REF. NO.CGIT-2/EPFA/Q. No.1 OF 2021

BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL-2, MUMBAI

THE PRDNYA NIKETAN EDUCATION SOCIETY,
THE ORCHID COLLEGE OF ENGG. & TECHNICAL
GAT NO.16, TULJAPUR ROAD,
SOLAPUR-413005 - APPELLANT

V/s.

ASSISTANT PROVIDENT FUND COMMISSIONER
EMPLOYEES' PROVIDENT FUND ORGANISATION,
REGIONAL OFFICE, 165-A, SURWASE TOWERS,
RAILWAY LINE, SOLAPUR-413001 - RESPONDENT

JUDGMENT

Dated : 09.09.2021

Present: **Shri Milan Bhayani, Representative for the Appellant.**
Mr. Suresh Kumar, Advocate for the Respondent.

1. The present appeal is filed by the appellant against the order of APFC i.e. Respondent under section 7 (i) of the EPF & MP Act, 1952 [hereinafter referred to as 'Act'] in which he challenged Respondent APFC order dated 28.02.20 which is passed u/s. 14B & 7Q of the Act.

2. Admitted fact of the case is that

(i) Appellant is College which is a registered society, which is also registered under EPF vide Code No. PU/SLP/105892 under EPFO Solapur.

(ii) According to appellant, APFC being quasi judicial authority passed the impugned order without considering written submission & arguments in respect of legal objection including citation which he take before him. He also asserted that respondent authority passed the order separately but actually order is in same footing without considering their arguments.

(iii) He also asserted that respondent authority issued summons / show cause notice and during the proceedings respondent authority did not report statement on AR and close the proceedings without giving proper opportunity.

(iv) According to the appellant he make payment salary of the staff and deducting PF contribution as per section 6 of the act & scheme. He never delayed the payment of PF contributions. Delay is caused due to late payment of State Govt.

(v) He also asserted that he did not use this money for business purposes or other purposes.

3. In this way the appellant filed this appeal on the following grounds;

(i) Respondent authority did not consider his written representations and legal objections.

(ii) Respondent authority did not apply judicial mind and without considering mensrea.

(iii) Respondent authority did not considered mitigating circumstances.

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

4. On behalf of respondent, Learned Counsel Shri Suresh Kumar opposed this appeal by asserting that order is proper and legal. Respondent authority applied his mind, passed separately order. He also argued that 7Q is not appealable so this appeal is not maintainable.

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 argued that

- He paid the contribution amount in instalment.
- He also argued that APFC did not consider their problem in which he received late payment from the State Govt. as a Matric Scholarship or grant.
- He also argued he submits the fee reimbursement bill on the to the State Govt. and State Govt. takes lot of time to clear the bills due to which they are delay in submitting EPF liability because they are totally dependent on State Government’s officials to their payment.

- He also argued that APFC did not consider mens rea and order of APFC is not speaking hence APFC order is sustainable in eye of law.

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

1. Assistant Provident Fund Commissioner V/s. Ashram Madhyamik – 2007 LLR – 1249 – M.P. High Court.
2. ESIC V/s. H.M.T. Ltd. – 2008 – I – LLJ – 814 (SC)
3. Gaurav Enterprises V/s. Union of India & Ors. – WP (C) 8485/2021 & CM APPL. 2648/2021 – Delhi High Court.

8. On behalf of respondent, Learned Counsel Shri Suresh Kumar argued that APFC order is proper and legal which consider all factor of law and it is speaking order.

9. He relied on following case law.

1. Birla Cotton Spinning & Weaving… V/s. Union of India And Ors. on 29 August, 1983 – ILR – 1984 Delhi 60.
2. Pune Mahanagar Parivahan Mahamandal Ltd. V/s. RPFC Pune – CGIT-2/EPFA/7 of 2018 [Old ATA No. 146 (09) 2012] Order dated 28.06.2018.

10. Now I want to see legal position :-

10.1 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.*

10.2. 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)***

10.3. 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.*

10.4 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"

10.5 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"*

10.6 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,** particularly para 28 & 29 of the judgments wherein it has been observed

> "Para 28: We have already stated that in Organo [1980 (1) SCR 61], the Regional Provident Fund Commissioner held that power cut financial problems, disputed between partners were not relevant explanations and that the said view was not interfered with by this Court.
>
> Para 29: From the aforesaid decision, the following principles can be summarised: The authority under section 14-B has to apply his mind to the facts of the case and the reply to the show cause notice and pass a reasoned order 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 the employer based on pleas of power cut, financial problems relating to other indebtedness or the delay in realisations 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 under section 14-B. The fact that proceedings are initiated or demand for damages is made after several years cannot by itself be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings under section 14-B would be taken; mere delay in initiating action under section 14-B cannot amount to prejudice in as much as the delay on the part of the department, would have only allowed the employer to use the monies for his own purposes or for his business especially when there is no additional provision for charging interest. However, the employer can claim prejudice if there is proof that between the period of default and the date of initiation of action under section 14-B, he had changed his position to his detriment to such an extent that if the recovery is made after a large number of year, the prejudice to him is of an “irretrievable” nature: he might also claim prejudice upon proof of loss of all the relevant records and/or non-availability of the personnel who were, several years back in charge of these payments and

provided he further establishes that there is no other way he can reconstruct the record or produce evidence; or there are other similar grounds which could lead to “irretrievable” prejudice; further, in such cases of “irretrievable” prejudice, the defaulter must take the necessary pleas in defence in the reply to the show cause notice and must satisfy the concerned authority with acceptable material; if those pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that effect.”

11. Now I see the factual matrix of this case – On the perusal of the impugned order for the period of 5/15 to 6/19, it appears that on behalf of establishment Mr. Suhas Selke appeared during the enquiry before APFC and he pray before APFC, “requesting for waive off the 14B dues.” He did not file any written submission before APFC. During the appeal no document or any written submission is filed by the appellant to explain mitigating circumstances as balance sheet or Profit & Loss A/c. and bill through which he receive payment from State Govt. or bank statement which shows that establishment received such amount at that date. Appellant did not file any document or order of APFC or EO who gave instalment facility of the payment of contribution to the establishment and under which circumstances he permitted the instalment to deposit contribution. So argument of appellant has no force / substance because it appears that he raised argument first time in this appeal.

12. On perusal of the APFC order, it appears that he mentioned that "it has been made clear in the past proceedings already that undersigned has no authority to waive off dues u/s. 14B" and also mentioned that "establishment has not submitted any new objection over the dues amount of the damages of Rs.37,13,576/-."

13. 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 as well as in my humble opinion that order is not fall under the purview of speaking order.

14. Learned representative of the appellant argued that he deposited 7A and 7Q amount before concerned officer. It means they did not dispute the calculation and period of delay. But the argument was that percentage of damages is too much high and APFC did not consider his mitigating circumstances as to whom when he received delay payment and payment of contribution is made through instalment. It appears that this argument raised first time by the appellant before this tribunal without supported documents so this argument has no substance.

15. On going above discussion it appears that fault on both sides appellant as well as respondent so in my humble opinion amount of damages to be reduced to near about 70% to give complete justice to the parties because no fruitful purpose is solved if case is remanded back. Hence order.

ORDER

1. **Damages amount of Rs.37,13,576/- is reduced to near about 70% i.e. Rs.25,99,000/-**
2. **Appellant is directed to deposit an amount of Rs. 25,99,000/- within one month from the date of order.**
3. **Both parties bear their own costs.**

Accordingly the appeal is allowed in part.

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

Sd/-

Date: 09.09.2021

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