

**CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL -CUM- LABOUR COURT,
ASANSOL**

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

EPFA No. 05 of 2023

M/s. Jai Balaji Industries Limited - III, Durgapur Appellant.

Vs.

Regional Provident Fund Commissioner - II, Durgapur Respondent.

ORDER

Dated: 27.06.2024

Mr. Soumitra Sengupta, Advocate for the Appellant.

Mrs. Mousumi Ganguli, Advocate for the Respondent.

1. This Appeal under Section 7-I of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the EPF Act) has been preferred against the impugned order dated 30.03.2023 passed by the respondent in a proceeding under Section 14B and 7Q of the EPF Act for delayed remittance of Provident Fund dues by the appellant establishment for the period from 01.04.2009 to 30.09.2021 and assessed damages of Rs. 2,98,42,396/- (Rupees two crore ninety-eight lakh forty-two thousand three hundred and ninety-six only) under Section 14B of the EPF Act and interest of Rs. 1,64,23,629/- (Rupees one crore sixty-four lakh twenty-three thousand six hundred and twenty-nine only) under Section 7Q of the EPF Act.

2. In gist, the fact of the case, giving rise to this appeal is that, the appellant establishment is covered under the EPF Act and has been allotted a Provident Fund Code No. WB/DGP/46654. The respondent authority issued Summons to the appellant initiating proceeding under Section 14B and 7Q of the EPF Act, bearing no. WB/DGP/0046654/000/Enf 502/Damages/241 dated 22.03.2022 / 10.05.2022, notifying that on scrutiny of records it was found that the establishment made delayed remittance during the period from 30.03.2007 to 22.03.2022 and the appellant establishment was liable to pay penalty and interest due to such belated payments. The damages was assessed as Rs. 2,99,16,292/- (Rupees two crore ninety-nine lakh sixteen thousand two hundred and ninety-two only) under Section 14B of the EPF Act as per rates recommended in paragraph 32A of the Employees' Provident Funds Scheme, 1952 (hereinafter referred to as the EPF Scheme, 1952) and further demanded interest of Rs. 1,64,23,629/- (Rupees one crore sixty-four lakh twenty-three thousand six hundred and twenty-nine only) under Section 7Q of the EPF Act.

3. The appeal has been preferred on 21.04.2023 on the grounds inter-alia, that the respondent authority has failed to consider that the levy of damages is not mandatory and in paragraph 32A of the EPF Scheme, 1952 it has been provided that 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. It is the case of the appellant that the respondent authority did not exercise its discretion according to the prevailing

circumstance and failed to appreciate that imposition of damages under Section 14B of the EPF Act is not automatic and the financial constraints of the appellant establishment should have been considered. It is urged that the appellant is a loss-making concern and a sick industrial company. The employer establishment has already paid the employer and employee's contributions towards Provident Fund and no amount was due and payable to the Provident Fund authority at the time of issuance of Summons. It is further contended that the financial reports of the establishment for the period from 01.04.2009 to 30.09.2021 would reveal its financial status and delay in contribution of Provident Fund dues was unintentional and beyond the control of the respondent. Further case of the appellant is that it made representation before the Board for Industrial and Financial Reconstruction (hereinafter referred to as BIFR) that the appellant establishment is a sick industrial company in terms of the provisions of Section 15(1) of Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as SICA) and the said reference was registered with BIFR as Case No. 122/2015. The matter was brought to the notice of the Provident Fund authority on 02.06.2022 but instead of taking into consideration the fact that the employer establishment is a sick industrial company, respondent passed the order for damages and interest in a mechanical manner, imposing excessive penalty and interest without considering the mitigating circumstance in favour of the appellant. The appellant therefore prayed for setting aside the impugned order and pass any order as may be deemed fit and proper.

4. Respondent contested the appeal by filing their reply, asserting that the appellant establishment is covered under the EPF Act and the appellant having admitted its delay in remitting the Provident Fund dues of its employees, the respondent authority is under obligation to impose penalty under Section 14B of the EPF Act in the form of damages due to failure to contribute within the

stipulated period under Paragraph 38 of the EPF Scheme, 1952. It is urged that every default attracts levy of damages under Section 14B of the EPF Act and factors like intentional and unintentional default do not bring out any distinction in the liability for payment of damages. It is urged that constitutional validity of Section 14B of the EPF Act has been upheld by the Hon'ble Supreme Court of India in the case of **Organo Chemical Industries and Another Vs. Union of India and Others [1979 AIR SC 1803]**. It is claimed that the impugned order has been passed after providing reasonable opportunity of hearing the appellant establishment. Relying upon the decision of the Hon'ble Supreme Court of India in the case of **Horticulture Experiment Station Gonikoppal, Coorg Vs. the Regional Provident Fund Organization [(2022) 4 SCC 516]**, it is stated that mens rea or actus reus is not an essential element for imposing penalty or damages for breach of civil obligations or liabilities.

5. With reference to the failure of the appellant establishment in making timely payments of Provident Fund contribution, it is asserted that the respondent complied the Circular issued by the Employees' Provident Fund Organization Head Office. On relaxation of lockdown due to pandemic the penal damages for the wage months of March and April of 2020 had been calculated taking the due date for payment as 15.06.2020 and the penal damages for the delay for the subsequent wage month has been calculated as per prescribed rate.

6. In respect of the financial constraints of the appellant for which a reference was made before BIFR for declaring it as a sick industrial company, it is submitted that respondent had no discretion to reduce or wave the damages and referred to paragraph - 32B of the EPF Scheme, 1952, which lays down that :

“ 32B. Terms and conditions for reduction or waiver of damages

The Central Board may reduce or waive the damages levied under section 14B of the Act in relation to an establishment specified in the second proviso to section 14B, subject to the following terms and conditions, namely:

- (a) *in case of a change of management including transfer of the undertaking to workers' co-operative and in case of merger or amalgamation of the sick industrial company with any other industrial company, complete waiver of damages may be allowed;*
- (b) *in cases where the Board for Industrial and Financial Reconstruction, for reasons to be recorded in its schemes, in this behalf recommends, waiver of damages up to 100 per cent may be allowed;*
- (c) *in other cases, depending on merits, reduction of damages up to 50 per cent may be allowed.”*

It is the case of the respondent that the damages imposed against appellant is consistent with the relevant provision of Section 14B of the EPF Act and Paragraph 32A of the EPF Scheme, 1952. It has been claimed that the appellant establishment was given ample opportunity to verify the dues and the proceeding was concluded after sixteen adjournments during the span of nine months. The respondent accordingly prayed for dismissing the appeal with cost.

7. Mr. Soumitra Sengupta, learned advocate for the appellant arguing the case submitted that the Summons in this case was issued on 10.05.2022 in respect of delayed remittance during the period from 30.03.2007 to 22.03.2022. The Notice having been issued after inordinate delay the employer establishment was not in a position to verify the claim made by the Provident Fund authority under Section 14B and 7Q of the EPF Act. It was further argued that the appellant was facing financial stringency during the period under consideration for which there had been delay in payment of the Provident Fund dues and the appellant had become a lossmaking concern and reference was made under Section 15(1) of SICA before BIFR which was registered as Case No. 122/2015. It is claimed that the appellant establishment had no mens rea in delayed remittance of employer and employee's contribution to the fund and the principal amount was already paid. Learned advocate relied upon the decision of the

Hon'ble High Court of Kerala in the case of **M/s. Harrison's Malayalam Limited Vs. Employees Provident Fund Appellate Tribunal and Another [WP(C) No. 26545 of 2010]** and argued that the Provident Fund authority ought to have considered the financial constraints faced by the employer establishment and exercised its discretion to waive the damages and interest assessed by the respondent against the appellant under Section 14B and 7Q of the EPF Act.

8. Per contra, Mrs. Mousumi Ganguli, learned advocate for the respondent argued that the appellant establishment was covered under the EPF Act and a Provident Fund Code was allotted to the establishment. After service of Summons for proceeding under Section 14B and 7Q of the EPF Act accompanied by Calculation Sheet in Annexure – A, representative of the employer establishment participated in the proceeding and raised no dispute regarding their delay in remittance of Provident Fund dues for the period from 01.04.2009 to 30.09.2021. Hearing of the matter was adjourned from time to time and sufficient opportunity was provided to the management of the appellant establishment but the establishment could not point out any discrepancy regarding the period of delay or the calculation. Learned advocate for the respondent argued that the delay in depositing Provident Fund dues was caused by the appellant as it had utilized the amounts deducted from the wages of the employees, including their own contribution and administrative charges in running their business. Therefore, the appellant cannot deny its liability on the ground of delay in initiating the proceeding. It is pointed out that in the impugned order the establishment for the first time in their representation dated 22.02.2023 took a plea that the establishment was facing financial difficulty during the case period but there was nothing on the record to establish that the employer establishment was declared a sick industrial company by BIFR under SICA. Therefore, the appellant was not eligible to claim waiver of damages according to the provision of Section 14B read with paragraph 32B of the EPF Scheme, 1952.

9. Regarding the claim of absence of mens rea on the part of employer establishment, learned advocate for the respondent argued that in case of civil liability mens rea or actus reus has no significance and relied upon a decision of the Hon'ble Supreme Court of India in the case of **Horticulture Experiment Station Gonikoppal, Coorg Vs. the Regional Provident Fund Organization [(2022) 4 SCC 516]**. It is argued that the appeal has no merit and the same is liable to be dismissed.

10. The short question for consideration in this appeal is whether the impugned order dated 30.03.2023 suffers from any illegality, calling for interference on the grounds raised by the appellant.

11. Having considered the rival contention of the contending parties, the Memorandum of Appeal, reply filed thereto, impugned order and the settled principle of law involved in this case, the stage is found set to examine whether the claim of waiver of damages made by the appellant establishment is tenable under the law. The undisputed facts culled out from the materials on record are that the appellant establishment is covered under the EPF Act and it has default in remitting the Provident Fund and allied dues along with administrative charges to the respondent authority in respect of its employees within the stipulated time. It is clearly stated in Paragraph 4 of the Grounds of Appeal that the employer and employee's contribution have been paid by the appellant establishment in spite of extreme financial hardship. This admission clearly establish the fact that the employer establishment failed to remit the Provident Fund dues in time and had diverted the Provident Fund contribution for its employees and its own contribution for some other purpose, thereby depriving the beneficiaries and causing loss to the Provident Fund Trust. The appellant establishment cannot seek any relief of reduction of damages on account of delay specially when such delay had been caused due to its own action, which would

not have arisen if it had been consistent and regular in making its contribution. The law governing Provident Fund does not prescribe any time limit for proceeding under Section 14B or 7Q of the EPF Act. The position of law stands forfeited by the decision of the Hon'ble Supreme Court of India. In the case of **Hindustan Times Limited Vs. Union of India and Others [AIR 1998 SC 688]**, it has laid down that the Act does not contain any provision prescribing a period of limitation for assessment or recovery of damages and the provisions of Indian Limitation Act, 1963 are not attracted. It was further held that the rule that power should be exercised within reasonable time cannot also be applied. It was observed that defence of power-cut, financial problems relating to other indebtedness or the delay in realizations of amounts paid by the cheques or drafts are not justifiable grounds for the employer to escape liability for damages.

12. In order to appreciate the second contention raised by the appellant regarding waiver of damages, it is necessary to analyze the provision of Section 14B of the EPF Act and Paragraph 32B of the EPF Scheme, 1952, which are reproduced below:

Section 14B of the EPF Act :

“ Power to recover damages — Where an employer makes default in the payment of any contribution to the Fund, the Pension Fund or the Insurance Fund or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 or in the payment of any charges payable under any other provision of this Act or of any Scheme or Insurance Scheme or under any of the conditions specified under section 17, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:

Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:

Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, subject to such terms and conditions as may be specified in the Scheme.”

Paragraph 32B of the EPF Scheme, 1952 :

“ Terms and conditions for reduction or waiver of damages

The Central Board may reduce or waive the damages levied under section 14B of the Act in relation to an establishment specified in the second proviso to section 14B, subject to the following terms and conditions, namely: —

- (a) in case of a change of management including transfer of the undertaking to workers' co-operative and in case of merger or amalgamation of the sick industrial company with any other industrial company, complete waiver of damages may be allowed;*
- (b) in cases where the Board for Industrial and Financial Reconstruction, for reasons to be recorded in its schemes, in this behalf recommends, waiver of damages up to 100 per cent may be allowed;*
- (c) in other cases, depending on merits, reduction of damages up to 50 per cent may be allowed.”*

13. On examining the aforesaid provision of the EPF Act it follows that, in order to qualify for the waiver under Section 14B of the EPF Act the establishment is necessarily required to be declared a sick industrial company under SICA. Paragraph 32B of the EPF Scheme, 1952 cannot be read in isolation but has to be considered along with Section 14B of the EPF Act as the EPF Scheme, 1952 has no overriding effect. The appellant in this case has made a

representation before the respondent on 22.02.2023 regarding the financial difficulty faced by it during the case period. However, no material was produced before the respondent authority that the appellant establishment was declared a sick industrial company under SICA by BIFR or any rehabilitation scheme has been sanctioned by the BIFR under SICA. Since the appellant does not qualify for waiver according to the above provision, I am of the considered view that the appellant was not entitled to waiver of damages on plea that it was facing financial stringency at the relevant time and the employer is obligated to pay the damages assessed by the respondent.

14. In the case of **BESCO Limited (Foundry Division) & Another Vs. Regional Provident Fund Commissioner-I & Others [2024 (180) FLR 305]**, the Hon'ble Single Bench of the Hon'ble High Court at Calcutta in a similarly placed case involving claim for reduction or waiver of damages under Section 14B of the EPF Act and Paragraph 32B of the EPF Scheme, 1952 held that :

“ 16. for an establishment to qualify for waiver within the meaning of Section 14B of the said Act, the said establishment would necessarily be required to be declared a sick company within the meaning of SICA. The provisions of paragraph 32B of the said Scheme cannot be read independently but has to be read along with Section 14B of the said Act, since, the Scheme has no overriding effect. It is not the case of the petitioners that the petitioner no.1 is a sick company within the meaning SICA, or any rehabilitation scheme issued by the BIFR is under implementation. Since, the petitioner no. 1 does not prima facie qualify for being entitled to waiver, the issue whether the Central Board of Trustees could have delegated its power becomes academic. Thus, the action of the respondents to take steps to seek recovery of the determination made under Section 14B of the said Act, cannot be said to be irregular. ”

Being fortified by the principle of law laid down in the above decision and in view of the fact that the appellant establishment had not been declared a sick

industrial company by BIFR, I hold that the ratio of the decision in **M/s. Harrison's Malayalam Limited Vs. Employees Provident Fund Appellate Tribunal and Another [WP(C) No. 26545 of 2010]** relied on behalf of the appellant does not apply to the facts of the present case.

15. In the case of **M/s. Gowri Spinning Mills (P) Ltd. vs Assistant Provident Fund Commissioner and another (W.A. No. 173 of 2006)**, the Hon'ble High Court at Madras held that:

“ 36. The levy of interest for delayed payment as well as the administrative charges are very much part of provident fund under the scheme framed under the EPF Act. As far as damages under Section 14-B is concerned, it would be open for a sick industrial company to request the authorities under the EPF Act, to postpone the determination of damages till the reference is finally decided by the BIFR and or the Appellate Authority, as the case may be. In case such a request is made, the concerned authority shall pass appropriate orders in the light of the provision of Section 14-B of the EPF Act. ”

37. For all the aforesaid reasons, we are of the considered view that the provident fund dues under the EPF Act are not covered by Section 22(1) of the SICA and the provident fund benefits which the employees are entitled to cannot be placed on the same footing as taxes of the Government or dues of other Commercial Venture or dues to Corporate or like others. ”

In the present case the appellant establishment could not justify its delay in depositing the Provident Fund contribution and it is not declared to be a sick industrial company.

16. Regarding the role of mens rea and its effect in matters of delayed payment of Provident Fund dues, the law is well settled that in cases involving breach of civil obligations / liability, mens rea or actus reus is not an essential element for imposing damages. In the case of **Horticulture Experiment Station**

Gonikoppal, Coorg Vs. the Regional Provident Fund Organization [(2022) 4 SCC 516], the Hon'ble Supreme Court of India held that any default or delay in the payment of EPF contribution by the employer under the EPF Act is a sine qua non for imposition of levy of damages under Section 14B of the Act 1952 and mens rea or actus reus is not an essential element for imposing penalty / damages for breach of civil obligations / liabilities. In view of such principle upheld by the Hon'ble Supreme Court of India, the argument advanced by the learned advocate for the appellant, claiming waiver of damages due to absence of mens rea on the part of the appellant establishment in default or delay in payment of Provident Fund contribution is not found tenable and lends no assistance to the appellant's case.

17. On close scrutiny of the impugned order I find that the respondent authority has extended generous accommodation to the employer establishment to submit their representation and point out any discrepancy in the assessment of damages made at the prevailing rate of interest. The hearing was concluded on 22.02.2023 but the appellant establishment had failed to point out any discrepancy in respect of Annexure-A. Referring to the decision of the Hon'ble Supreme Court of India in the case of **Organo Chemicals Industries and Another vs Union of India and Others [1979 (4) SCC 573]**, the respondent urged that the object of the imposition of penalty under Section 14B is not merely to provide compensation to the employees but it is meant to penalize the defaulting employer as also to provide reparation for the amount of loss suffered by the employees. It is not only a warning to employers in general not to commit a breach of the statutory requirement of section 6 of the Act, but at the same time it is meant to provide compensation or redress to the beneficiaries i.e. to recompense the employees for the loss sustained by them. In my considered view the impugned order suffers with no illegality and the same is consistent with the law and principles laid down by the Hon'ble Courts. In consequence thereof I find no merit in the appeal and the same is dismissed on contest.

18. The respondent has already made pre-deposit of twenty percent (20%) of the assessed damages with the respondent authority in compliance with the order dated 22.06.2023 of this Tribunal. The appellant shall remit the balance amount of the assessed damages and the interest before the respondent authority within one (1) month from the date of communication of the Order.

Hence,

O R D E R E D

that the appeal under Section 7-I of the EPF Act is dismissed on contest without cost. The impugned order dated 30.03.2023 passed by the respondent is affirmed. The appellant having remitted twenty percent (20%) of the assessed amount under Section 14B of the EPF Act is directed to remit the balance amount of damages under Section 14B along with the interest under Section 7Q of the EPF Act before the respondent within one (1) month from the date of the communication of the Order. 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.