**REF. NO.CGIT-2/EPFA/108 OF 2017**
**[Old ATA No. 1013(9) of 2016]**

**BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL-2, MUMBAI**

M/S. AGLOWMED LTD.

MUMBAI - APPELLANT

V/s.

ASSISTANT PROVIDENT FUND COMMISSIONER

MUMBAI - RESPONDENT

**JUDGMENT**

**Dated : 20.08.2021**

**Present:** **Shri H. L. Chheda, Representative for the Appellant.**

**Mrs. K. Sawant, Advocate for the Respondent.**

1. The present appeal is filed by the appellant M/s. Aglowmed Ltd. against the order of APFC i.e. Respondent Mumbai under section 7 (i) of the EPF & MP Act, 1952 [hereinafter referred to as 'Act'] in which he challenged Respondent APFC order dated 11.11.16 which is passed u/s. 14B of the Act.

2. Both the parties admitted that 7Q amount and 7A amount was paid by the appellant. It is also admitted that 7Q amount of Rs.83,434/- was deposited by the appellant on 25.1.17. According to appellant he was registered under the provisions of Companies Act, 1956 and covered under EPF Act vide code No. MH/23410. According to the appellant the establishment had continued suffer losses due to stiff competition in the domestic market as well as

adverse Government policy and sale was affected due to supply & demand of the finished goods. The inflow of the financial aid was stopped.

3. According to appellant, during the year 2009-10 establishment was suffering from huge losses and due to actual financial crises it was no possible to appellant establishment to pay salary and wages to its employees within time limit. So according to appellant he is not in a position to pay PF contribution within such scheme as prescribed under the Act. So he filed this appeal on the following grounds.

(i) Respondent authority do not follow the principle of natural justice and do not provide sufficient opportunity. They pass the order which is not speaking order and imposed maximum rate of damages indicating in summon.

(ii) According to appellant respondent authority do not followed Hon'ble SC & H.C. judgment regarding mens rea and mitigating circumstances which he raised before him.

(iii) That section 14B not envisaged mandatory levy of penal damages. Issue of demand notice directing the firm to pay damages for default in making remittances was un-sustainable.

(iv) That respondent authority passed order in dual capacity as a Prosecutor as well as Judge. He also misused his power which is vested by legislature without applying the mind and do not

following para – 32 of scheme. He do not mentioned reason and ground for reaching the conclusion.

In this way the appellant filed this appeal for praying that order passed by the APFC in exercise of power u/s. 14B is illegal, unjustified and un-sustainable so it should be set aside and quashed. He also pray for further review.

4. On behalf of respondent they file reply by raising preliminary objections

(i) that it is not maintainable because appeal is prepared is bad in law and appellant is well aware about the concerned act. Respondent denied all material facts which is raised in the appeal as indicating wrong falls & baseless.

(ii) According to respondent principle of natural justice have been duly followed and order is speaking, sufficient opportunity given before levying damages, compliance fully provisions of above act. Quantification of damages amount is calculated vide system based application.

(iii) According to respondent damages are as specified in scheme bear from 5 to 25% according to periodical default. There is nothing in the scheme which prohibited the respondent from levying the damages. According to respondent, notice and summons was issued to the appellant before assessment for the period of 4/09 to 6/09. There is nothing in provision which must

bear the relationship to loss which is caused to the beneficiaries under the scheme.

(iv) According to respondent, absence of mens rea in itself without justification is not necessary. If that was the case it would have been open for every employer to circumvent the provisions of a statutory enactment and plead absence of mens rea.

(v) According to respondent, there is no dispute that establishment had defaulted in depositing PF on due dates. According to respondent, the appellant establishment had not any certification of being sick unit under SICA and no rehabilitation scheme is approved from BIFR to the establishment.

In this way the respondent pray that dismissal of appeal in merits because it is welfare measure for class of workers.

5. **Point of Determination**

1. Whether respondent APFC provided sufficient opportunity to the establishment in the form of principle of natural justice ?

2. Whether mens rea considered by the respondent authority ?

3. Whether order is sustainable ?

6. **Reasons for decision:**

(I) Learned representative for appellant in written arguments they raised following main points; i) respondent authority imposed maximum rate of penalty without considering mitigating circumstances, ii) without adopt

straight-jacket formula, iii) even they are quasi judicial authority even though they did not apply their mind, iv) order is without reasoning and without discussing the mens rea so according to the appellant it is not speaking order but it is passed mechanically and v) without consonance their departmental guidelines.

In this way they relied their arguments in following case laws. i) Assistant Provident Fund Commissioner V/s. The Management of RSL Textiles (I) Pvt. Ltd. – Hon'ble S.C. [MANU/SC/0028/2017], ii) ESIC V/s. HMT Ltd. – Hon'ble SC [MANU/SC/0488/2008], iii) CBT, EPFO V/s. Sanjay Maintenance - Hon'ble Bombay H.C. [MANU/MH/1366/2017], iv) RPFC V/s. Harrisons Malayalam Ltd. D.B. – Hon'ble Keralal H.C. [MANU/KE/0754/2013] and v) Aglowmed Ltd. V/s. APFC, Mumbai – Hon'ble EPFAT under ATA No. 35 (9) 2012 dated 1.10.2013

(II). On the contrary Learned Counsel of respondent filed their written arguments by asserting that, i) it is statutory duty of the establishment to comply with the provisions of act, ii) opportunity of being heard was given to the establishment but establishment had not produce any record, iii) respondent authority applied their mind and given reasons before passing the order so order is speaking, iv) according to the respondent, appellant is habitual defaulter so burden of proof lie on appellant u/s. 106 of Evidence Act and v) it is the duty of the appellant to give valid and proper reason for delay by filing document as well as evidence.

In support of their arguments he relied on following cases, i) Hon'ble S.C. – Orango Chemical Inds. & Anr. V/s. UOI (1979), ii) Hindustan Times Ltd. V/s. UOI (1998), iii) Avon Scales Company V/s. RPFC, (1993) II LLJ 216, iv) The Hon'ble CGIT-2 in the case of EPFA/07/2018, v) Hon'ble Apex Court – S.D. College Hoshiapur and vi) APFC V/s. EPF 1. Appellate Tribunal, New Delhi & 2. M/s. Sri Rani Laxmi Ginning Spinning & Weaving Mills Ltd. [TN/3476] Coimbatore – Madras H.C. – WP No. 4633 of 2012 – dated 1.10.19.

7. Now I want to see legal position :-

**7.1** In the case of **Kiron B Dhingra Vrs. Union of India** & ors. reported in 2012/(3)/MHLJ/334 Bombay HC, it has been held and observed by the Hon'ble Bombay High Court in following para

*"8. The learned Advocate for the Petitioner has rightly relied upon the observations made in paragraphs 10 and 11 of the Judgment of learned Single Judge ( Coram: B. P. Dharmadhikari J.) in the case of Bhatkuli Taluka Co-operative Agricultural Sale and Purchase Society Ltd. Amravati v/s. Regional Provident Fund Commissioner, reported in 2007 (2) Mah. L. J.810 : 2007(3) of All MR 249 2006 Indlaw MUM 713, which I quote below:-*

***Para-10:-*** *Perusal of the various judgments mentioned above, therefore, clearly show that the Authority writing a order under section 14-B is obliged to point out the actual damages and also the damages imposed as penalty. If the order is not indicating application of mind in relation to these heads, the order has been held to be a non-speaking order. Not only this but the judgment also show that the Authority exercising the function to assess damages in paragraph No.32-A read with section 14-B is exercising quasi-judicial function, and therefore, it has to take into account the difficulties placed before it by the employer. The contentions that the Authority is therefore obliged to levy damages at the maximum rate prescribed in paragraph No.32A does not appear to be correct. The discretion in the matter is very much available with the Authority and all judgments on which the parties have placed reliance unequivocally indicate this. Even the plain language of paragraph 32A shows that the word used therein is `may`. As already pointed out those provisions has been brought into force from 1-9-1991 and if the framers of scheme wanted to force the*

*authority to recover damages at the maximum rate specified in the table, there was no need to use the word `may`. The word `shall` could have been very well used in it. In view of the judgments referred above and in view of the language of paragraph No.32-A, I find that the argument of respondent in this respect cannot be sustained. It is also pointed out that paragraph No.32-A cannot be interpreted to defeat scheme of section 14-B as laid down by the Hon'ble Apex Court and as expounded by the learned Single Judge of this Court otherwise it would itself become vulnerable.*

***Para-11:-*** *In this background when the impugned order is perused, the impugned order nowhere speaks about such damages or its penal part as mentioned above. It is further apparent that the maximum rate stipulated in paragraph No.32-A has been mechanically applied and from the arguments advanced, it appears that the respondent is under wrong impression that it has no discretion to levy damages at lesser rate than prescribed.*

**7.2**. In the case of **Streetlight Electric Corporation Vs. RPFC, Haryana,** The Hon'ble Supreme Court specifically observed that

*"It can be like non- availability of record of the persons from which it could be established that there was some justifiable basis for delay in deposit - Still the authority has to give some rational basis for imposition of penalty - Different rates of penalty imposed for different years - No rational basis disclosed for different rates - Entire amount of penalty reduced to its 25% only"* ***(2001(4)SCC/449)***

**7.3**. In the case of **M/s R.D.34 Ariyakudi Primary Agricultural Co-op. Bank Vs… EPFAT**(2020/LLR/229) The Hon'ble Madras High Court specifically held that

***PARA-5 "****Learned Counsel for the appellant placed reliance on the judgment of the Hon'ble Supreme Court in Mcleod Russel India Limited v. Regional Provident Fund Commissioner, Jalpaiguri and others reported in (2014) 15 Supreme Court Cases 263, wherein the Hon'ble Supreme Court has held as under:*

*"11. In [ESI Corpn.v. HMT Ltd., (2008) 3 SCC 35 : (2008) 1 SCC (L&S) 558], 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 mensrea and actusreus to contravene a statutory provision are necessary ingredients for levy of damages, this Court set aside the interference of the High Court vis-a-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 mensrea and/or actusreus would be a determinative factor in imposing damages under Section 14-B, as also the quantum thereof since it is not inflexible that 100 per cent of the arrears have to be imposed in all the cases. Alternatively stated, if damages have been imposed under Section 14-B, it will be only logical that mensrea and/or actusreus 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 establishment concerned."*

***PARA-8-****"In view of the fact that the authorities below have not applied their mind and in view of the fact that the Hon'ble Supreme Court has held that mensrea is an essential ingredient.*

**7.4** In the case of **RPFC Vs. Shibu Metal Workers** (1964(27)/FJR/491) The Hon'ble Supreme Court held that

> *Para-13 "Reverting then to the question of construing the relevant entry in Sch. 1, it is necessary to bear in mind that this entry occurs in the Act which is intended to serve a beneficent purpose. The object which the Act purports to achieve is to require that appropriate provision should be made for the employees employed in the establishments to which the Act applies; and that means that in construing the material provisions of such an Act, if two views are reasonably possible, the courts should prefer the view which helps the achievement of the object. If the words used in the entry are capable of a narrow or broad construction, each construction being reasonably possible, and it appears that the broad construction would help the furtherance of the object, then it would be necessary to prefer the said construction. This rule postulates that there is a competition between the two constructions, each one of which is reasonably possible. This rule does not justify the straining of the words or putting an unnatural or unreasonable meaning on them just for the purpose of introducing a broader construction"*

**7.5** In the case of **Maharashtra State Co-operative Bank Ltd. Vs. APFC** (2009(10)/SCC/123) The Hon'ble Supreme Court held that

> ***Para-47*** *"If interest payable by the employer under Section 7Q and damages leviable under Section 14 are excluded from the ambit of expression "any amount due from an employer", every employer will conveniently refrain from paying contribution to the Fund and other dues and resist the efforts of the concerned authorities to recover the dues as arrears of land revenue by contending that the movable or immovable property of the establishment is subject to other debts. Any such interpretation would frustrate the object of introducing the deeming provision and non obstante clause in Section 11(2). Therefore, it is not possible to agree with the learned senior counsel for the appellant-bank that the amount of interest payable under Section 7Q and damages leviable under Section 14B do not form part of the amount due from an employer for the purpose of Section 11(2) of the Act"*

**7.6** In the case of **Hindustan Times Ltd. //vs// Union of India and others** (1998) 2 Supreme Court Cases 242, The Hon'ble Supreme Court placing reliance upon the case of **Organo Chemicals reported in 1979(4) SCC 573,** laid down certain principles for the purpose of deciding the matters pertaining to damages u/s. 14-B of the EPF Act and held that "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 passed a reasoned orders 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 employer based on the 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."

8. Now I see the factual matrix of this case – On the perusal of the impugned order of APFC dated 11.11.16 it reveals that this is combined order 7Q as well as 14B in which 7Q amount was assessed for Rs.83434/- which is paid by the appellant on 25.1.17. It also appeared that on behalf of establishment / appellant, Sr. Manager of appellant Mr. Stephen Anthony was appeared on 8.11.16 and according to respondent authority he asserted that "he has agreed and accepted the belated remittance of PF and allied dues and levy of damages & interest." But nothing in record shows that he seek any adjournment or filed any documents relating to financial crises of the company. Appeal memo is also not show that appellant submitted written submission before APFC. On the contrary he accepted the belated remittances. It also appears that appellant deposited 7Q of the act amount i.e. interest amount in concerned department so it seems that calculation part i.e. delay period and amount due and rate of interest is not disputed. In this way

as we think about damages part calculation for period and amount is same. For which no objection was filed by any party.

9. As far penal rate of damages u/s. 14B is concerned, summons issued by the department to the appellant for imposing damages so that after 26.9.08 rate of damages prevail less than 2 months delay of 5% and more than 2 month it will vary from 10% to 25%. It also appears that appellant establishment did not file any document neither before this tribunal nor before APFC regarding their financial position so how can we expect from APFC to discuss this point.

10. On perusal of the impugned order of APFC dated 11.11.16 order is cumulative, no reason was mentioned regarding rate of damages and mens rea. So in my mind it is not called speaking order. It also appears that mens rea is not discussed here with so counsel for appellant prayer to reduce the damages amount is appears to be genuine and proper.

11. Assessment period 4/09 to 6/09 in which calculation sheet at page 32 of appeal part it shows that first default for 12 days, second default for 87 days and third default is for 69 days. It also appears that amount for last two defaults he imposed maximum rate of penalty i.e. 25%. So in my humble opinion total damages amount u/s. 14B of Rs.69145/- is reduced to near about 50% i.e. Rs.35,000/- to give complete justice to the parties. So appeal is allowed in part.

12. Hence order.

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**[Old ATA No. 1013(9) of 2016]**

**ORDER**

1. **Damages amount of Rs. 69145/- is reduced to near about 50% i.e. Rs.35,000/-**
2. **Appellant is directed to deposit an amount of Rs.35,000/- within one month from the date of order.**
3. **Both parties bear their own costs.**

13. Accordingly the appeal is allowed in part.

14. The copy of order be sent to both the parties. File be consigned to the Record Room after due compliance.

Sd/-

Date: 20.08.2021

(SHYAM. S. GARG)
Presiding Officer/Link Officer
CGIT-2, Mumbai