BEFORE THE HON'BLE 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.

M/s. PGT Component Ltd. Appellant

Vs.

APFC, Noida Respondent

ATA No. 679(14)2008

ORDER DATED:- 12.04.2021

Present:- Shri S.K. Gupta, Ld. Counsel for the Appellant.
Shri Narender Kumar Singh, Ld. Counsel for the Respondent.

The appellant in this appeal has challenged the order dated 16.04.2008 passed by the APFC Noida whereby the establishment has been directed to pay Rs. 25,11,913/- as damage and Rs 11,65,942/- as interest for delayed remittance of the PF dues of its employees.

The sole contention raised by the appellant is that it is a Pvt. Limited company registered under the Company Act. Since the year 1996 it has been covered under the EPF and MP Act and a code No. has been allotted. The company was very diligent in deposit of the PF dues of its employees and never the name of the appellant company had appeared in the defaulter list of the EPFO. While being diligent in deposit of the challan showing remittance the company was also diligent in filing the periodical returns in form no. 3A and 6A annually. On behalf of the EPFO, on 26.06.2002 a letter was received wherein the EPFO had called upon the appellant/establishment to clarify some confusions relating to the deposit of the contribution in the Bank. In response thereto the officials of the company made inquiry from the Bank and found out misappropriation of fund by one of its employees named Mr. M.L. Sharma who had managed to create fraudulent challan and deposited those before EPFO Noida. Infact the remitted amount for a particular period was not deposited with the EPFO. The appellant/establishment lodged FIR against the wrong doer Mr. ML Sharma the factory manager at local police station. The forged monthly challans were managed to be deposited by Mr. M.L Sharma in connivance with some of the employees of EPFO. The Director of the Company Mr. S.K Malik brought this fact to the notice of the persons in authority at the EPFO and the said authority acting

upon the compliant took departmental action against its own employees. While the matter stood thus the EPFO authorities initiated an inquiry u/s 7A of the act for assessment of the defaulted amount for the period 04/1993 to 04/2002 and passed an order dated 27.12.2002 assessing an amount of Rs. 34,75,075/-. Since the amount was big the establishment made a prayer for deposit by installment which was allowed by the central PF commissioner and the appellant in due course made deposit of the entire amount assessed. Thereafter, the authority initiated a separate proceeding assessing damage and interest payable for the said delay in remittance. On getting notice of the said inquiry for damage and interest the then director of the company Mr. S.K. Malik suffered a heart attack and succumbed to the same. This gave a huge backlash to the company and its business activities came to a halt as most of the employees resigned and the new director was not in a position to setup a proper defence during the impugned inquiry. During the 7A inquiry though all the facts leading to delay in remittance were brought to the knowledge of the EPFO and it was pleaded that the delay in remittance was never intentional but for the fraud committed, the same was never considered during the 14B and 7Q inquiry. It has also been stated that the respondent department defaulted in keeping a vigil over the remittance done though it was duty bound to have periodical inspection of the deposit and challans. The A/R for the establishment had appeared before the commissioner during the impugned inquiry and sought for some more time to trace out all old record. It was also pointed out that the establishment was never listed as a defaulter. Furthermore, the employees of the establishment were being granted deposit slips by the EPFO on periodical intervals and some of the employees on their retirement or resignation were granted final withdrawal of the EPF deposits which left no scope for the establishment to doubt that the remittance is not in time or properly. This, to a greater extent gave a false notion to the appellant about regular deposit of the PF dues. Thereby, it was pleaded before the commissioner conducting the inquiry that there being no malafide intention behind the delay in remittance no penal damage or interest can be imposed on it. But the commissioner without taking into consideration the mitigating circumstances and without giving any finding with regard to the mensrea for such delay passed a cryptic non speaking order to the prejudice of the appellant. He thereby submitted that the said order being illegal is liable to be set aside. To support his contention he has filed the copies of the order passed u/s 7A of the Act and several other documents which include the notice and calculation sheet of the damage and interest, the FIR lodged alleging the fraud etc.

In reply, the Ld. Counsel for the respondent has filed a written objection to the appeal wherein he has elaborately described about the legislative intention behind the beneficial legislation. With regard to

the grounds taken in the appeal it has simply been stated that the said grounds are illegal and misconceived. Describing the appellant is a habitual defaulter it has been stated that imposition of damage @ 100% of the arrear is legal just and proper. Thereby, he pleaded for dismissal of the appeal.

The Ld. Counsel Mr. Gupta representing the appellant argued that the appellant is a company and is carrying out business following all rules and procedure laid under law. Since the year 1983 it has been paying the EPF contribution of its employees and during all these periods no default was detected by the department. It has been further argued that the employees of the establishment were being granted EPF deposit slip regularly. The employees quitting the job were also allowed final withdrawal of the PF dues. One Mr. M.L. Sharma played fraud in connivance with some of the employees of the department which was detected of late. During the 7A inquiry held for recovery of the defaulted amount the appellant rendered full cooperation and diligently made deposit of the entire amount assessed u/s 7A. But the commissioner ignoring the said facts held the appellant liable for the penal damage. To support the contention he has placed on record the order dated 27.12.2002 and the evidence showing deposit of the said assessed amount. Thus, the Ld. Counsel strenuously argued that fraud having been committed by one of its employees and action been taken against him the establishment is no way liable for penal damage. In support of his contention he has relied upon the judgment of Hon'ble High Court of Gujarat reported in **Saurashtra Solvent Extraction company Pvt. Ltd. vs. RPFC reported in 2006LLR644** wherein the Hon'ble High Court have held when the contribution was paid by the establishment to the consultant for deposit and the said consultant misappropriated the money the establishment cannot be held liable for the penal damage if it is proved that proper legal action was taken against the man committing the fraud. He has also placed reliance in the case of the **Arbindo Mills limited vs. RM Gandhi and others decided by the Hon'ble High Court of Gujarat and reported in 1982Lab.I.C 344** in which circumstances have been laid down where the employer become unable to pay the dues on time and under the said circumstances the employer cannot be held liable for committing the error attracting liability for penal damage and interest. One of the circumstance indicated in the judgment is the defalcation on the part of the clerk entrusted with the money.

On the strength of these two judgments the Ld. Counsel for the appellant strenuously argued that the commissioner did not give the establishment proper opportunity to set up a defence and to explain the mitigating circumstances. No finding has been given in the impugned order on the mensrea of the appellant for the delay in deposit.

From the documents placed on record it is not disputed by the respondent that FIR was lodged by the appellant company against its employee M.L Sharma and the case was registered u/s 406/420/467/468/571 of the IPC. The case was investigated and charge sheet was submitted against the accused M.L Sharma. The appellant has also placed on record the list of un-exempted defaulting establishments for the year 2001, 2002 wherein the name of the appellant/establishment was never included.

From the record it is evidently clear that while passing the impugned order the commissioner had failed to appreciate the mitigating circumstances of the appellant/company. In the case of **M/s Prestolite of India Limited vs. The Regional Director and others reported in AIR 1994SC521** the Hon'ble Supreme Court have held that while imposing the damage the mitigating circumstances should be considered. Not only that in the case of **Mcleod Russel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri & Others reported in (2014)15 S.C.C 263** and in the **Assistant Provident Fund Commissioner vs. Management of RSL Textile India Pvt. Ltd., reported in 2017LLR 337** it has been clearly held that mensrea/actusreus are the determining factors for imposing and quantifying damage u/s 14B. The commissioner must give a finding while imposing penal damage that mensrea or actusreus was prevailing at the relevant time. In the case of prestolite referred supra the Hon'ble Apex court have held that the adjudicating authority while finally deciding the matter for imposition of damage is bound to take into consideration the mensrea instead of acting mechanically and imposing the upper most limit of the damage table.

The Ld. Counsel for the respondent counter argued that the deposit of the defaulted amount would not act as a protection against the action u/s 14B of the Act. But here is a case where the commissioner has not give any finding on the mensrea of the appellant nor the impugned order has elaborated as to why the maximum penal damage and interest was levied when the mitigating circumstances like fraud by one of the employee of the establishment was very much within the knowledge of the EPFO.

A plane reading of the provision laid u/s 14B of the act shows that when a employer makes default in payment of contribution to the PF fund, the CPFC or such other officers authorized by the Central Government may recover from the employer by way of penalty such damage not exceeding the amount of arrear as may be specified in the scheme. The legislature has used the word 'may' twice. Firstly with reference to the very recovery itself and secondly with reference to the quantum. Long back in year 2008 the Hon'ble Supreme Court in the case of **ESI corporation vs. HMT Limited reported in (2008)3SCC 35**, while considering a pari-materia provision under the ESI Act 1948

came to hold that the statute doesn't mandate that in every case a penalty has to be levied and had left to the discretion of the authority to decide the same.

Not only that the Hon'ble High Court of Delhi in the case of **APFC vs. Hi-tech Vocational Training Centre reported in 2015SCC12215** have held that Merely because a power has been vested in a superior authority to reduce or waive the damage would not mean that the adjudicatory authority is left with no discretion.

Perusal of Para 32A of the EPF Scheme 1952 clearly shows that the legislature has ones again used word 'may' in the phrase may recover from the employer by way of penalty. Para 32A of the scheme is in conformity with section 14B of the Act and the discretion in the section is retained in the scheme. But in this case the commissioner without giving any finding on the mensrea and without assigning any reason as to why maximum damage was imposed when there were material before him that for the fraud played by the one of the employee there was default in remittance, passed the cryptic and non speaking order. This makes the impugned order illegal and not sustainable in the eye of law.

In this case a composite order was passed u/s 14B and 7Q of the Act by order dated 16.04.2008 which is a period before the amendment was made effective i.e from 26.09.2008. In the case of Roma Henny Security Services Pvt. Limited vs. CBT the Hon'ble High Court of Delhi have held that prior to the amendment the damage u/s 14B included the interest chargeable u/s 7Q of the Act. In the present case a composite order has been passed for the damage and interest. It is found that the damage was levied from June 1999 to Oct 2008 and for the said entire period the interest stands charged. There is no mention that for one month i.e. 27.09.2008 to Oct 2008 damages were charged on the rates specified in the new table. That itself shows that the impugned order was passed by the commissioner without application of mind.

Hence, on considering the matter from all aspects it is found that the commissioner without giving any finding on the mensrea prevailing on the part of the establishment at the time of the period of default and without assigning any reason for imposing the maximum of damage had passed the impugned unreasonable and non speaking order which cannot sustain in the eye of law and liable to be set aside. Hence, ordered.

ORDER

The appeal be and the same is allowed on contest. The impugned order dated 16.04.2008 passed u/s 14B is hereby set aside. The LCR be returned forthwith and the record be consigned according to Rules.

Sd/-
Presiding Officer