

**BEFORE THE PRESIDING OFFICER, CENTRAL GOVERNMENT
INDUSTRIAL TRIBUNAL CUM LABOUR COURT-II, ROUSE
AVENUE, DISTRICT COURT COMPLEX, DELHI.**

Present:

Smt. Pranita Mohanty,
Presiding Officer, C.G.I.T.-Cum-Labour
Court-II, New Delhi.

ATA No. 1113(16)2015

M/s. Lakhani Shoes and Apparels Pvt. Ltd

Appellant

VS.

RPFC, Faridabad

Respondent

ORDER DATED:- 08/02/2022

Present:- Shri Rajiv Shukla, Ld. Counsel for the Appellant.
Shri B. B. Pradhan, Ld. Counsel for the Respondent.

This appeal challenges the orders passed by the APFC Faridabad on 10.09.2015 communicated to the appellant on 11.09.2015 u/s 14B and 7Q of the EPF and MP Act 1952 (herein after referred to as the Act) levying damage of Rs. 9,74,102/- and interest of Rs. 4,87,516/- on the appellant/establishment for the period 1/03/2011 to 28/02/2014. The plea of the appellant taken in this appeal is that it is a Pvt. Ltd. company and covered under the provisions of EPF and MP Act. Notice dated 26/03/2014 proposing levy of damage and interest was served on the appellant for the above said period. In the said showcause notice the appellant was directed to appear before the respondent on 9/04/2014. On the said day and thereafter the authorized representative of the appellant establishment appeared and raised dispute with regard to the period of calculation of the damage and interest and pointed out the overlapping period. Not only that during the inquiry the establishment also submitted a written representation raising various legal objections including the mitigating circumstances leading to delay in deposit. The appellant company had categorically prayed for production of evidence in respect of the proposed damage. The said written submission was never rebutted by the respondent department and the commissioner without considering the mitigating circumstances and without giving proper opportunity to the appellant for proving its bonafides for the default passed the impugned order without application of mind and without giving any finding on the mensrea of the appellant behind the delay in deposit of the PF contribution. The Principle of Natural Justice were flouted and the inquiry was hurriedly concluded. While pointing out various legal aspects and the position of law settled by the Apex Court and different High Courts, the appellant has pleaded that the impugned order is liable to be set aside on various legal grounds as has been stated in the appeal memo.

The counsel appearing on behalf of the respondent has filed a written reply objecting the stand of the appellant. Citing various judgments of the Hon'ble Supreme Court and High Courts he submitted that interference with the impugned order shall defeat the very purpose of the social welfare legislation. He also pointed out that the provision laid u/s 7I doesn't allow any appeal to be filed before this tribunal challenging the order passed u/s 7Q of the Act. Hence, the appeal in respect of the order passed u/s 7Q is to be dismissed in limine. He also submitted that several adjournments were allowed to the appellant during the inquiry who had admitted the delay in remittance and took time to make deposit of the damage and interest proposed. Despite the time being allowed on repeated occasions, the establishment failed to make deposit and the commissioner passed a reasoned and speaking order.

The Ld. Counsel for the appellant during course of argument submitted that the APFC at the first instance passed the impugned order without indicating the basis for imposing the damage at the maximum rate though the statute has vested the discretion on him to exercise in this regard. The basis of calculation of the damage and interest for the default period was never supplied to the appellant despite demand. The mitigating circumstance explained in the written objection was not at all considered and no finding has been rendered on the mensrea of the establishment behind the delayed remittance which in view of the judicial pronouncements makes the order illegal. The impugned order is bad in law for the inquiry being held after an inordinate delay. The impugned order passed u/s 14B also suffers patent illegality in as much as the mitigating circumstances, indicated in the written reply was simply ignored. By placing the copy of the said written reply on record, he submitted that for the dispute between the two factions of Lakhani Group, the matter was adjudicated by the company Law Board and a settlement was arrived there in the year 2008. But for the division of moveable and immovable assets, restructuring of loan agreement etc, almost two years lapsed and the appellant had to make a fresh start in the year 2011. During that period there were acute issues relating to cash flow, but the appellant had not dismissed its employees though there was delay in payment of salary and remittance of PF dues. The learned counsel for the appellant by placing reliance in the case of **Shanti Garments vs. RPFC decided by the Hon'ble High Court of Madras and reported in 2003 Vol 1 CLR, 228** submitted that when the default is found but not for willful fault, the quantum of damage should be compensatory and not penal. He further submitted that in this case the commissioner never considered the mitigating circumstances and never dealt the written submission filed during the inquiry to give a finding on the mensrea, which makes the impugned order not sustainable in the eye of law for the view taken by the Hon'ble SC in the case of **Mcleod Russel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri & Others**

reported in (2014)15 S.C.C 263 and the case of **Assistant Provident Fund Commissioner vs. Management of RSL Textile India Pvt. Ltd., reported in 2017LLR 337**. He also argued that the Hon'ble SC in the case of **Organo Chemicals vs. U.O.I reported in II LLJ(1979)416** have held that for the punitive nature of the order passed u/s 14B of the Act, the order should be a speaking order containing valid reasons supporting the finding.

In his reply argument the learned counsel for the respondent took this tribunal through the impugned order to point out that the establishment had never disputed the delay in remittance. On the contrary several adjournments were granted on the request of the AR of the establishment who gave undertaking to deposit the proposed damage and interest by the next date. Since the deposits were not made during the inquiry, the same was closed and the order was passed. With regard to the mensrea and non discussion of the same the learned counsel Mr. Pradhan submitted that mensrea is a state of fact to be gathered from circumstances in a given case. In this case the appellant establishment since admitted the delay, the order can not be viewed as defective for want of finding on mensrea. He also submitted that financial difficulty or disturbance in internal management can not be made a ground to avoid the statutory liability. The default in deposit makes the amount arrear for which damage and interest is leviable. To support his stand he placed reliance in the case of **Hindustan Times Ltd vs. U O I A I R 1998 SC 851** and **Birla Cotton Mills Ltd vs. U O I ILR 1984 Delhi 60**.

Perusal of the impugned order shows that the commissioner while passing the said order as a quasi judicial authority has not mentioned a word in support of his finding in imposing damage at the maximum rate prescribed under the scheme though he is vested with a power to exercise discretion in this regard in appropriate cases. The order contains an account of adjournments allowed to the establishment for making deposit of the proposed amount. Though at various places of the order, the commissioner has stated that the AR agreed to make deposit of the proposed amount, not a single paper containing an endorsement to that effect by the AR has been filed by the Respondent. Even otherwise, if it is accepted that the establishment, during the inquiry admitted the delay in remittance, that will not lead to a conclusion that the delay was with an ulterior motive entailing the establishment for penal damage at the highest rate. The law is well settled that all delay in remittance will not attract penal damage unless there is a specific finding to the effect that the same was with an ulterior intention.

The Ld. Counsel for the appellant further argued that the commissioner in this case has imposed the damage at the maximum rate prescribed under the scheme. He was neither

aware of the discretion vested on him nor has assigned any reason for arriving at such a decision. To support his contention he relied upon the judgment of **APFC vs. Ashram Madhyamik, 2007LLR1249** wherein the Hon'ble High Court of Madhya Pradesh have held that imposition of full damage is not compulsory and it is discretionary as understood from the word "May" used. Not only that the Hon'ble Supreme Court in the case of **ESIC vs. HMT Limited (2008ILLJ814SC)** have clearly pronounced after considering the Hindustan Times case that when a discretion was conferred on the statutory authority to levy penal damage the provision could not be construed as imperative. While pointing towards the written objection dated 4.3.2015 filed by the establishment before the commissioner during the impugned inquiry, he argued that the said representation was containing all the pleas of the appellant in detail. But it was never considered.

In the case of **Mcleod Russel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri & Others reported in (2014)15 S.C.C 263** and the case of **Assistant Provident Fund Commissioner vs. Management of RSL Textile India Pvt. Ltd., reported in 2017LLR 337** the Hon'ble Apex Court have held that absence of finding on mensrea makes the impugned order illegal and not sustainable in the eye of law. In this case as seen from record the establishment in it's objection before the commissioner had clearly indicated about the mitigating circumstances but the commissioner while passing the impugned order failed to consider the same. Non consideration of the same makes the order illegal.

On hearing the argument and on perusal of the impugned order passed u/s 14B of the Act it appears that the commissioner never accepted the submission of the establishment but proceeded to impose the damage at the maximum rate on a mathematical calculation which is not based upon any reasoning. The plea of the appellant that for the settlement between the partners which was a long drawn process delay in remittance happened seems acceptable as without any malafides as it is not the case of the respondent that during this period under inquiry the establishment had deducted the contribution from the salary of the employees and retained the same for use otherwise.

Thus, from the totality of the circumstances and the pleas canvassed in this appeal it clearly appears that the commissioner had passed the impugned order u/s 14B without application of mind and without giving any finding on the mensrea behind the delay in remittance so also the various legal objection taken by the appellant.

During course of argument the Ld. Counsel for the appellant never disputed the computation of interest proposed

through the notice and assessed in the impugned order. Admittedly there was delay in remittance of the dues for which interest is payable by the establishment. Even though the order impugned in this appeal is a composite order, it is not felt proper to interfere with the finding of the commissioner in respect of the interest. But at the same time it is held that the commissioner has committed patent illegality while passing the order u/s 14B of the Act and the said order cannot sustain in the eye of law. Hence, ordered.

ORDER

The appeal be and the same is allowed in part the impugned order passed u/s 14B of the EPF and MP Act is hereby set aside. Any amount deposited by the appellant as a part of the assessed amount u/s 14B shall be refunded to the appellant by the EPFO within 60 days from the date of communication of this order. The order in respect of the interest calculated in the order is confirmed. Consign the record as per Rules.

Presiding Officer