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

NO. CGIT/LC/EPFA-24/2018

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

M/s Itarsi Security Services,
Shop No.61, Near pani Tanki, Idgah Chowk,
Farid Nagar, Bhilai, District Durg.

APPELLANT

Versus

The Assistant Provident Fund Commissioner
Regional Office D-Block Scheme No.32,
Indira Gandhi Commercial Complex,
Pandri, District Raipur(Chhattisgarh)

RESPONDENT

(J U D G M E N T)

(Passed on this 17th th day of September-2021)

1. The present appeal is directed against the order of Respondent Authority dated19-1-2018, whereby the Respondent Authority imposed damages under Section 14-B of the Employees Provident Fund and Misc Provisions Act,1952, herein after referred to as the word 'Act', holding the appellant establishment guilty of late deposits of employees provident fund dues for the period March-2009 to June-2014. At the very outset, it is made clear that by a

separate order passed by the Respondent Authority under Section 7Q of the Act, the Respondent/Authority has imposed interest to the tune of Rs.2,59,085/- under Section 7Q of the Act. The appeal has been filed against both the orders, but since there is no provision in the Act providing for appeal against the order under Section 7Q of the Act. The present appeal, so far it relates to the order under Section 7Q of Act is held not maintainable and is disposed accordingly to that extent. The appellant may have the opportunity to avail remedy in law against this order. Consequently, the appeal is being considered only against order under Section 14B of the Act.

2. Facts in brief, connected to the appeal are mainly that the Appellant is a Security Service Provider to various industries through security guard engaged by them. It has been depositing employees provident fund dues of its employees without any delay since its inception. There was a short deposit of employees provident fund dues for the period March-2009 to June-2014, therefore, the Respondent Authority assessed dues for the period to the tune of Rs.3,12,227/- under Section 7A of the Act, vide its order dated 5-7-2016 which was deposited by the Appellant Authority but was not credited to the members because it was assessed without identification of beneficiaries. According to the Appellant, it was running its business from Shop No.526 B Market, Sector 6 Civil Lines Bhilai , District Durg but changed its business address to new place at Shop No.61 near Pani Tanki Idgah Chowk Faridnagar, Bhilai from 1-1-2017. No notice, sent by the Respondent/Authority before

proceeding under Section 14B of the Act was ever served on the Appellant because they were not sent on their new address, rather the Respondent sent notices deliberately to the old address of the appellant, hence the appellant was deprived of hearing by the Respondent before passing the impugned order. Hence according to the appellant, the impugned order is ex-parte and requires to be set aside on this score only.

3. The grounds of appeal, in brief are mainly that the impugned order was passed without giving adequate opportunity to the appellant before passing the order, hence it was passed without hearing the appellant. Secondly this order is bad in law and fact because it has been passed without recording specific finding regarding existence of required mens-rea in non-deposit of the employees provident fund dues. Further more the impugned order has been passed mechanically without assigning any reason which is against the settled preposition of law in this respect as propounded in case of **Mecald Rusal India Limited Vs. R.P.F.C. Jalpaiguri and Others** reported in 2014 AIR SCW 3820 and other cases in this respect. Accordingly to the appellant, they come to know about the impugned order when they received recovery notice on their new address.

4. According to the Respondent, their case, as put in their counter to the appeal is that it was incumbent on the appellant establishment to

inform the Respondent/Authority about the change of its business address which was not done by the appellant establishment. Hence notices were sent to the appellant establishment on the business address registered with the Respondent/Authority. The Respondent/Authority came to know about the new address when recovery notice was sent to the appellant establishment through the principal employer. Hence there was occasion to hear the appellant during the proceedings before the Authority, before passing the impugned order. According to the Respondent/Authority, the Act is a beneficial legislation, there was continuous default in depositing of employees provident fund dues by the appellant establishment, hence the impugned order is fully justified in law and fact. Accordingly, it has been prayed that the appeal be dismissed in favour of Respondent/Authority. No rejoinder has been filed by the Appellant establishment, inspite of opportunity given.

5. At the time of final arguments, learned counsel for the appellant did not appear for oral arguments, hence arguments of Advocate Shri Manu.V.John were heard for respondents. The Appellant establishment has not filed any written submissions. The respondent has filed written submissions through its learned counsel Mr. J.K.Pillai which is on record.

6. Though the appeal can be dismissed on the sole ground that the appellant side was not present on the date of hearing to press the

appeal as mentioned in **Rule 15 of Tribunal (Procedure) Rules,1997,** which is reproduced as follows:-

> **"15. Action on appeal for appellant's default:- 1)Where on the date fixed for hearing of the appeal or on any other date to which such hearing may be adjourned, the appellant does not appear when the appeal is called for hearing, the Tribunal may, in its discretion either dismiss the appeal for default or hear and decide it on merit**."

7. I think it is better to decide the appeal on merits and proceeding to decide the appeal on merits.

8. On perusal of the file and record in the light of arguments, following points come up in the present appeal for determination:-

> **1."Whether the impugned order and findings therein are justified in law and fact**."
>
> **2."Whether the appellant is entitled to the relief claimed for?."**

9. **<u>POINT FOR DETERMINATION NO.1:-</u>**

As it comes out from the record that the Appellant was not heard by the Respondent/Authority before passing the impugned order under Section 14B of the Act. According to the appellant, it

has changed its business address which according to the Respondent was not intimated to the respondent by the appellant. Learned counsel for the Respondent has referred to Rule 36A of the Employees Provident Fund Scheme 1952 which mandates that any change regarding the particulars of Branches and Department/owner/Occupiers, Directors/Partners/ Managers having control over the affairs of the factory or establishment shall be notified to the Regional Commissioner by Speed Post in electronic format within 15 days of the change. This Rule reads as follows:-

"36-A.Employer to furnish particulars of ownership:-

Every Employer in relation to a factory or other establishment to which the Act applies on the date of coming into force of the Employees'Provident Funds(Tenth Amendment)Scheme 1961, or is applied after that date shall furnish(in duplicate) to the Regional Commissioner Form No.5-A annexed hereto(Particulars of all the branches and departments, owners), occupiers, ultimate control over the affairs of such factory or establishment and also send intimation of any change in such particulars, within fifteen days of such change, to the Regional Commissioner by registered post and in such other manner as may be specified by the Regional Commissioner)

Provided that in the case of any employer of a factory or other establishment to which the Act and the Employees Family Pension Scheme,1971 shall apply the aforesaid form may be deemed to satisfy the requirements of the Employees Family Pension Scheme, 1971, for the purpose specified above.

Provided further that above mentioned details shall be furnished by the employer in the electronic format also, in such form and manner as may be specified by the Commissioner."

10. Hence it is established that it was incumbent on the Appellant establishment to send information regarding change of its business address to the Respondent/Authority since it was not done by the

Appellant, the Respondent/Authority cannot be faulted in sending notices on the business address mentioned in their record. Accordingly, the contention of the Appellant Establishment that they were not given opportunity of hearing also cannot be accepted. consequently, it is held that the appellant establishment was given opportunity of hearing which they could not avail on their own fault.

11. The next point assailing the impugned order has been taken in the memo of appeal is that the impugned order has been passed mechanically, without recording finding of required mens-rea in not depositing the contribution and that the damages imposed are more than 100 percent of the assessed amount, under Section 7A. The settled proposition of law in this respect, is being reproduced as follows:-

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

> ***"14B. Power to recover damages. – Where an employer makes default in the payment of any contribution to the Fund, the 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 or sub-section (5) of section 17 or in the payment of any charges payable under any other provision of this Act or of any Scheme or Insurance Scheme or under any of the conditions specified under section 17, the Central Provident Fund Commissioner or such other officer as may be authorized by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty such damage, not exceeding the amount of arrears, as may be specified in the Scheme.***

13. 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.

14. 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."***

15. 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 damagers and/or the quantum thereof."

16. 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."

17. 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"

18. 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"

19. 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.

……

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."

20. Hon'ble Calcutta High Court in W.P. No. 8527 (W) of 2015 **Tirrihannah Company Ltd. Vs Reginal 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 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."

21. 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.

22. From the above referred cases, the settled preposition of law established is that there must a finding of required mens-rea in imposing damages under Section 14B of the Act. Since the appellant establishment did not appear before the Respondent Authority at the time of hearing naturally the Respondent/Authority did not have the occasion to come to know about the mitigating facts and circumstances to enable him to reach at a finding that the required mens-rea was lacking in the case in hand. This is also established that the employees provident fund dues which were required to be deposited within 15 days of next month when they became due were not deposited in time between the period of March-2009 to June-

2014 i.e. to say that there were regular defaults during this period for months. In absence of mitigating circumstances that were put before the Respondent/Authority, he cannot be held unjustified in not recording the finding regarding non-existence of required mens-rea rather, he was perfectly correct in assuming the presence of required mens-rea in non-depositing the employees provident fund dues for such a long period on regular basis. This Tribunal , being the Court of First Appeal has the power to record its own finding on the basis of evidence put before it when the finding of the Court below is found not tenable in law. The Appellant establishment had opportunity to produce before this Tribunal the mitigating facts and circumstances which could show the lack of required mens-rea in non-deposit of employees provident fund dues. In absence of evidence in this regard, there is no occasion to defer from the assumption of existence of required mens-rea on the part of appellant establishment in non-deposit of employees provident fund dues reached at by the Respondent/Authority. As regards the second contention of the appellant establishment raised in its memo of appeal assailing the impugned order that the damages imposed are more than 100 per cent of the assessed amount under Section 7A of the Act, it comes out from perusal of record that the Respondent Authority assessed the dues for the period in question to the tune of Rs.3,12,227/-(Rupees three lakh, twelve thousand and two hundred twenty seven only) under Section 7A of the Act, vide its order dated 5-7-2016. Whereas the amount assessed under Section 14-B of the Act is Rs.3,21,225/-(Rupees three lakh, twenty one thousand, two hundred and twenty five only) which is more than 100 percent of the

amount assessed under Section 7A of the Act, hence the impugned order suffers with illegality on this point and the amount is liable to be reduced to make it not more than 100 percent of the assessed amount.

23. In the light of the above discussion, the impugned finding by the Respondent Authority is upheld in part. **Point No.1 is answered accordingly.**

24. **DETERMINATION OF POINT NO.2:-**

In the light of the finding reached at while discussing Point no.1, this appeal is liable to be partly allowed.

ORDER

A. Appeal is partly allowed. The impugned order dated 19-1-2018 passed by the Respondent Authority is partly set aside to the affect that the amount of fine under Section 14B of the Act is reduced from Rs.3,21,225/- to Rs.3,12,227.

B. No order as to costs.

(P.K.SRIVASTAVA)

PRESIDING OFFICER

JUDGMENT SIGNED , DATED AND PRONOUNCED.

(P.K.SRIVASTAVA)

PRESIDING OFFICER
Date:17-9-2021