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. D-2/13/2020

M/s Sahara Q Shop Unique Product Range Ltd. Appellant

VS.

RPFC, Gurgaon (E) & Another Respondent

ORDER DATED :-21/02/2023

Present:- Shri Rishabh Gupta, Ld. Counsels for the Appellant.
Shri Satpal Singh, Ld. Counsel for the Respondent.

This appeal challenges the order dated 24/12/2019,passed by the RPFC Gurgaon , East, imposing Rs 81,90,552/- as damage u/s14B of the EPF and MP Act against the appellant/-t establishment for delay in remittance of the PF dues of it's employees for the period 06/2014 to 12/2017.

Notice being served the respondent appeared through it's counsel and filed a written reply.Appellant filed rejoinder to the reply of the Respondent. Both parties argued in detail in support of their respective stand taken in the appeal.

The stand of the appellant is that it is an establishment doing business as a FMCG Retail Venture and a part of Sahara Group of Companies. It has engaged several persons as employees and to facilitate deposit of the PF contribution of those employees , the PF code No has been obtained. Since the date the company has been set up it has been diligently complying with the provisions of EPF Act in relation to it's

employees.On20/05/2019, a notice was issued to the establishment along with the detail statement proposing imposition of damage and interest. On receipt of the same the appellant establishment through it's AR appeared and made a prayer for time to verify and reconcile the deposits and the date of remittance as the portal of the appellant was reset by the Respondent and the appellant had no clue of the user ID and Pass word. The appellant company, by writing a letter dt 25/07/2019, also sought for the copies of the challan and ECR as most of it's employees had left the job by then on account of the financial break down of the company. In fact the appellant could not verify the challans, whereas on 24/12 /2019 the commissioner passed the to reconcile the demand and the commissioner passed the impugned order holding that the establishment could not made any submission contrary to the calculation sheet attached to the notice.

It has further been pleaded that the appellant company is a part of Sahara Group of Companies, which is facing several legal proceedings and the matter is pending subjudice before the Hon'ble SC. The Hon'ble SC by order dt 21/11/2013, contempt petition(civil)No 260/2013) directed that the Sahara Group of companies shall not part with any movable or immovable properties until further order. Soon thereafter, the chairman of the Group was arrested and detained in judicial custody by the order of the Hon'ble SC, which added to the owes of the appellant company causing huge loss in business. But the company, while facing the set backs, with the good intention of safeguarding the interest of it's employees , continued to deposit the PF contribution from out of it's corpus fund. The fund depleted first and being unable to part with the properties for the order of the Hon'ble SC, failed to comply with the deposits, which was not intentional nor intended to avail any wrongful gain by the company. The

delay in remittance was for a situation beyond the control of the appellant. The company was going through acute liquidation problem for the order passed by the Hon'ble SC. The appellant and some other companies of the group, though had approached the Hon'ble SC for relaxation of the earlier order, no fruitful result could be achieved. For such unavoidable circumstances, the appellant company was compelled to make belated deposit of the contribution. All these mitigating circumstances pointed out during the inquiry was not considered at all. On the contrary, the commissioner went on to pass the impugned order without giving a finding on the mensrea behind the delayed remittance of the appellant.

By placing on record the various orders passed by the Hon'ble SC on different dates, the appellant has explained that the mitigating circumstances leading to delay in deposit having not been considered and no proper opportunity for placing the materials on record been allowed during the inquiry, the order challenged in the appeal is not sustainable in the eye of law and liable to be set aside.

It is also pleaded that the commissioner imposed the penal damage for the period06/2014 to 12/2017, in clear violation of the established principle of law and the revision incorporated in the table in para 32A of the EPF & mp;MP Scheme. Thus relying on the judgment of the Hon'ble SC in the case of Mcleod Russel India Ltd, and RSL Textiles he submitted that a finding on the mensrea behind the delayed remittance is sine qua non for imposition of penal damage. The commissioner, a quasi judicial authority is guilty of ignoring the law settled by the Appex court of the country. He thereby pleaded to set aside the impugned cryptic order passed solely accepting the submission made by the department representative. The other stand taken by the appellant is that it is an order in which the commissioner has not assigned any reason for imposition of the damage at the maximum

percentage prescribed under the scheme as if it is a liability under the tax legislation.

The respondent in his written reply has fully supported the impugned order. It has been stated that the sufficient opportunity was given to the appellant for production of records. The establishment did not co-operate and no records were produced as has been observed in the order by the commissioner. No dispute on the calculation was ever raised by the establishment during the inquiry. The establishment, though initially took time to reconcile the calculation of the proposed damage and pleaded about the financial instability of the company, later did not cooperate by producing the documents. Long adjournments were allowed for the purpose. More over no objection was ever raised with regard to the calculation of damage made. The non responsive behavior of the establishment left the commissioner with no other option than considering the documents available with the department. The stand of the establishment with regard to financial crunch was duly considered and rejected in view of the judicial pronouncements. Hence relying upon the judgment of the Hon'ble SC in the case of Hindustan Times Ltd vs UOI, 1998 SC (2) 242, and in the case of Ess Kay Machinery Pvt Ltd vs RPFC, 1998 LLJ 925 (Orissa DB),the Responded pleaded that financial difficulty is not at all a circumstance to be considered for imposition of penal damage. All other stand taken by the appellant has been denied.

During course of argument the appellant mainly raised two questions i.e no finding has been rendered on the mensrea behind the delayed remittance and the calculation of damage has been made following the table though the law is well settled that the commissioner in a given circumstance is vested with the power of exercising discreation.

Counsel for the respondent on the contrary, vehemently challenged both the stand taken by the appellant and argued that for the recent pronouncements by the Hon'ble Supreme Court in the case of **Horticulture Experiment Station, Gonikoppal, Coorg vs. the RPFC (Civil Appeal No. 2136 of 2012 order dated 23.02.2022) mensrea** is no more the required condition for levy of damage. He argued that in the case of Horticulture Experiment referred supra the Hon'ble Supreme Court have discussed and distinguished all the earlier judgments including **Organo Chemical Industries vs. UOI, ESI vs. HMT, Mcleod Russel vs. RPFC, APFC vs. the management of RSL Textile** and came to hold that the liability for damage under the EPF and MP Act being for the breach of a civil obligation and the delay committed by the employer being the sine qua non for imposition of penalty/ damage the element of mensrea is not required. He thus, argued that the impugned order can not be found with fault for want of finding on mensrea. He emphasized that the judgment of the Hon'ble Supreme Court in the case of Horticulture Experiment, referred supra being the latest judgment has the overriding effect on the earlier judgment of the bench of similar strength.

The Ld. Counsel for the appellant further argued relying upon the judgments of the Hon'ble Supreme Court in the case of **Mcleod Russel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri & Others reported in (2014)15 S.C.C 263 and DCW Employees Co-operative Canteen Pvt. Ltd vs. P.O.EPFAT,2018 LLR 672**, decided by the Hon'ble High Court of Madras, that mensrea is the factor to be considered for levy of damage. Unless existence of the mensrea is pleaded and established against the employer the levy of damage u/s 14B cannot be done automatically as every delay cannot be termed as willful or intentional delay and it depends on the facts and circumstances of each case. The

adjudicating authority has to give a specific finding as to why the damage will be levied. He thereby argued that the impugned order which is not only a non speaking order also lacks the finding on mensrea. The Ld. Counsel for the appellant besides relying upon the judgments of Mcleod Russel and DCW Employees referred supra has also placed reliance in the case of **Assistant Provident Fund Commissioner vs. Management of RSL Textile India Pvt. Ltd., reported in 2017LLR 337.**

The argument advanced by the counsel for both the parties on the necessity of a finding on the mensrea before assessing penal damage and for the reliance placed by them on judgments of the Hon'ble SC having contradictory views, it is felt expedient to arrive at a decision as to which judgment, earlier or the later, is to be followed for reaching at a decision on the necessity of the finding on mensrea.

The admitted facts are that in the impugned order is a cryptic order and the commissioner has not rendered any finding on the mensrea. The learned counsel for the Respondent argued that the later judgment in this regard is to be followed and the Hon'ble SC in the latest judgment i.e. Horticulture Experiment referred supra, have clearly held that mensrea or actus reus is not an essential element for imposing penalty or damage for breach of civil obligation and liability. He also argued that the Hon'ble SC while passing the judgment in Horticulture Experiment have considered and distinguished the earlier judgments passed in **Mcleod Russel and RSL Textiles. Not only that, the Hon'ble SC in the case of Horticulture Experiment have also observed that the Judgment of ESI vs. HMT Ltd (2008)3SCC,35**, which was relied in the judgment of **Mcleod Russel and RSL Textiles** is not binding as the said judgment were passed considering the judgment of the division bench of the Hon'ble SC in the case of Dillip N Shroff and the judgment of Dillip N Shroff has been overruled by the Hon'ble SC in the case of **UOI vs. Dharmendra Textile**

Processors(2008)13, SCC 369. The learned counsel for the Respondent Mr. Singh, thus emphasized in his argument that all the earlier judgments governing the field being discussed and distinguished in Horticulture experiment, and the case of Dharmender Textile referred supra and relied in the judgment of Horticulture Experiment being the judgment delivered by a larger bench of three judges, is binding on the courts and Tribunals on the necessity of the finding on mensrea for levying damage on breach of a civil obligation.

The counter argument advanced by Mr. Gupta, the learned counsel for the appellant is that the judgments passed in the cases of Mcleod Russel and RSL Textiles are directly on the law relating to the provisions of EPF &MP Act and governing the field for a pretty long period. Those judgments were passed in the year 2014 and 2017 respectively by the division Bench of the Hon’ble SC comprising of two judges. A bench of similar strength cannot overrule the earlier judgment of the co ordinate bench. He also argued that over ruling of the judgment of Dillip N Shroff ,relied in the case of Mecloed Russel ,shall not have the effect of automatically over ruling the later judgment unless the same is so done by a larger bench. He thus argued that the judgment and principle decided in the case of Mecloed Russel and R S L Textile still governs the field and the judgment of Horticulture Experiment being the later judgment of the coordinate bench, the earlier judgment in Mecloed Russel shall prevail.

To support his argument he has relied upon the judgments of the Hon’ble SC in the case of **Sandeep ku Bafna vs. State of Maharastra & others, AIR 2014 SC 1745** and submitted that the statement of law pronounced by a division bench is considered binding on the subsequent division bench of same strength or lesser no of Judges.If any contrary view is expressed by the said later bench, the same would fall in the category of per incuriam and the earlier judgment of the co

ordinate bench shall prevail. He thereby argued that the view taken in Mecloed Russel and RSL Textiles, in respect of the finding on mensrea still governs the field being the earlier judgment of theco ordinate bench. He has also placed reliance in the judgments of the Hon'ble SC in the case of **Union of India vs. Raghubir Singh(1989(2) SCC 754 Const Bench), Chandra Prakash vs. State of UP (AIR2002 SC 1652 Const Bench) and Saha Faesal & others vs. Union of India(AIR 2020 SC 3601**) to argue that the constitution bench of the Hon'ble Apex Court have time and again ruled that in order to promote consistency in the development of law and it's contemporary status, the statement of law by an earlier division bench is binding on the subsequent division bench of same or lesser no. of judges.

For the argument advanced by the counsel for both the parties with regard to the effect of the judgment passed by the Hon'ble SC in the case of Horticulture Experiment referred supra, the short and important question before this Tribunal is which judgment is to be followed. At the cost of repetition, be it stated here that this Tribunal is not competent to examine the correctness of the judgments referred supra and only required to take a decision as to which judgment is to be followed. In the case of Raghubir Singh referred supra, the Hon'ble Constitution Bench of the Apex Court have held

Para 27-

"There is no constitutional or statutory prescription in the matter, and the point is governed entirely by the practice in India. It is in order to guard against the possibility of inconsistent decisions on point of law by different Division Benches, the rule has been evolved in order to promote consistency and certainly in the development of law and it's contemporary status, that the statement of law by a division bench is considered binding on the division Bench of similar

strength or of lesser no of judges.” The same view was again taken by the Hon’ble SC in the case of **Chandra Prakash vs. State of UP (AIR 2002 SC 1652)** which has been relied by the learned counsel for both the parties. In the case of Chandra Prakash the view taken by the Apex court in the case of **Pradeep Candra Parija vs Pramod ku Patnaik h(2002 1 SCC 1) has been followed. Not only that, in the case of Saha Faesal & others vs. Union of India (AIR 2020 SC 3601)**the Hon’ble bench of Five judges have held that **Para 23** “it is now a settled principle of law that the decision rendered by a co ordinate bench is binding on the subsequent bench of equal or lesser strength. **Para 31**” therefore the pertinent question before us is regarding the application of the “Rule of Per in curiam”. This court while deciding Pranay Sethi case referred to an earlier decision rendered by a two judge bench in the case of **Sundeep Bafna vs. State of Maharastra (2014)16 SCC 623**,where in the application of the Rule of Per in curium was emphasized.

While considering the argument advanced, it is necessary to say that in the case of Sundeep ku Bafna referred supra the Hon’ble SC have clearly observed that “A decision or judgment can be per incuriam to any provision in a statute, Rule or Regulation which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger bench, or if the decision of a high court is not in consonance with the views of this court. It must immediately be clarified that per-incuriam rule is strictly and correctly applicable to the ratio decidendi and not to the obiter dicta. It is often ecountered in High Court orders that two or more mutually irreconcilable decisions of Supreme Court are cited at the bar. With that the inviolable

recourse is to apply the earlier view as the succeeding one would fall in the category of per incuriam.

On a careful reading of the judgments cited by the Ld. Counsel for both the parties it is found that when there are two judgments of coordinate bench with two contrary views taken, the earlier judgment shall be followed as the later judgment falls in the category of per incuriam. The argument of Mr.Singh, the Ld. Counsel for the respondent that Horticulture Experiment judgment though has been delivered by a Division Bench having two judges, in fact the case of harmender Textile referred supra delivered by a division bench of Hon'ble three judges have been discussed therein and thus, it has a overruling effect on the earlier judgments in the case of Macleod Russel and R.S.L Textile, does not sound convincing for the reason that the judgment of Dharmender Textile was not with relation to the EPF Act and the judgment of Horticulture Experiment has not overruled the judgment of Macleod Russel and RSL Textile. Thus applying the ratio in the case of Sandeep Kumar Bafna referred supra, the earlier judgment of Macleod Russel and RSL Textile are to be followed.

Now coming to the facts of the present appeal it is evident from the record that the establishment had filed written request on 25/07/2019,during the inquiry requesting time on the ground that their portal having been reset, some more time is required to reconcile the calculation of the proposed damage. Copy of the same have been placed on record as Annexture A8. The document marked as A8 contains the seal of the respondent dt 26/07/2019,acknowledging receipt. The appellant has also filed office copy of several orders passed by the Hon'ble SC to exhibit the mitigating circumstances. But none of those orders were placed before the commissioner as the proceeding was closed. On the contrary, the commissioner has observed in the

order that the establishment , even though allowed time on several occasions failed to submit records and submissions in defence. It seems that the commissioner without allowing sufficient time and in a technical manner and by following the table of para 32A passed the impugned order.

The learned counsel for the Respondent counter argued that the commissioner making the inquiry is not empowered to reduce the damage prescribed in the scheme and the said power is vested with the CBT only. He further argued that the period of inquiry was for more than three years. He also argued that no illegality has been committed in assessing the damage.

On perusal of the impugned order it appears that the commissioner has passed a cryptic order in a mechanical manner applying the table under the scheme.

Thus for absence of a finding on mensrea, for non consideration of the submission of the establishment seeking time to reconcile the calculation when the portal was re set, for absence of a reasoning for imposition of damage at the highest the order is held to have been passed without proper consideration of the facts and application of mind. The order passed imposing damage is wrong and liable to be set aside.

From the totality of the circumstances, the pleas canvassed by both the parties during argument it appears that the impugned order u/s 14B has been passed without application of mind and without giving due opportunity to the appellant of producing evidence during the inquiry. Thus, it is held that the commissioner has committed patent illegality while passing the order u/s 14B of the Act which is not sustainable in the eye of law. It is felt expedient in the interest of justice to remand the matter for a fresh inquiry, after giving due opportunity to the appellant establishment to plead and

prove the mitigating circumstances behind the delayed remittance. Hence, ordered.

ORDER

The appeal be and the same is allowed. The impugned order passed u/s 14B of the EPF and MP Act is hereby set aside. The matter is remitted back for a fresh inquiry to be conducted by the commissioner after giving due opportunity to the appellant establishment for reconciling the deposit and the proposed calculation and pleading and proving the mitigating circumstances. The inquiry shall be concluded within six months from the date of communication of this order.

Presiding Officer