REF. NO.CGIT-2/EPFA/69 OF 2018

BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL-2, MUMBAI

M/S. SPURGEON TRANSPORT [P] 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. Spurgeon Transport Pvt. 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 8.6.18 which is passed u/s. 14B of the Act for the period of 1.10.2013 to 31.03.2014 (default period 2/10 to 5/13).

2. Admitted fact of the case is that

(i) Assessment is done for the period of 1.10.2013 to 31.03.2014 (default period 2/10 to 5/13).

(ii) Appellant is private limited company registered under Companies Act and working as transport Management logistics. Company registered under PF Act on 24.4.2013. It is also

admitted that appellant paid 7A of the Act amount on from Oct. 13 to March 14 and 7Q of the Act amount on 23.9.2019.

(iii) This tribunal passed an order u/s. 7 O on 18.9.19 in which he directed the appellant to deposit 10% of the assessed amount and stay is granted.

(iv) This tribunal also decided same type of case on 16.08.2021 which carry No. REF. NO.CGIT-2/EPFA/44 OF 2019.

3. Case of appellant was that :-

(i) Case of appellant was that “upon verification of the records, the Act and Scheme provisions of 1952 were applied against the appellant establishment with retrospective date and was provided with PF Code No. MH/BAN/128370 for rendering compliance in respect of the employees employed by the appellant. It is to state that, due to various reasons that were being attributed to the global recession, the appellant was compelled to make the remittances to the Fund belatedly.”

(ii) That the appellant was into the business of carry & forward was unaware of the provisions of the Act and the three Schemes framed there under. It has come to the knowledge of the appellant only after the enforcement officer paid a visit to the appellant.

(iii) That the respondent commissioner ignoring the prescribed procedure of serving show cause notice, has issued summons to appear for hearing u/s. 14B of the Act, 1952 on 12.07.2016 for belated remittance made during the period from 02/2010 to 05/2013 vide No. MH/BAN/0128370/Enf 501/Damages/AK/733 dated 20.06.2016.

(iv) That the appellant after going through the annexure 'A' to the summons issued by the respondent commissioner found that said summon the respondent has recorded that, "And whereas, under section 14B of the Act, where an employer makes default in payment of contributions or any charges, the Commissioner is required to recover by way of penalty such damages, not exceeding the amount of arrears and the rates of Damages at the rates specified in para 32A of EPF Scheme, 1952, 5 of EPS 1995 and 8A of EDLI Scheme 1976."

(v) That the Authorised Representative appeared before the respondent commissioner and verbally pleaded that, the proposed damages by waived and also to consider the written submission made on 7.6.18.

In this way the appellant challenged the impugned order of APFC dated 8.6.18 on following grounds;

(i) The impugned order passed by the respondent commissioner is ex-facie bad in law besides being not only illogical but also illegal that requires to be set aside and quashed.

(ii) The appellant has been denied the first reasonable opportunity to show good cause in mitigation specifically for the pre-discovery period.

(iii) That the levy of damages by following straight jacket formulate amounts calculation of damages without application of mind and is illegal and liable to struck down.

(iv) That ignored to consider that there was neither wilful default nor guilty of conduct contumacious on the part of the appellant. In view of the above facts, it can be concluded that the respondent commissioner prima facie intentionally, deliberately and in planned manner avoided to issue show cause notice.

(v) That the respondent commissioner ignoring his own department circular dated 17.06.2004 which clarifies in respect of pre-discovery period the EPFO is required to credit the interest only has levied damages and passed the impugned order requires to be declared as null and void.

(vi) That in the impugned order passed by the respondent commissioner, no such findings were recorded that the appellant actions can be termed as either mens rea or actusreus.

(vii) That the respondent commissioner has been functioning in “Dual-Capacity” as prosecutor as well as quasi-judicial authority which is against the principles of natural justice.

(viii) That there was non-application of mind on the part of respondent commissioner while passing the impugned order and passed non-speaking and non-reasoned order.

In this way appellant pray to quash and set aside the impugned order passed by respondent APFC.

4A. Learned Counsel for respondent by filing counter reply denied most of material fact by asserting that some facts are related to matter of record, some are replied as no comments but respondent asserted that establishment has been covered u/s. 1(3) (b) w.e.f. 1.4.06. According to respondent he admitted that he engaged 20 more employees from 1.4.06. According to respondent it was duty of employer to get coverage as soon as it engaged 20 or more persons but establishment was covered u/s. 1(3)(b) on 18.4.13 after the inspection carried out by Enforcement Officer. According to respondent benefit of pre-discovery period has been withdrawn by the Head office circular dated 3.2.09. So appellant is responsible for delay in remittance. According to respondent submission in para 6.6 of appeal is baseless, false and denied. According to them mens rea is very much established as much as coverage from 1.4.06 and order of respondent authority is based on following the principle of natural justice and facts submitting before the authority.

4B. According to respondent interest u/s. 7Q can be fixed at 12% or more as may be specified in the scheme. It is decided by parliament through amendment.

By filing reply respondent pray that dismiss this appeal with costs and uphold the order of respondent authority.

5. **Point of Determination**

1. Whether respondent APFC passed this order by providing reasonable opportunity ?

2. Whether order of APFC is speaking ?

3. Whether order of APFC is legal & proper ?

4. What relief appellant is entitled to ?

6. **Reasons for decision:**

Learned representative for appellant in written synophis of arguments argued that

- respondent is misleading this Hon'ble Tribunal by stating that Mens rea is not applicable.
- He also argued that determining the factor for imposing damages u/s. 14B of this act is not inflexible so APFC has not followed the case laws passed by Hon'ble High Court and Hon'ble Supreme Court.
- He also argued that they did not follow Central Board of Trustees circular of 17.06.2004 of appellant covered under para 2 of this circular.
- He did not consider the Mens rea, order is not speaking and he did not provide reasonable opportunity so he pray for quashing & set aside of the impugned order by allowing appeal.

7. Learned representative for appellant relied on the following case laws.

- Central Board of Trustees for EPF V/s. Institute of Our Lay of Fatima & 1 Other (s) – Order dated 11.7.2019 – R/Spl. Civil Appln. No. 8654 of 2017 – Gujarat H.C. at Ahmedabad.
- RPFC V/s. Harrisons Malayalam Ltd. – 2013 – LLR – 1083 – Kerala H.C.

8. On the contrary written submission submitted by the Learned Counsel of respondent by denying the arguments of appellant submitted following facts;

- That reasonable opportunity was given. It is also denied that order is not speaking.
- That timely deposit of PF contribution is absolutely a statutory obligation which cannot be allowed to be diluted by such extraneous factors.
- That in this case the appellant establishment was covered under the Act of 1952 w.e.f. 1.4.2006 wide memorandum dated 24.4.2013.
- That their deliberate default may be seen in earlier year also for which the establishment regularly defaulted the statutory dues in appeal field by the establishment in the year 2018 in appeal No. 69/2018, this proves that the establishment is a habitual offender.
- That establishment fails to prove that by reasons or document for delayed the payment.
- That the circular for taking benefit of pre-discovery period has been withdrawn by Head office circular dated 13.2.2009.

Learned Counsel of respondent pray that appeal is liable to be dismissed with cost because APFC order is legal and valid. He relied on following case laws.

1. Organo Chemical Industries & Anr. V/s. UOI (1979) – Hon'ble S.C.
2. Hindustan Times Ltd. V/s. UOI (1998)
3. Avon Scales Company V/s. RPFC, (1993) – II LLJ – 216.
4. S.D. College, Hoshiapur – Hon'ble Apex Court.
5. Rajawade Mandal Peoples' V/s. RPFC – WP No. 2341/1996 – Hon'ble Bombay H.C.
6. 6. M/s. Catterjee Cleaning Arts V/s. APFC – WP No. 2613 / 2011 – Hon'ble H.C. – order passed on 2.9.2014.

9. Now I want to see legal position :-

9.1 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.*

9.2. 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)***

9.3. 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.*

9.4 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"

9.5 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"

9.6 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."

10. Now I see the factual matrix of this case – On the perusal of the record, it appears that 7Q and 7A amount was deposited by the appellant / establishment without any dispute. The dispute is arisen according to the appellant as to penalty because the establishment was registered under EPFO i.e. covered with effect from 24.04.2013. After that he deposited that amount from Oct. 2013 to March 14. This amount is for the period in question. Appellant's argument was that respondent authority wrongly imposed damages from back date i.e. retrospectively. He also argued that respondent authority cannot go against their departmental circular which is issued by the C.B.T. on 17.06.2004. He also argued that due to ignorance of the provisions of EPF Act, appellant did not registered this firm under EPF Act even though their employees are more than 20. This argument was denied by the Learned Counsel for respondent.

11. On the perusal of appeal memo, it is admitted that appellant firm M/s. Spurgeon Transport [P] Ltd. is registered under Companies Act, 1956 and is into the business activities of providing transport management logistics. It shows that he is doing advance transport business of logistics. So argument of learned representative of the appellant is not sustainable as he ignored the PF law. Otherwise we think that ignorance of law is no excuse.

12. As far as CBT circular dated 17.6.2004 is concerned which is issued by the department but according to Learned counsel for respondent it was withdrawn by the department on 13.2.09.

13. For a moment if we consider the argument of learned representative for the appellant, as per requirement of the circular dated 17.6.2004 is that “establishment which paid PF dues within the time prescribed in the coverage notice” but on perusal of the records it appears that he deposited that amount Oct. 2013 to March 14 after coverage but coverage is from 24.4.13. It means Mens rea is present there for not depositing that amount within a prescribed period. Principle of equity require that those who want equity must do equity. On the perusal of the record, it appears that delay of registration under EPF act as regards to the coverage is not fault of department because squad team inspecting the establishment and found that employees in this establishment is more than 20 so squad team made further enquiry / investigation regarding applicability of act from 2007. So in my humble opinion appellant liable to pay damages due to default in depositing dues amount u/s. 7A. In case of Navnilal K. Shah (Dr.) Petitioner V/s. Union of India and Anr. [Respondents] – 2004 (1) Mh.L.J. pg. 984 Hon’ble High Court held that ;

"Imposition of damages for default on part of employer to make contribution – In absence of any power being given to waive such penalty altogether it cannot be heard to contend that merely because the decision under section 7-A was taken after the date from which the Act was applicable to the establishment that it would automatically postpone the date for imposition of damages under section 14-B – Certainly it does not mean that in a given situation, authorities should not exercise their discretion under section 14-B while imposing the penalty but it cannot be said that the authorities cannot impose damages for pre-discovery period."

14. On going through above discussion and touch stone of above case laws, my humble opinion is that respondent authority has not applied his mind to decide Mens rea in this case. It is also appeared that they do not given observation regarding submissions submitted by the appellant. So in the eye of law that order is not called speaking order. As I observe that default of appellant from 2007 i.e. before the registration u/s. 1(3)(b) of the act i.e. establishment was covered from 24.4.13 w.e.f. 1.4.06. I also observe that ignorance of law is not justifiable exercise. In this circumstances mens rea can be infer considering default from 2/2010 to 05/2013 in my humble opinion it is treated as presence of mens rea on the part of appellant. It also appears that respondent authority imposed the damages without mentioning proper reason.

15. On going above discussion it appears that fault on both side appellant as well as respondent so in my humble opinion amount of damages to be

reduced to near about 40% to give complete justice to the parties. So appeal is allowed in part.

16. Hence order.

ORDER

1. **Damages amount of Rs.1,55,041/- is reduced to near about 40% i.e. Rs.63,000/-**
2. **Appellant is directed to deposit an amount of Rs.63,000/- within one month from the date of order.**
3. **Both parties bear their own costs.**

17. Accordingly the appeal is allowed in part.

18. 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