CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL -CUM- LABOUR COURT, ASANSOL

PRESENT: Justice Ananda Kumar Mukherjee (Retd.),
Presiding Officer,
C.G.I.T-cum-L.C., Asansol

EPFA No. 04 of 2015
[ATA 684(15) of 2015]

M/s. Durgapur Polymers Private Limited, Durgapur. ..... Appellant.

Vs.

Assistant Provident Fund Commissioner, Durgapur. ..... Respondent.

O R D E R

Dated: 08.09.2023

Mr. S. K. Khanna, Adv.
Mr. C. K. Chandra, Adv.
Mr. B. Banerjee, Adv. ..... for the Appellant.

Mrs. Mousumi Ganguli, Adv. ..... for the Respondent.

1. The appeal has been filed under Section 7-I of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the EPF Act) against impugned order dated 11/22.05.2015 passed by the Respondent under Section 14-B and 7-Q of the EPF Act, levying damages of Rs.6,48,178/- and interest of Rs.3,43,913/- against the appellant due to delayed remittance for the period from 03/2004 to 12/2012.

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2. The respondent issued Summons / Notice bearing No. WB/DGP/0033179/000/Enf 500/Damages/782/17647 dated 17/22.01.2014, initiating a proceeding under Section 14-B of the EPF Act against the appellant establishment for delayed payment of some Provident Fund dues and charges for the period from 01.04.2008 to 30.06.2013 and that the Provident Fund commissioner was required to recover damages by way of penalty at the rate specified in Paragraph - 32A of the Employees' Provident Fund Scheme 1952 (hereinafter referred to as EPFS), Paragraph – 5 of the Employees' Pension Scheme 1995, and Paragraph – 8A of the Employees' Deposit Linked Insurance Scheme 1976 (hereinafter referred to as EDLIS). The dues towards damages was notified to be Rs.6,48,178/- and interest of Rs.3,43,913/- amounting to total dues of Rs.9,92,091/-.

3. The representative of the appellant appeared before the Provident Fund Commissioner and submitted a representation on 27.11.2014 in reply to the Show Cause Notice, contending therein that due to financial crisis and recession there was delay in contributing Provident Fund dues, which was unintentional and not within the control of the appellant and that the proceeding for levying of damages was initiated after a long laps of time ranging from two to fifteen years due to which the appellant establishment could not produce their records as they were not preserved for such a long period. Furthermore, relying on the decision of **M/s. Systems and Stamping & Another vs Employees' Provident Fund Appellate Tribunal & Others [2008 (2) LLJ 939],** it was submitted that damages at the rate of 17%, 22%, 27%, and 37% included interest under Section 7-Q of the EPF Act in pursuance of Circular dated 25.09.1990 for the period prior to 26.09.2008 and the SLP filed against the decision of the Hon'ble High Court of Delhi was dismissed on merit. The appellant / petitioner urged before the Provident Fund Commissioner that in the case of **M/s. Atal Tea Company Limited and Another vs Regional Provident Fund Commissioner [1998 (79)**

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FLR 372], decided by the Hon'ble High Court at Calcutta, it was held that the damages had to be levied at the rate provided in the Scheme at the time of levy of damages, but in the present case the damages proposed at the rate of 17% to 37% is inclusive of the interest at the rate of 12% under Section 7-Q of the EPF Act. Therefore, an additional interest of 12% assessed under Section 7-Q of the EPF Act for the period up to 25.09.2008 resulted in a claim of interest twice for the same period and no separate interest under Section 7-Q of the EPF Act should be levied as damages after applying the unamended rates of damages.

4. After considering various aspects the respondent assessed a total due of Rs.9,92,091/- against the appellant for the period from 03/2004 to 12/2012.

5. The appeal has been preferred on 01.07.2015, wherein it has been contended that the respondent passed the impugned order rejecting the submissions of the appellant without application of mind and in an arbitrary manner. The respondent has passed a non-speaking, order in a mechanical manner, in contravention of the EPF Act. The contention of the appellant is that as per the amended provision of Paragraph 32-A of EPFS which came into effect from 26.09.2008 damages could not have been levied at the old rate of 17% to 37%, which is higher than the previous rates. Relying upon a decision of the Hon'ble High Court at Calcutta in the case of **M/s. Atal Tea Company Limited and Another (Supra.)** it is argued that the commission has now to follow the sliding table incorporated in Paragraph – 32A of the EPFS by applying the rates for levying of damages according to the periods of default specified therein. It is also contended that the proceeding has been initiated after a delay of eighteen years which deprived the appellant of an opportunity of producing old records which are not available and the persons dealing with the Provident Fund matters have also left the establishment after such a long time.

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6. Learned advocate for the appellant argued that the respondent issued Notice and proceeded to levy damages for the period from 04/2008 to 06/2013 whereas the damages have been levied for the period from 03/2004 to 12/2012, depriving the appellant from defending their case. It is contended that the impugned order is in violation of natural justice and the old rates prior to 26.09.2008 were applied for imposing damages, thereby excess amount of damages under Section 14-B of the EPF Act was levied which includes the interest amount as per Circular dated 25.09.1990, issued by the Provident Fund Commissioner. Therefore, the interest amount has been levied twice. The appellant assailed the impugned order on the ground that it has been passed in contravention of the law laid down by the Hon'ble High Court of Delhi in the case of **M/s. Systems and Stamping & Another (Supra.)** and the Hon'ble Supreme Court of India also dismissed the Special Leave Petition on merit. The decision of the Division Bench of the Hon'ble High Court of Delhi in **M/s. Systems and Stamping & Another (Supra.)** considered the question as to whether the damages recovered under Section 14-B of the EPF Act includes the interest component under Section 7-Q of the EPF Act. Appellant relied upon the above decision wherein the Hon'ble High Court of Delhi held that damages under Section 14-B of the EPF Act were inclusive of interest chargeable under Section 7-Q of the EPF Act. As the case covered that very period, the respondent had no right to charge the interest under Section 7-Q of the EPF Act additionally when it already stood payable in the order passed under Section 14-B of the EPF Act.

7. It is the case of the appellant that in violation of the decision of **M/s. Atal Tea Company Limited and Anr. (Supra.)** the respondent has levied damages and interest at the old rate and not at the prevailing rate. The financial difficulties of the appellant establishment were not taken into consideration and there was no mens rea on the part of appellant establishment. It is urged that the presence of mens rea is sine qua non for imposing damages which was not considered and

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thereby violated the law laid down by the Hon'ble Supreme Court of India in the case of **Mcleod Russel India Limited vs Regional Provident Fund Commissioner, Jalpaiguri and Others [(2014) 15 SCC 263]**. The appellant relying upon the aforesaid ground prayed for setting aside the impugned order dated 11/22.05.2015 passed by the respondent.

8. The respondent contested the appeal by filing reply, contending inter alia that the appeal is liable to be dismissed since the delay in remittance of Provident Fund dues has been admitted by the appellant. Learned advocate the respondent submitted that mere deposit of dues after date does not absolve the employer from the liability of payment of damages. It is asserted that in order to attract Section 14-B of the EPF Act no distinction has been made between intentional and unintentional default in making contribution. According to Paragraph – 38 of EPFS non-deposit of dues will be counted as default and the establishment will be liable to pay damages. Relying upon the decision of the Hon'ble High Court of Gujarat in the case of **Arvind Mills Limited vs R.M. Gandhi [Special Civil Application No. 1187 of 1980],** it is contended that non-availability of funds or running losses is not a valid reason for delayed remittance of Provident Fund dues. The respondent asserted that the statutory obligation of the employer is to make payment of Provident Fund dues in time and Section 14-B of the EPF Act is to deter the employer from making default. For such reasons the Regional Provident Fund Commissioner has been vested with the jurisdiction to impose exemplary damages to prevent employers from making defaults. According to the respondent the impugned order has been passed in accordance with the provisions of the EPF Act. Furthermore, the Provident Fund authority is empowered to recover damages under Section 14-B of the EPF Act at the rates stipulated along with interest under Section 7-Q of the Act on the defaulted amount from the date on which the amount became due till its actual payment. It is contended that there is no merit in the appeal and the same is liable to be dismissed with cost.

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9. The point for consideration in this appeal is whether the impugned order dated 11/22.05.2015 needs any interreference on the ground raised by the appellant.

10. The appeal came up for hearing on 16.03.2023, 23.03.2023, 04.05.2023, 15.06.2023, 27.07.2023 and 31.08.2023. Learned advocates for the appellant were present only on 16.03.2023 and advanced their argument. Thereafter the appellant remained unrepresented till 15.06.2023. Mr. Bibhas Banerjee, learned advocate appeared for the appellant on 15.06.2023 and prayed for time. On 31.08.2023 the appeal was finally heard in absence of learned advocates for the appellant.

11. Having considered their respective arguments and materials on record I find that the Appellant has admitted the fact that there had been delay in remitting Provident Fund contribution, EPFS contribution, EDLIS contribution and Administrative Charges for the period from 03/2004 to 12/2012. The contention of the appellant is that the delay in initiating the proceeding against the appellant for the period from 03/2004 to 12/2012 in the year 2014 has deprived the appellant in defending its case as the records have been lost after a long interval. It is argued that in the case of **K. Streetlite Electric Corporation vs Regional Provident Fund Commissioner, Haryana [Appeal (Civil) 6498 of 1998],** the Hon'ble Apex Court held that :

" *if there is proof that between the period of default and the date of initiation of action under Section 14-B he has altered his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an irretrievable nature, and such prejudice can also be established by stating reason of non-availability of records of the personnel by which evidence it could be established that there was some basis for delay in making the payments.***"**

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In the instant case on receiving the Notice dated 17/22.01.2014 the appellant establishment had submitted a reply on 27.11.2014 wherein it has stated that the delay on their part was unintentional and beyond their control and due to the ongoing recession, it was difficult for the appellant to manage the business and also pay salary to the employees. In support of such contention, they had attached a copy of Annual Account as evidence. The appellant claimed that the delay is not wilful and there is no mens rea on their part. From such submission it can be gathered that the concerned establishment attempted to reason out the cause of delay due to recession and financial stringencies faced by it. There is no case that it has altered its position to such an extent that recovery would prejudice the establishment. In such view of the matter, I hold that the decision cited by the appellant in the case of **Arvind Mills Limited (Supra.)** has no application to the facts of this case. Appellant failed to establish that delay in initiating the proceeding by ten years has prevented the appellant establishment in identifying its default and the reasons thereof. Therefore, the argument advanced on behalf of the appellant that due to long delay they were prejudiced from presenting their case is without substance and force and the same is not acceptable.

12. The appellant establishment has also tried to defend their case on the plea that there was no mens rea on their part for delayed contribution.

13. Per contra argument of learned advocate for the respondent is that mens rea is not an essential element for considering liability of the employer establishment for the purpose of imposing penalty. It has been argued that any contravention of Paragraph Section 38(1) of EPFS would make the establishment liable to damages and presence of mens rea is not the requisite.

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14. For considering the argument advanced it is worthwhile to refer to the provisions under Section 14-B of the EPF Act which provide :

" *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.***"***

Nowhere in the provision there is any pre-requisite of 'mens rea' for levy of damages. In this context it would be pertinent to refer to the decision of the Hon'ble Apex Court in the case of **Horticulture Experiment Station Gonikoppal, Coorg vs. the Regional Provident Fund Organization [(2022) 4 SCC 516]**, where the Hon'ble court noted that it is the delinquency of the defaulter itself which establishes his blameworthy conduct without further proof of existence of mens rea. The law laid down in the above judgement is the guiding principle and holds good in the instant case. Therefore, I have no hesitation to hold that presence of intention or existence of 'mens rea' on the part of the appellant establishment is not essential for the purpose of assessing damages against it. Levy of damages is a sine qua non, once the employer has failed to deposit the contribution of EPF or committed default as mandate in the provisions of the EPF Act.

15. In the case of **Chairman, SEBI vs Shriram Mutual Fund and Another [(2006) 5 SCC 361],** the Hon'ble Apex Court held that :

" *33. This Court in a catena of decisions has held that mens rea is not an essential*

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element for imposing penalty for breach of civil obligations.

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35. In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not. We also further hold that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of Section 15-D(b) and Section 15-E of the Act, there is nothing which requires that mens rea must be proved before penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow."

The contention regarding absence of mens rea on the part of the appellant establishment regarding delayed payment is therefore put to rest and is of no avail to the appellant.

16. The third contention of the appellant is that the damages for the relevant period has been levied as per rates provided in the Sliding Table of old Paragraph – 32A of EPFS, which has been amended on 26.09.2008. Therefore, the amount assessed as damages against the appellant is arbitrary and not tenable. Further argument advanced on behalf of the appellant is that the damages imposed under Section 14-B of the EPF Act includes the interest amount under Section 7-Q of the EPF Act and Circular dated 25.09.1990 issued by the Central Provident Fund Commissioner the damages imposed under Section 14-B of the EPF Act includes the interest. Appellant in support of their argument relied upon

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the decision in the case of **M/s. Systems and Stamping & Another (Supra.)** and the Special Leave Petition dismissed by the Hon'ble Supreme Court of India on merit and argued that the larger Division Bench of Hon'ble High Court of Delhi in the case of **Roma Henny Security Services Pvt. Ltd. vs Central Board of Trustees, E.P.F.O. [W.P. (C) 831 OF 2012]** has followed the ratio of the decision in the case of **M/s. Systems and Stamping & Another (Supra.).** Accordingly, it is claimed that the interest of 12% under Section 7-Q of the EPF Act cannot be demanded separately.

17. Mrs. Mousumi Ganguli, learned advocate for the respondent in reply argued that since the provision relating to interest under Section 7-Q of the Act was not in force until 01.07.1997, the Circular dated 25.09.1990 was applied to include the component of interest while imposing damages under Section 14-B of the EPF Act. Learned advocate placing reliance upon the decision of the Hon'ble Apex Court in **Central Board of Trustees vs Roma Henny Security Services Pvt. Ltd. [SLP No. 19610 of 2017]**, argued that the decision of the Hon'ble High Court of Delhi in the case of **Roma Henny Security Services Pvt. (Supra.)** holding that the damages under Section 14-B of the Act were inclusive of interest chargeable under Section 7-Q of the EPF Act and that the respondent have no right to charge the interest under Section 7-Q where an order is passed under Section 14-B of the Act has been set aside by the Hon'ble Supreme Court of India and the case was remanded for fresh decision.

18. I have perused the summons to appear dated 17/22.01.2014 wherein proceeding under Section 14-B of the EPF Act was started against M/s. Durgapur Polymers Private Limited for delayed remittance for the period from 01.04.2008 to 30.06.2013. It was notified that an interest at the rate of 12% per annum was to be paid within fifteen days of receipt of the Summons under Section 7-Q of the EPF Act. On a perusal of the impugned order dated

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11/22.05.2015, I find that the respondent authority has travelled beyond the period of notice and proceeded to assess damages for the period from 03/2004 to 12/2012, which was not covered by the summons to appear. The appellant therefore, was not provided with the opportunity to respond to the unnotified time period from 03/2004 to 31.03.2008 for which the assessment had been made.

19. In the instant case the Provident Fund authority has assessed interest under Section 7-Q of the EPF Act separately at the statutory rate of 12% per annum. The provision of Section 7-Q of the EPF Act has come into force w.e.f. 01.07.1997 and the damages has been calculated on the basis of Paragraph – 32A of EPFS after its substitution by the Notification G.S.R. 689(E) dated 26.09.2008 whereby, the Central Provident Fund Commissioner or such 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, damages at the rates given in the table. The rates varied from 5% to 25%, depending upon the period of default. Referring to the summons dated 17/22.01.2014 learned advocate for the appellant demonstrated that two different rates have been applied by the respondent authority for assessing damages and the commission failed to consider that the previous rates which have been substituted by Notification G.S.R. 690(E) dated 26.09.2008 had no application in the present case and the prevailing rates at the time of proceeding should have been applied. Learned advocate for the appellant in support of his argument relied upon the following cases:

(i) **Atal Tea Company Limited and Another (Supra.)**, and

(ii) **Andrew Yule and Company Limited vs Regional Provident Fund Commissioner and others [C.O. No. 15347 (W) of 1992]**

20. Respondent harped upon the case that damages have been assessed at the prevailing rates and the same do not exceed the amount of arrear specified in the Scheme.

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21. It is undisputed that the Summons / Notice in Annexure - A.2 stipulated the rate of damages varying from 17% to 37% for the period up to 25.09.2008 and the rate of damages from 26.09.2008 till 12/2012 as 5% to 25%.

22. Notification G.S.R. 689(E) dated 26.09.2008 has amended the EPFS lays down as follows:

" 1. (1) This Scheme may be called the Employees' Provident Funds (Second Amendment) Scheme, 2008.

(2) It shall come into force on the date of its publication in the Official Gazette.

2. In the Employees' Provident Funds Scheme, 1952, for sub-paragraph (1) of paragraph 32A, the following sub-paragraph shall be substituted, namely:- "(1) Where an employer makes default in the payment of any contribution to the 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 of the Act or in the payment of any charges payable under any other provisions of the Act or Scheme or under any of the conditions specified under section 17 of the Act, the Central Provident Fund Commissioner or such 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, damages at the rates given in the table below:-

TABLE

S. No.	*Period of default*	*Rates of damages (percentage of arrears per annum)*
(1)	*(2)*	*(3)*
(a)	*Less than 2 months*	*Five*
(b)	*Two months and above but less than four months*	*Ten*
(c)	*Four months and above but less than six months*	*Fifteen*
(d))	*Six months and above*	*Twenty Five."* **"**

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23. In the case of **Andrew Yule and Company Limited vs Regional Provident Fund Commissioner and others [C.O. No. 15347 (W) of 1992]**, the Hon'ble High Court at Calcutta held that :

" *By the amendment provision of Section 14B of the Act read with paragraph 32-A of the Scheme with effect from September 1, 1991, the legislature has manifested its intention to divest the respondent No. 1, the concerned authority, of the power to impose penalty according to its discretion from the aforesaid day; on the other hand, it has mandated the respondent No. 1 to assess penalty in accordance with the chart shown in paragraph 32-A of the Scheme notwithstanding the fact that the delay or default occurred earlier.***"**

It was held that the respondent assessed penalty which was in excess of Paragraph 32A. The same principle applies to the present case where the respondent has acted in excess of its authority in demanding damages in excess of the prevailing rate which should have been between 5% to 25% and not 17% to 37%.

24. In the case of **Atal Tea Company Limited and Another vs Regional Provident Fund Commissioner [C.O. No. 17462 (W) of 1996],** the High Court at Calcutta in Paragraph – 29 held that :

" *The effect of amendment that was made in Section 14-B of Employees' Provident Funds and Miscellaneous Provisions Act, 1952, by Section 20 of Amendment Act 33 of 1988 which came into force with effect from 01.09.1991 as well as the insertion of Paragraph – 32A of Employees' Provident Fund Scheme, 1952 w.e.f. 01.09.1991. Both before and after the amendment it has been optional with the Regional Provident Fund Commissioner to levy and recover the damages by the way of penalty. Prior to the amendment, he had the power to levy the damages at the rate, the maximum of which was fixed at 100%. It did not, however, prescribe any minimum rate. He was free to impose damages at such rate as he thought fit. After the amendment his power to levy the damages upto the maximum rate of*

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100% appears to have been curtailed. He is now to follow the sliding table incorporated in paragraph 32-A of the scheme for applying the rates for levy of damages according to the periods of default specified therein. The proceeding under Section 14-B was not at all pending at the time when the relevant amendment was made and para 32-A of the Scheme was introduced. Admittedly, such proceeding was initiated for the first time only in the year 1996 when the petitioner was served with a notice to show cause on 16.04.1996. The defaults for which the writ petitioner did incur the liability for such damages, did occur at a time when the amendment was yet to be made. It is true that the right to levy the damages had already accrued to the Regional Provident Fund Commissioner long before the amendment was made. But such right or the liability was not sought to be enforced till the issuance of said notice dated 16.04.1996 when the amendment had already been brought into force."

At the time proceeding under Section 14-B was initiated on 22.01.2014, the prevailing rates of damages applicable were between 5% to 25%, depending upon the period of delay. The respondent appears to have assessed the damages on the basis of previous rates i.e. 17% to 37% for the period up to 25.09.2008 which is not tenable under the law. The settled position in the aforesaid case is that the Provident Fund Commissioner ought to have followed the prevailing rates in the 'Sliding Table' for assessment of damages instead of applying the previous rates which were higher than the present rate.

25. The question regarding inclusion of interest in the rate of damages is not found involved for adjudication in this appeal. Therefore, application of the principles laid down in the case of **M/s. Systems and Stamping & Another (Supra.)** and decision in the case of **Roma Henny Security Services Pvt. Ltd. (Supra.)** do not have any application to the facts and circumstances of this case which are distinguishable. There has been advancement of law in this matter by way of amendment in the EPF Act whereby the damages under Section 14-B of

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the EPF Act at the prevailing rates can be levied in addition to the interest of 12% per annum under Section 7-Q of the EPF Act and the Circular dated 29.05.1990 would not have any application after incorporation of Section 7-Q of the EPF Act as the object has been reached by the legislature by introducing such change. The answer to the dispute involved in the present case is embedded in the principles laid down by the Hon'ble High Court at Calcutta in the case of **Atal Tea Company Limited and Another (Supra.)** which has noted that the amendment in Section 14-B of the EPF Act so far as it conferred the discretionary power to determine the rates at which the damages would have to be levied can be said to have been repealed by implication. The amendment not having provided any saving clause expressly. It was clear that the discretionary power of the authority to levy damages was curtailed by virtue of the amendment. The intention of the legislature in amending Section 14-B and introducing relevant Scheme was to curtail the discretionary power of the levying authority and when the authority enforcing the right or liability which had accrued prior to the amendment, had been divested of the discretionary power which he earlier had, the levy of damages was to governed by the amended provisions of Section 14-B of the EPF Act read with Paragraph – 32A of the EPFS.

26. I find from the summons in proceeding and the impugned order that the Provident Fund commissioner had exceeded its jurisdiction and acted in an arbitrary manner by applying rates of damages which have already been amended and did not exist at the time the assessment of damages was made. The impugned order therefore is not sustainable under the facts and law and the same is liable to be set aside. the appeal is accordingly allowed on contest. The instant case is remanded to the Provident Fund authority for passing a fresh order after hearing the appellant establishment.

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Hence,

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that the appeal under Section 7-I of the EPF Act is allowed on contest. The impugned order dated 11/22.05.2015 passed in the EPF Case No. WB/DGP/0033179/000/Enf 500/Damages/7107/23629 is set aside. The case is remanded to the respondent with a direction to hear the matter afresh in the light of my above observation and pass a fresh order after giving opportunity to the appellant to present their case. The respondent shall dispose the case preferably within a period of three (3) months from the date of communication of the order.

The appellant herein is directed to participate in the proceeding before the Employees' Provident Fund Authority on all dates fixed, failing which adverse presumption may be raised. Let copies of the Order be communicated to the parties under Rule 20 of the Tribunal (Procedure) Rules, 1997.

Sd/-

(ANANDA KUMAR MUKHERJEE)
Presiding Officer,
C.G.I.T.-cum-L.C., Asansol.