1948), the person so named; and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent;

Section 7A. Determination of moneys due from employers. “ (1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional

Provident Fund Commissioner or any Assistant Provident Fund Commissioner may, by order, -

(a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the [Pension] Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.

Section 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 him 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.

Section 8. Mode of recovery of moneys due from employers“ Any amount due -
(a) from the employer in relation to an establishment to which any Scheme or the Insurance Scheme applies in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund damages recoverable under section 14B, accumulations required to be transferred under sub-section (2) of section 15 or under sub-section (5) of section 17, or any charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme; or (b) from the employer in relation to an exempted establishment in respect of any damages recoverable under section 14B or any charges payable by him to the appropriate Government under any provision of this Act or under any of the conditions specified under section 17 or in respect of the contribution payable by him towards the Pension Scheme under the said section 17, may, if the amount is in arrear, be recovered in the manner specified in sections 8B to 8G.

Section 11(2) Without prejudice to the provisions of sub-section (1), if any

amount is due from an employer whether in respect of the employees contribution deducted from the wages of the employee or the employers contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law for the time being force, be paid in priority to all other debts.

Section 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 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 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.

Section 17B. Liability in case of transfer of establishment - Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be, in respect of the period up to the date of such transfer: Provided that the liability of the transferee shall be limited

to the value of the assets obtained by him by such transfer.

6 We shall briefly discuss a decision of this Court namely, *Sayaji Mills Ltd. vs. Regional Provident Fund Commissioner*, 1984 (Supp) SCC 610, even though the questions before this Court are disparate in quotient. The management/owners of the Sayaji Mills had contended that since the factory had been purchased in 1955 in certain liquidation proceedings and the period of three years had not elapsed from the date of its establishment, the EPF Act would have no applicability to it under unamended Section 16(1)(b) of the Act. This Court observed that the statute is a beneficent legislation and any interpretation facilitating the evasion of its provisions should be abjured, as employers would spare no ingenuity in seeking to deprive the employees of all the benefits conferred upon them; that the old establishment should virtually have come to an end for the EPF Act to apply afresh; and most significantly, that the said Act is made applicable to the factory in contradistinction to its owner. Once this rationale is applied to the present conundrum, it becomes apparent that the inter se covenants between the Eveready Industries (India) Ltd. and the erstwhile owners viz. Saroda Tea Company Ltd. would not insulate the former from the rigours of damages imposed by the EPF Act. Damages must be calculated, it is plain, and be recovered by the Authority in the most efficacious and convenient manner. This decision, *Sayaji Mills Ltd.*, was not brought to the notice of the Division Bench of the Karnataka High Court in *Karnataka Forest Plantations Corporation Limited*, otherwise it would not have endeavoured to explore which party/employer was ~guilty of the infraction of the statutory provisions. The reasoning of the Karnataka decision is evidently flawed and runs counter to the intendment of the EPF Act as is crystal clear from a perusal of its Preamble (supra); and manifests the ingenuity that employers may devise to circumvent liability.

7. Mr. Jayant Bhushan, learned Senior Counsel for the Appellant has sought sustainment for his submissions from *Employees State Insurance Corporation vs HMT Ltd.* (2008) 3 SCC 35, but in our consideration, in vain. In that case, the ESIC raised a claim for deposit of interest on outstanding contributions of the management under the ESIC Act and the concerned Regulations, and in addition thereto levied damages in terms of Section 85B of the Employees State Insurance Act, 1948 (~ESIC Act for brevity). Section 85B of the ESIC Act is essentially para materia Section 14B of the EPF Act, and therefore this decision assumes great importance. The submission of the HMT Management was that damages ought not to be levied, since Section 85B was an

enabling provision and did not intend to make levy of damages mandatory. We shall reproduce for facility of reference and comparison, the statutory provision of ESIC Act, 1948 to spotlight the legal nodus with which we are presently engrossed “ 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 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 of 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 regulations.

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

8. 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 vis-à-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 14B, 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 14B 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 well-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 proscribe 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 concerned establishment.

9. The Two-Judge Bench decision in *Organo Chemical Industries vs Union of India* (1979) 4 SCC 573, makes compelling reading not only because of the contrasting styles of two of our illustrious predecessors; A.P. Sen J for his erudite, efficient and precise exposition of the law and V.R. Krishna Iyer J for his elegance of expression and verve impregnated with humanism and compassion. *Organo* involved a petition under Article 32 of the Constitution challenging the Constitutional vires of Section 14B of the EPF Act. The contention was that the default of the employer/establishment was not wilful, rendering inappropriate the imposition of damages of a penal nature; and since the computation of damages was left totally unguided and untrammelled, violation of Article 14 was plainly and expectedly obvious. The Court while upholding the Constitutional validity of Section 14B held that the *raison detre* for the introduction of Section 14B (by Act 40 of 1973) was to deter and thwart employers from defaulting in forwarding contributions to the Funds, most often with the ulterior motive of misutilizing not only their own but also the employees contributions. Section 14B originally restricted damages to 25 per cent of the withheld amounts which, having been found to be ineffectual for the attainment to the objectives of the Act, was increased to a sum not exceeding the amount of arrears. This Court also interred the division or dichotomy of opinions flowing from differing decisions of different High Courts by clarifying that the word ~damages has been

employed in this dispensation to mean penalty on recalcitrant employers as well as reparation for loss caused to the Fund. The Court stoutly repelled the contention that damages were merely compensatory in nature and, therefore, should not exceed the interest that would have accrued in favour of the Funds had the contributions been diligently dispatched to the Funds. Organo has been favourably followed in Babubhai & Co. vs. State of Gujarat (1985) 2 SCC 732.

10. There is no gainsaying that criminal liability remains steadfastly fastened to the actual perpetrator and cannot be transferred by any compact between persons or even by statute. But this incontrovertible legal principle does not support or validate the contention of Mr. Jayant Bhushan, Learned Senior Advocate for the Appellants, that damages levied in terms of Section 14B of the EPF Act cannot be foisted onto his clients. Sections 14, 14A, 14AA, 14AB and 14AC of the EPF Act are the provisions postulating prosecution; in contradistinction Section 14B contemplates the power to recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme. It is true that it is not a river but a mere rivulet that segregates and distinguishes the legal concepts of damages or compensatory damages or exemplary damages or deterrent damages or punitive damages or retributory damages. We shall abjure from writing a dissertation on this compelling legal nodus; save to clarify that modern jurisprudence recognizes that the imposition of punitive damages, quintessentially quasi-criminal in character, can be resorted to even in civil proceedings to deter wilful wrongdoing by making an admonished example of the wrongdoer. This is the essential purpose, it seems to us, of Section 14B of the EPF Act, and an imposition within its confines does not assume criminal prosecution so as to stand proscribed insofar as transfer of establishment from one management/employer to its successor is concerned.

11. It has also been argued that damages as postulated in Section 14B would not be transferable under Section 17B. This argument has to be stated only to be rejected for the reason that Section 17B specifically speaks of the contributions and other sums due from the employer under any provision of this Act or the Scheme (emphasis added). The proviso to Section 17B indeed clarifies the position inasmuch as it restricts and/or limits the liability of the transferee up to the date of the transfer to the value of the assets obtained by him through such transfer. 12 We are also not impressed by the argument addressed by Mr. Bhushan to the effect that damages under Section 14B are not jointly and separately recoverable from the erstwhile and

the present managements under Section 17B as Section 14B moves in its own and independent orbit. Several amendments have been made to the EPF Act so far as the fasciculous of Sections 7A to Section 7Q is concerned. This is also true of the pandect containing Sections 14A, 14AA, 14AB, 14AC, 14B and 14C; and for that matter Sections 17A, 17AA and 17B. Where such widespread amendments and changes are incorporated in a statute, it is always salutary and advisable to reposition the provisions and number them sequentially and logically. The argument that the phrase determination of amounts due from any employer is found in Section 7A as well as in Section 17B is not factually correct. Section 17B speaks of contributions and other sums dues from the employer under any provision of this Act .; the latter Section is, therefore, wider in ambit than the previous one. In our opinion, Section 14B is complete in itself so far as the computation of damages is concerned. It is conceivable that the money due from an employer would have to be calculated under Section 7A, and in the event the default or neglect of the employer is contumacious and contains the requisite mens rea and actus reus yet another exercise of computation has to be undertaken under Section 14B. Where the Authority is of the opinion that damages under Section 14B need to be imposed, the computations would come within the purview of Section 14B and it would be recoverable jointly and severally from the erstwhile as well as the current managements. A perusal of the Appeals Section, namely, 7I is illustrative of the fact that these exercises are distinct from each other as per the enumerations found in the first sub-Section of Section 7I. It also appears logical to us, in the wake of the numerous and different dates of amendments, that Section 7A(2) would also be available to proceedings under Section 14B of the Act. The applicability of Civil Procedure Code, 1908 to proceedings under Section 14B has not specifically been barred by the statute. 13 It is necessary to clarify that Eveready Industries (India) Ltd. had in the interregnum of this litigation changed its name to Mcleod Russel India Ltd. In view of our above analysis, it is our considered opinion that the impugned Judgment deserves to be upheld. It contains a detailed and logical exposition of facts as well as the law pertaining to the present dispute. We also approve the pithy observations of the RPF Commissioner, Jalpaiguri in the subject Order that failure on the part of the employers to make remittances of accumulations and contributions, undermines the objectives and purposes of the statute. We underscore that the liability of the Fund to pay interest to subscribers regardless of whether employers have paid their dues, runs relentlessly. The Commissioner has specifically recorded that he has taken a lenient view in the matter and has eschewed imposition of damages to the extent of 100 per cent of the arrears even though this is

envisaged by the EPF Act. The Appellant-Petitioner has, in the circumstances of the case, been also rightly burdened with the payment of interest under Section 7Q of the EPF Act. Accordingly, the Appeal is dismissed and the interim Orders are recalled. Although, it is our opinion that the Appeal is wholly devoid of merit, we refrain from imposing costs.