

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

NO. CGIT/LC/EPFA-228/2017

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

M/S Sharif Bidi Company
Sironj, Vidisha, Bhopal (M.P.)

APPELLANT

Versus

The Assistant Provident Fund Commissioner
Bhopal (M.P.)

RESPONDENT

Shri Pranay Choubey : **Learned Counsel for Appellant.**

Shri J.K.Pillai : **Learned Counsel for Respondent.**

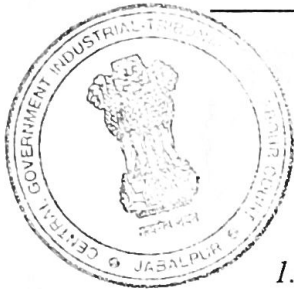
(J U D G M E N T)

(Passed on this 24th day of December-2021)

1. Under challenge in this appeal is order dated 12/1/2017 passed by the Respondent Authority by which the respondent has imposed penal damage under Section 14B of the Employees Provident Fund And Misc. Provisions Act, 1952, herein after referred to as "the Act", holding that the appellant has defaulted payment of employees provident fund dues between the period from January-1998 to February-2012.

2. The grounds taken in the memo of appeal are mainly that the appellant was not given reasonable opportunity to represent its case, hence the impugned order is bad in law. Further the impugned order has been passed by the Respondent which is erroneous, illegal order

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passed against the facts and circumstances on record. The impugned order clearly shows that it was not passed in a judicial manner, rather it was passed mechanically. The Respondent Authority has acted as a prosecutor and a Judge both in passing the impugned order and has passed it without applying the judicial mind, hence the impugned order is bad in fact and law.

3. The Respondent Authority has defended the impugned order in its reply/counter with a stand that as required by law, the employees provident fund dues are to be deposited by the 15th of the next month in which the employee worked in the establishment. The contributions have to be deposited so that it could be credited to the respective accounts of the employees to enable them to earn interest payable on the amount by not depositing the employees provident fund dues on time the appellant establishment has put the beneficiaries in loss which the appellant establishment is bound to compensate. This is also the stand of the Respondent authority that a notice dated 22-4-2014 and 9-9-2015 were first issued by the Respondent Authority to the appellant establishment before passing the impugned order. The appellant establishment appeared during the inquiry through its authorized representative and requested for waiver of damages on the ground of financial crisis which is not a valid ground for waiver. The appellant establishment did not raise any objection with regard to collection of the amount. Hence the impugned order is justified in law and fact and the appeal requires to be dismissed. Also it has been stated that appeal is not maintainable so far as it relates to order under Section 7Q of the Act.



4. The Appellant establishment has filed rejoinder wherein it has reiterated its case.

5. I have heard arguments of learned counsel for appellant Shri Pranay Choubey and learned counsel for respondent Shri J.K.Pillai and I have also gone through the record.

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6. At the very outset, it requires to be mentioned that there are two separate orders passed on the same day, one under Section 7Q and the other under Section 14B of the Act. Both the appeal has been preferred against both the orders. There is no provision in the Act for appeal against order under Section 7Q of the Act before this Tribunal. Hence the appeal. So far it relates to order under Section 7Q, it is held not maintainable before this Tribunal and stands disposed of accordingly to that extent. The appellant is at liberty to seek remedy in this respect before the appropriate forum. IN the light of the above discussion, now the appeal remains only limited to order under Section 14B of the Act and is being disposed accordingly.

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

“..Whether the finding of Respondent Authority regarding default and the liability to pay penal damages can be faulted in law and fact?.”



8. Learned Counsel for appellant has stated that due to bad financial condition, the appellant establishment could not deposit the employees provident fund dues on time. The impugned order of Respondent Authority shows that it has considered this pleas of appellant establishment and recorded a finding that this plea cannot be accepted.

9. It is not disputed that default in payment is accepted by the appellant establishment. This is the settled preposition of law that as per para 38 of the Employees Provident Fund Pension Scheme, the employees provident fund dues of employees are to be deposited up to 15th of the next month , when they are due. This is also not

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disputed that the default was for many years regularly. The ground is that it was due to financial crisis that there was a default in deposit. There is nothing on record to show that this ground was substantiated by any document in the form of balance sheet etc. before the Respondent Authority. No such document has been filed before this Tribunal also. Hence the finding of the Respondent Authority that such a ground which is not substantiated cannot be accepted is totally justified in law and is affirmed accordingly.

10. As regards the next argument of learned counsel for appellant that there is no finding regarding required mensrea in default in the impugned order. Section 14B of the Act is being reproduced as follows:-

Section 14(B)-

Power to recover damages. - Where an employer makes default in the payment of any contribution to the Fund the 2 [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 3 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of 4 [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, 5 [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 6 [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme].] 7 [Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard.] 8 [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 conditions as may be specified in the Scheme.



11. 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.

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12. 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."

13. 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."

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

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“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.”

15. 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”

16. 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”



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17. 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 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."

18. Hon'ble Calcutta High Court in W.P. No. 8527 (W) of 2015 Tirrihannah Company Ltd. Vs Regional 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.

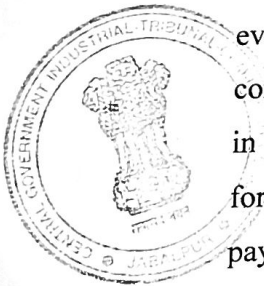
In view of law declared in HMT (supra), which come after Dalgaon (supra) this Court finds no application of the view that liability under section 14B accrues immediately on default for there to be subsequent or late quantification. Impugned order having omitted to provide illumination regarding why it 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

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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."

19. 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 'mensrea' to contravene a statutory provision has also been held to be a necessary ingredient for levy of damages and quantum thereof.

20. In the light of above principle of law laid down in above referred cases, it is established that firstly the imposition of penal damages is discretionary and not mandatory and secondly penal damage can be imposed only when there is required mensrea for the late deposits. Though the Respondent Authority has not recorded a specific finding in this respect, this Tribunal being the Appellate Tribunal on fact and law is within its powers to look into this point at this stage. Mensrea is a state of mind. There can be no direct evidence to mensrea which can only be imposed on the basis of the conduct of the parties in given facts and circumstances. In the case in hand the plea of financial crisis taken by Appellant Establishment for late deposits has been found substantiated. The default in payment is of many years i.e. to say continuous default in every month of the year when the party has defaulted deposit in every month continuously since years no inference other than that the party had required mensrea of non-deposit can be drawn, hence the required culpable mensrea is evident from the conduct of the appellant establishment and is held accordingly.




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21. Accordingly, the appeal sans merit and requires to be dismissed with costs.


ORDER

Appeal stands dismissed with costs.


(P.K.SRIVASTAVA)
PRESIDING OFFICER

JUDGMENT SIGNED , DATED AND PRONOUNCED.




(P.K.SRIVASTAVA)
PRESIDING OFFICER
Date:24-12-2021