

**THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR
COURT/EPF APPELLATE TRIBUNAL, JABALPUR**

NO. CGIT/LC/EPFA-5/2017

**PRESENT: P.K.SRIVASTAVA
H.J.S.(Retd.)**

**M/s Nav Bharat Press(Bhopal)
3.Indira Press Complex,
Ramgopal Maheshwari Marg,
M.P.Nagar Zone-1,Bhopal(M.P.)**

APPELLANT

Versus

**The Assistant Provident Fund Commissioner
Regional Officer, Bhopal**

RESPONDENT

(J U D G M E N T)

(Passed on this 8th day of March-2021)

1. Under challenge in this petition is the order dated 18-5-2017 passed by the Respondent Authority by which the Respondent authority has held the Appellant Establishment guilty for late deposits of employees provident fund dues between the period October-2005 to February-2013 and saddled the Appellant Authority of liability under Section 14-B of the Employees Provident Fund and Misc. Provisions Act,1952, hereinafter referred to as the word “Act”, to pay damages of Rs.69,32,954/-.

2. The undisputed facts are that the Appellant Establishment is covered under the “Act” and has been depositing the employees provident fund dues as per law and Rules with the Respondent Authority. It was found by the Respondent Authority that the employees provident fund dues within the period October-2005 to February-2013 were not deposited in time, hence a notice under the Act was issued to the Appellant Authority and after following due procedure the Respondent Authority held the Appellant Establishment guilty of late deposit of employees provident fund

dues and imposed damages under Section 14-B of the Act, accordingly, as mentioned above.

3. The grounds of appeal are, mainly that the Appellant Authority was in financial distress due to which it could not deposit the employees provident fund dues for the period in time. The dues were deposited late. The Respondent Authority wrongly held the Appellant Establishment guilty of late deposit without giving any finding on required 'mens-rea' for non-deposit, hence the order is bad in law.
4. In its counter the Respondent Authority took a case of financial distress is not a ground for late deposit, hence it cannot be a ground for giving relaxation in deposits. Also it was pleaded that this plea was never taken by the Appellant before the Respondent Authority. Accordingly, the Respondent Authority has sought the dismissal of the aforesaid appeal.
5. The appellant has filed rejoinder wherein it has reiterated its case.
6. I have heard arguments of learned counsel Shri Pranay Choubey for the Appellant and learned Counsel Shri J.K.Pillai appearing for the Respondent. I have gone through the record as well.
7. Learned Counsel for both the sides have highlighted their grounds of appeal and counter in their respective arguments. Before proceedings on merit, it is necessary to reproduce the relevant provision and settled preposition of law in this respect:-

The provisions contained in Section 14 B of the Act read as under:

"14B. 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 authorized by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty such damage, not exceeding the amount of arrears, as may be specified in the Scheme.

Rule 32, 32-A and 32-B of the Employees Provident Fund Scheme, 1952 reads as under:-

32. Recovery of a member's share of contribution

(1) The amount of a member's contribution paid by the employer [or a contractor] shall, notwithstanding the provisions in this scheme or any law for the time being in force or any contract to the contrary, be recoverable by means of deduction from the wages of the member and not otherwise:

Provided that no such deduction may be made from any wages other than that which is paid in respect of the period or part of the period in respect of which the contribution is payable:

Provided further that the employer [or a contractor] shall be entitled to recover the employee's share from a wage other than that which is paid in respect of the period for which the contribution has been paid or is payable where the employee has in writing given a false declaration at the time of joining service with the said employer [or a contractor] that he was not already a member of the Fund:

Provided further that where no such deduction has been made on account of an accidental mistake or a clerical error, such deduction may, with the consent in writing of the Inspector, be made from the [subsequent] wages.

(2) Deduction made from the wages of a member paid on daily, weekly or fortnightly basis should be totalled up to indicate the monthly deductions.

(3) Any sum deducted by an employer [or the contractor] from the wages of an employee under this Scheme shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it was deducted.

32A. Recovery of damages for default in payment of any contribution :-

(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 below: —

TABLE S.No. (1)	Period of default (2)	Rates of Damages (percentage of arrears per annum) (3)
(a)	Less than two 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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(2) The damages shall be calculated to the nearest rupee, 50 paise or more to be counted as the nearest higher rupee and fraction of a rupee less than 50 paise to be ignored.

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.

A bare perusal of the provision quoted hereinabove, make is crystal clear that recovery of damages is ‘not mandatory’; rather ‘discretionary’ and the Commissioner being a statutory authority is invested with discretion to levy or not to levy the damages. The use of the word ‘may’ is indicative of such discretion which has to be exercised appropriately with rationality and justified reasons.

Hon’ble Calcutta High Court in *Murarka Paint & Varnish Works Ltd. Vs. Union of India* 1976 Lab IC 1453 has held as under:

“Though the liability of the employer to the provident fund of employees is statutory, it does not follow that belated payment would always attract imposition of damages. The authority is obliged to find out how the beneficiaries have been affected by the non-payment of contribution to their fund.”

Hon’ble Supreme Court in *ESIC vs. HMT* 2008 (1) SCALE 341 has observed that:

“21. A penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that penalty must be levied in all situations. Such an intention on the part of the legislature is not decipherable from Section 85-B of the Act. When a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative. Even otherwise, an endeavor should be made to construe such penal provisions as discretionary, unless the statute is held to be mandatory in character.

25. The statute itself does not say that a penalty has to be levied only in the manner prescribed. It is also not a case where the authority is

left with no discretion. The legislation does not provide that adjudication for the purpose of levy of penalty proceeding would be a mere formality or imposition of penalty as also computation of the quantum thereof became a foregone conclusion. Ordinarily, even such a provision would not be held to providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance with the principles of natural justice is necessary thereunder.

26. Existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof.”

Hon’ble Apex Court in *McLeod Russel India Ltd. Vs. Regional Provident Fund Commissioner* (2014) 15 SCC 263 has held as under:

“11. the presence or absence of mens rea and/or actus reus would be a determinative factor in imposing damages under Section 14-B, as also the quantum thereof since it is not inflexible that 100% of the arrears have been imposed in all the cases. Alternatively stated, if damages have been imposed under Section 14-B it will be only logical that mens rea and/or actus reus was prevailing at the relevant time.”

Further, the Hon’ble Supreme Court in *Assistant Provident Fund Commissioner, EPFO & Anr vs. Management of RSL Textile India Private Limited* (2017) 3 SCC 110 has observed as under:

*“following *McLeod Russel India Ltd.*, (2015) 15 SCC 263, since presence or absence of mens rea and/or actus reus would be a determinative factor in imposing damages under S. 14-B, High Court or appellate authority or original authority having found no mens rea and/or actus reus, respondent(s) could not be held liable under S. 14-B”*

Hon’ble Punjab & Haryana High Court in *Assistant Provident Fund Commissioner vs. Employees Provident Fund Appellate Tribunal & Anr.* (2016) 148 FLR 311, dismissing the appeal has held as under:

“5. The learned Single Judge upheld the said order passed by the Appellate Tribunal, while observing that under Section 14B of the Act, the competent authority has a discretion to impose damages which it may think fit keeping in view the facts and circumstances of a case. It has been observed that before imposing damages, the competent authority is required to see whether a default is justified or intentional in the given set of circumstance or not. The learned Single Judge has observed that in the present case, the Appellate Tribunal has rightly come to the conclusion that the competent authority without considering the facts and circumstances of the case wrongly exercised its discretion and imposed damages under Section 14B of the Act. The said order passed by the Appellate Authority has been found to be legal and the learned Single Judge has come to the conclusion that there is no ground to interfere in the discretion exercised by the Appellate Tribunal”

Hon’ble High Court of Chhattisgarh in *M/s Mohanti English Medium School vs. Employee Provident Fund & anr.* 2019 (161) FLR 289 (Chhti) has held as under:

“9. Very recently, the Supreme Court in the matter of Assistant Provident Fund Commissioner, EPFO and another vs. Management of RSL Textiles India Pvt. Ltd., Thr. Its Director, relying upon the earlier judgment rendered in the matter of McLeod Russell India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri and others has held that imposition of damages without recording the finding of mens rea/actus reus on the part of the employer is unsustainable.

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10. Applying the principle of law laid down by the Supreme Court in the above stated judgements to the facts of the present case, it is quite vivid that there is no finding recorded either by the Regional Provident Fund Commissioner or by the Employees Provident Fund Appellate Tribunal with regard to mens rea/actus reus on the part of the employer and as such, in absence of finding with regard to mens rea/actus reus on the part of the employer/petitioner, action under Section 14-B of the Act of 1952 against the petitioner cannot be sustained.”

Hon’ble Calcutta High Court in W.P. No. 8527 (W) of 2015 Tirrihannah Company Ltd. Vs Regional Provident Fund Commissioner decided on 31.07.2018 has held as under:

“In HMT Ltd. (supra) Supreme Court declared, conferment of discretionary jurisdiction on statutory authority to levy penal damages by reason of enabling provision cannot be construed as imperative. Existence of mens rea to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and quantum thereof.

In view of law declared in HMT (supra), which come after Dalgaon (supra) this Court finds no application of the view that liability under section 14B accrues immediately on default for there to be subsequent or late quantification. Impugned order having omitted to provide illumination regarding why it was thought fit to exercise discretion to impose penal damages, corresponding to omission to record opportunity given regarding a defence against imposition of penal damages or mitigation, makes it an order which violates principles of natural justice. As such impugned order is set aside. The Authority will give opportunity to the establishment, hear out its contention regarding imposition of penal damages or mitigation and make appropriate order.”

Thus, on going through the principle laid down by the Hon’ble High Courts and Hon’ble Supreme Court in the case laws, cited hereinabove, it is very much clear that for conferment of discretionary jurisdiction on statutory authority to levy penal damages by reason of enabling provision cannot be construed as imperative; moreover, existence of ‘mens rea’ to contravene a statutory provision has also been held to be a necessary ingredient for levy of damages and quantum thereof.

8. Now coming on the facts of the case in hand, it appears from the perusal of the impugned order that during the inquiry, representative of appellant appeared but it did not file any written objection during the inquiry, rather absented later-on during the inquiry. Hence, the Respondent Authority had no occasion to look into any excuse for late deposit of the employees provident fund dues. The Respondent Authority has so stated this fact in its counter as well. This fact further is corroborated by an allegation of Appellant Authority in its memo of appeal that the grounds were verbally stated before the Respondent Authority and not in written, though the verbal statement is also not corroborated by the perusal of the impugned order, hence there are sufficient grounds to presume that the ground of financial distress is being taken for the first time before this Tribunal in this appeal and was not taken earlier before the Respondent Authority when the proceedings were going on. Since this Tribunal is Court of First Appeal which can look into the factual and legal aspects also, hence the Appellant was granted leave to raise this point of financial distress as an excuse for late deposit of dues before this Tribunal.

9. The learned counsel for Appellant has filed a written argument. He has referred to case **M/s Harrisons Malyalam Ltd. Vs. Regional Provident Fund Commissioner** reported in 2012(1)ILR(KLJ) 398 to buttress his point that financial crisis can also be a ground for lesser damages. Learned Counsel submits that financial crisis at least shows that there was not required 'mens-rea' for late deposits. He further submits that proceedings under Section 14-B of the "Act" are penal in nature, hence they are quasi judicial and for imposing damages the Authority must record a finding that the default was intentional and the Appellant Establishment deserves maximum damages. Learned Counsel has referred to case laws: **Indian Telephone Industries Ltd. Vs. Assistant Provident Fund Commissioner**, 2006(3)KLJ 698, **E.S.I. Corporation Vs. H.M.T.**

Ltd. AIR 2008 SCC 1322 and M/s Prestolite of India Ltd. Cs. The Regional Director and Another AIR(1994) SCC521 in support of his arguments. In the case of ESI Corporation and Indian Telephone Industries *supra*, the principle of law laid down is that levy of damages is by way of penalty. It is an enabling provision and to invoke this provision the existence of required ‘mens-rea’ and ‘actus reus’ to contravene a statutory provision must be there. It was further held that in imposing of damages without giving finding of ‘mens-rea’ on the part of the employer is unsustainable. This point has been emphasized in case of **Assistant Provident Fund Commissioner, EPFO and Anr V. Management of RSL Textiles’ India Pvt. Ltd** AIR(2017) SCC 679.

10. Learned Counsel for Respondent has submitted that for unit in financial distress, there is provision for exemption in rule 32-B. The Central Board is Authorised to exempt deposit since these case was not followed by the Appellant such a plea cannot be taken before the Appellant Authority. He also submits that financial distress is not a ground to lessen the amount of damages.

11. As it appears from the perusal of the record that plea of financial distress has been taken for the first time before this Tribunal in this appeal. In the case of M/s Harrison's Malayalam Ltd. *Supra* Hon'ble the High Court of Kerala has observed that it may also be considered by the Authority to arrive at a finding whether the non-deposit was with required ‘mens-rea’ or not. Hence the plea in defence as mentioned above raised by the Appellant Authority in this appeal requires to be examined by the Respondent Authority for which it appears in the interest of Justice that the case be remanded to the Authority for examining the plea of financial distress by the Authority.

12. Accordingly, the impugned order is liable to be set aside and case is liable to be remained as observed earlier.

ORDER

Setting aside the impugned order dated 18-5-2017, this case is remanded back to the Respondent Authority to consider the defence/excuse behind late payment raised before this Tribunal and record a finding in this respect. The Respondent Authority is required to pass a fresh order in the light of the above observations, since the appeal is pretty quiet old, hence the Respondent Authority is directed to dispose the lis within three months from the date of receipt of the order.

No order as to costs.

(P.K.SRIVASTAVA)

PRESIDING OFFICER

JUDGMENT SIGNED , DATED AND PRONOUNCED.

(P.K.SRIVASTAVA)

PRESIDING OFFICER

Date:8/3/2021