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

NO. CGIT/LC/EPFA-204/2017

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

M/s Rural Engineering Services,
Katni

APPELLANT

Versus

The Assistant Provident Fund Commissioner
Jabalpur **RESPONDENT**

Shri P.C.Chandak : Learned Counsel for Appellant
Shri J.K.Pillai : Learned Counsel for Respondent

(J U D G M E N T)

(Passed on this 18th th day of March-2021)

1. The present appeal is directed against the order dated 18-7-2016 passed by Respondent Authority holding the appellant establishment guilty of defaulting in depositing employees provident fund dues for the period April-2015 to June-2015.

2. Facts connected in brief are that Appellant is an agency and instrumentality of State of Madhya Pradesh and is the principal organ at District level to oversee the implementation of various development schemes, having electrical and engineering aspects. It has to facilitate other government departments for works under Panchayatiraj, Rural Development Department and Employment Guarantee Council. To facilitate the aforesaid work, the Data Entry Operators on contract basis were appointed by Jilla Panchayat of the concerned districts. They were required to discharge duties under the appellant. Their service conditions were notified by the

concerned department. Accordingly, the remuneration of the data entry operators was determined on the basis of basic wages including the dearness allowance. One such Data Entry Operator Hiralal Vishwakarma was appointed on contractual basis with the appellant establishment on fixed monthly remuneration determined at district level. His remuneration inclusive of dearness allowance was Rs.8,820/-. His services were extended from time to time and his wages were also revised to Rs.11000/- during the course of time. Further he took Rs.13,000/- per month w.e.f. 1-6-2013, since the said employee was drawing more than Rs.6500/- per month, hence he was in the category of excluded employee for the purposes of employees provident fund contribution in the Employees Provident Fund & Misc. Provisions Act,1952, herein after referred to as the word 'Act". His salary was further revised to Rs.14,300/- per month w.e.f 1-4-2014. It was informed by the Respondent Organisation that inspite of the fact that the appellant was getting salary higher than that to be included for the benefit of Scheme, the employees of the Appellant Organisation would be covered in the Scheme. The respondent organization issued letter of coverage under Section 2A of the "Act", covering the Appellant Establishment retrospectively w.e.f 1-11-2011. Thereafter, it was informed by Government of Madhya Pradesh that only the employees who were drawing less than Rs.6,500/- were covered in the Scheme vide its letter dated 17-12-2012 (Annexure A-10) to the Memo of Appeal. Thereafter, as stated by the appellant, the establishment was inspected by Enforcement Officer of Respondent Authority. He was apprised of the excluded employees including the Data Entry Operator working on contractual basis, but the Enforcement Officer told that all the employees irrespective of monthly remuneration, were to be covered by the Scheme. Accordingly, acting on the advise of the Enforcement Officer the appellant establishment sought budget from Competent Authority for remittance of employees provident fund dues for the period November-2011 to March-2015. These letters are (Annexure 11 to 13) to the Memo of Appeal. After required budget was received by the appellant establishment from the Government, the amount was deposited with the Respondent

Authority, without deducting employees contribution from their salaries for the period November-2011 to March-2015. The Respondent Authority wrongly calculated the interest and damages, holding the deposit as late deposit and issued a show cause notice in this respect on 8-6-2016(Annexure-15) to the Memo of Appeal for the period 1-4-2015 to 31-3-2016 with relation to the late deposits and assessed the amount of damages at Rs.63,431/- . The interest was assessed at Rs.31,601/-, which is illegal and arbitrary exercise of powers by the Respondent Authority, hence not sustainable in law.

3. The main grounds of appeal taken in the memo of appeal are that the impugned order has been passed against fact and law ignoring the fact that the employees were not covered under the Act as they were excluded employee and the appellant establishment itself readied for deposit of their employees provident fund dues and to get them covered under the Act. The Respondent Authority also did not consider fact that the appellant establishment is dependent on budget from the government. They did not have any '*mensrea*' for late deposit, rather it deposited the amount when it was received from the Government, without any violation or delay, hence committed error in law. Other grounds are that the Respondent Authority committed error in law in not considering the fact that damages are required to be imposed only for the period of default which are required to be quantified on the basis of contribution due for a particular month. The damages have been imposed without examining mitigating factors , hence not sustainable in law. The Respondent Authority acted in contravention of settled principle of law laid down in the case of Oregano Chemicals and **Hindustan Times Ltd. Vs. Union of India(1998) 2 SCC 242**. The Respondent Authority passed the impugned order without considering the relevant facts namely whether the establishment is in the habit of making payment regular ,nature, number of frequency of default and other factors and imposed maximum damages which is against law.

Accordingly, it has been prayed that the appeal be allowed and the impugned order under Section 14B of the' Act' be set aside.

4. In its counter, the Respondent Authority has defended the impugned order with a case that the appellant authority requested for allotment of code number for deposit of employees provident fund dues with respect to Lab Technicians and Assistants vide its letter dated 14-8-2012 and deposited Rs.21,251/- by way of demand draft dated 7-8-2012. It was in pursuance to this letter, that the Area Enforcement Officer was directed to make inspection of the establishment and verify the record. The Enforcement Officer inspected the establishment and submitted his report, wherein the establishment reported their compliance to be made in respect of one person and therefore a coverage confirmation letter dated 22-10-2012 on account of the establishment falling under Section Scheduled Head expert services was brought under the purview of Section 2A of the 'Act' w.e.f 1-11-2011, initially with one employee and the appellant establishment was directed to make compliance in this respect. The appellant establishment did not dispute it and remitted the amount of Rs.21,251/- in compliance of the aforesaid letter vide its letter dated 28-12-2012 against the provident fund contribution of Lab Technicians and Assistants remitting contribution only for March to June 2012, whereas it was obligated to remit contribution from the date of appointment of its employees. The Area Enforcement Officer, who inspected the establishment, found that the establishment has made compliance only for the month of November-2011 and from December-2011 till date of inspection no compliance from the date of appointment of such employees has been made. Inspection Report to this effect was filed by Enforcement officer, copy of which was supplied to the appellant establishment, thereafter the appellant establishment made deposit of six employees from the date of their appointment and made complete compliance of the report and direction. Thus the appellant establishment at no point of time disputed or raised any grievance

with respect to any kind or exclusion of employees on the ground of crossing maximum ceiling limit of Rs.6500/-, hence once the membership of all the employees have been granted from their date of their appointment, the Appellant Establishment cannot be permitted for the first time to raise the point of excluded employee. Also it has been stated that since the provident fund contribution of eligible employees was remitted late by the appellant as spelled out in the calculation sheet of damages, the contribution was deposited on 4-7-2015, though it was required to be deposited from December-2015 to 2012. The Appellant Establishment was rightly saddled with damages for delayed deposits. Accordingly it has been prayed that the appeal be answered against the appellant.

The provisions contained in Section 14 B of the Act read as under

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.**

5. 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.

6. **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."***

7. **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.***
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> ***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.***
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> ***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."***

8. **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."***

9. 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"***

10. 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"***

11. 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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> ***……***
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> ***……***
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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."***

12. 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.***
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> ***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."

13. Thus, on-going 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.

14. Now coming to the facts of the case in hand, in the light of aforesaid preposition of law, the impugned order no where states that default was intentional with required 'mens rea'. The circumstances as mentioned earlier in this judgment, namely the fact that the employees of the Appellant Establishment were covered retrospectively or its prayer only and also the fact that the Appellant Establishment is dependent on budget to be made available from the Government Department's as well the fact that the appellant Establishment did require budget for making employees provident fund contributions, the default in payment cannot be said was with required' mens rea', hence it cannot be said intentional and willful default. The impugned order has been passed by ignoring this fact, hence it suffered vice of illegality.

15. **Accordingly the Appeal deserves to succeed.**

ORDER

The Appeal is allowed. The Impugned order dated 18-7-2016 passed by the Respondent Authority imposing penal damages

under Section 14B of the Employees Provident Fund & Misc. Provisions Act,1952 is set aside.

No order as to costs.

(P.K.SRIVASTAVA)

PRESIDING OFFICER

JUDGMENT SIGNED , DATED AND PRONOUNCED.

(P.K.SRIVASTAVA)

PRESIDING OFFICER

Date:18-3-2021