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

NO. CGIT/LC/EPFA-202/2017

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

M/s Jilla Panchayat
Annuppur **APPELLANT**

Versus

The Assistant Provident Fund Commissioner,
Jabalpur(M.P.) **RESPONDENT**

(J U D G M E N T)

(Passed on this 26th day of February-2021)

1. Under challenge in this petition is the order dated 6-9-2016 passed by the Respondent Authority under Section 14-B of Employees Provident fund and Misc. Provisions Act,1952, herein after referred to as the word "Act" holding the appellant establishment guilty in default of making payment of employees provident fund dues and contribution for the period 8/2010 to 01/2016 and holding them liable to pay Rs.35,68,413/- as damages.

2. Facts connected in brief are mainly that Appellant Organization is a instrumentality of the Government engaged in various activities detailed in Memo of Appeal being a Society Registered with Society Registrations Act,1860, it was exempt from the provisions of the Act

vide Central Government Notification dated 7-6-2005 till 31-3-2010 which was further extended to 31-3-2015 by another notification, details mentioned in the Memo of Appeal. The case of the Appellant Company is that under the instructions of Government, it itself decided that its employees to be covered under the Act and submitted itself, to the provisions of the Act, vide its letter dated 11-1-2011(Annexure-12) of the Memo of Appeal. According to the appellant, it undertook to remit contribution with retrospective effect with respect to the contribution of employers and employees share for the period 1-4-2008 to 31-3-2016. It was further alleged that the appellant Establishment runs with the Grant-in-aid received by the Central and State Government's from time to time and it has no other source of its income. The Respondent Authority issued a notice under Section 14-B of the Act for the alleged default in payment of employees provident fund dues from 1-4-2008 to 31-3-2016 and wrongly held the appellant guilty of default in payment, ignoring the various factors as mentioned as grounds of appeal in the memo, which are mainly that the impugned order is against law as it failed to appreciate that the appellant has itself opted for coverage under the Act with retrospective effect though it was not obligated for it in the light of Central Government Notification, mentioned earlier. The Respondent Authority further failed to appreciate that the appellant/establishment is dependent on the funds from Central and State Government and has no independent source of income . It deposited the dues when the funds were allocated to the appellant on its request, after coverage. The Respondent Authority further failed to appreciate that it was required to act as a watch dog of the interest of employer and employee, both. It failed to appreciate that the appellant had remitted contributions even prior to issuing of letter of coverage by the Respondent authority . Further, it was pleaded that the finding of the Respondent Authority that appellant committed default in payment is against fact. The Respondent Authority further erred in law in holding the appellant liable for maximum penal damages without examining the mitigating circumstances while passing the order. The Respondent Authority was required to consider the mitigating circumstances and actual

loss which the employees had to face for alleged default which was zero. The Appellant itself paid the accrued interest under Section 7Q of the Act. The Respondent Authority further erred in law in not giving a finding of required '*Mens rea'* in holding the appellant establishment liable for maximum penal damages. Accordingly the appellant has prayed that the appeal be allowed with consequential damages.

3. In its counter, the Respondent has defended the impugned order with the case that when the Appellant Authority is covered under the Act and defaulted payment , it was liable to pay damages. The mitigating circumstances mentioned are not recognized in law as these are internal matters between the appellant and Government. Accordingly the Respondent Authority has submitted that the appeal be answered against the Appellant.

4. I have heard the arguments of Mr.Uttam Maheshwari, learned counsel for the Appellant and Shri J.K.Pillai, learned Counsel for the Respondent . I have gone through the record as well.

5. After perusal of the record, in the light of the rival arguments, the following point comes up for determination:-

> **"Whether the finding of the Respondent Authority that the Appellant Establishment had committed willful default with required '*Mens rea'* to make it liable for maximum penal damages can be faulted in law and fact.**

6. The perusal of the impugned order, shows that the grounds taken by the Appellant Authority before this Tribunal, in this appeal were also taken before the Respondent Authority who has discussed the grounds in his order, which is under appeal. The main ground on

which the Respondent Authority has brushed aside the alleged mitigating circumstances is that these are internal matters between the Appellant Authority and sponsoring Central and State Government and Respondent has nothing to do with it.

Before entering into the merit, the aforesaid observation in the impugned order under Section 14-B is being re-produced as follows:-

> **[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 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, (1 of**

1986) subject to such terms and condition as may be specified in the Scheme."

7. 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.

8. 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."

9. 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 damagers and/or the quantum thereof."

10. 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."

11. 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"

12. 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"

13. 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 int eh matter of Mcleod Russel 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."

14. Hon'ble Calcutta High Court in W.P. No. 8527 (W) of 2015 Tirrihannah Company Ltd. Vs Reginal Provident Fund Commissioner decided on 3107.2018 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

of 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."

15. Thus, ongoing 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.

16. Now, coming to the case in hand, in the light of the above mentioned certain principles, the perusal of the impugned order reveals that the Respondent/Authority had assumed the required 'mens rea' without properly considering the mitigating circumstances. The grounds taken as mitigating circumstances, enumerated earlier in this Judgment, may be internal matters between the Appellant Establishment and Central & State Government's but the fact still remains that the Appellant Establishment will be in an position to pay contributions only after it received grants-in-aid from various Government's because it is not disputed that it had no other source of its income to run the establishment. Secondly it was the Appellant Establishment who otherwise was exempted under the notification mentioned earlier ,being a Society registered under the Society Registration Act, came forward and submitted itself to the provisions of the Act. These two factors certainly reflect to the state of mind on the part of Appellant Establishment and are determinative on the point, that it lacked required 'mens rea' or atleast, it did not deserve to be saddled with maximum penalty. Hence, the finding of the Respondent Authority ,imposing maximum penalty as damages, holding the Appellant Establishment liable for maximum penalty as damages, cannot be sustained in law and is liable to be set aside. Hence, setting aside the aforesaid finding and

keeping in view the facts and circumstances peculiar to the case in hand, the levy of 50% of maximum fine from the Appellant Authority will meet the ends of justice in my opinion. Accordingly, the appeal deserves to be allowed partly.

17.On the basis of the above discussion the appeal is allowed partly.

ORDER

The appeal is allowed partly. The order dated 6-9-2016 passed by the Respondent Authority is modified to the extent that Appellant Establishment will be liable to pay 50% of the amount of damages levied by the Respondent Authority in the impugned order. Any deposit made at any stage in this appeal shall be adjusted in the amount and excess shall be returned to the Appellant Establishment by the Respondent Authority within 30 days from the date of receipt of the order by the Respondent Authority, failing which it will attract interest @ 12% p.a .

No order as to costs.

(P.K.SRIVASTAVA)

PRESIDING OFFICER

JUDGMENT SIGNED , DATED AND PRONOUNCED.

(P.K.SRIVASTAVA)

PRESIDING OFFICER

Date:26-2-2021