

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

NO. CGIT/LC/EPFA-119-2017

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

Jilla Panchayat (DRDA)
Satna

APPELLANT

Versus

The Assistant Provident Fund Commissioner
Jabalpur

RESPONDENT

Shri Uttam Maheshwari : **Learned Counsel for Appellant.**

Shri J.K.Pillai : **Learned Counsel for Respondent.**

(J U D G M E N T)

(Passed on this 21st day of December-2021))

- 1.* This appeal has been filed by the Appellant Establishment against the composite order of the Respondent Authority dated 20-6-2014 passed under Section 7Q and 14B of the Employees Provident Fund And Misc. Provisions Act,1952, herein after referred to the word "Act", holding the appellant establishment liable to pay interest under Section 7Q and penalty as damages under Section 14B of the Act for not paying employees provident fund dues within the period of April-1997 to February-2010 and March-2010 to October-2013 which is Rs.3478699/- under Section 7Q as interest and Rs.4639734/- under Section 14B as penalty /damages.

2. . Facts connected in brief are that the Appellant establishment District Rural Development Agency has been created under Rural Development Departments of Central and State Governments. It is a Society registered under the M.P.Societies Registration Act. There was an issue of employees provident fund dues of the employees working in the appellant establishment after consultation of the representative of the Respondent Authority, the appellant establishment filed an application before the Respondent Authority for being covered under the Act on 6-4-2020 and also deposited the computed shares of its employees as well as employers share with the respondent . the Respondent Authority issued show cause notices dated 20-2-2014 for the period March-2010 to October-2013 and dated 13-3-2014 for the period April-1997 to February-2010 requiring the appellant establishment to deposit interest under Section 7Q and penalty under Section 14B of the Act for the late remittance of the employees provident fund dues as calculated by the Respondent Authority. It is the case of the appellant establishment that they appeared and preferred objection of 20-4-2014 and 23-5-2014, wherein they requested the Respondent Authority to wave the interest/surcharge and penalty/damage. The grounds taken was that at the time when appellant establishment applied for coverage, it was not told that any surcharge will be payable on that amount and that its employees have given in writing that they have no grievances. After considering the objection of appellant establishment, the Respondent Authority passed a composite order under Section 7Q and 14B of the Act brushing aside the objection of Appellant establishment and held the appellant establishment liable to pay Rs.3478699/- as interest under Section 7Q and Rs.4639734/- as penalty/damages under Section 14B of the Act with a finding that the Act is a beneficial legislation and that since the Act applies Suijuris it does not call for vigilance of Respondent organizations to notify eligible establishments with rigors of Act. Hence any establishments having 20 or more than employees and engaged in any of the activities notified under the ACT, falls within the ambit of this Act on its own and liability arises

accordingly. It was further observed that the interest and damages are taken to prevent the beneficiaries from loss. Hence this appeal.

3. Grounds of the appeal are mainly that the impugned order is bad in law because firstly the Respondent failed to appreciate the fact that it was a appellant establishment who had by itself opted for coverage inspite of the fact that it is a registered society. The Respondent Authority also did not care to look into the fact that within the period from 1997 to 2010, the Appellant never employed requisite number of employees. Further the Respondent Authority has failed to appreciate the fact that the Appellant Establishment is an instrumentality of State Government and is dependent on government funds. The Respondent Authority has erred in law in not appreciating the principle of law laid down by Hon'ble the Apex Court in the case of Organo Chemicals. Also committed error in law in not computing the actual loss that the employees would be deprived of according to the respondent.
4. In its reply/counter to the appeal, the Respondent Authority has defended the impugned order with a case that the Act is a beneficial legislation, the fact that the appellant establishment itself offered for coverage is immaterial because it was covered under the Act on the ground that it had employed more than 20 employees in an activity notified under the Act. Also it is the case of the Respondent Authority that it was to see that the beneficiary are not deprived of or made to suffer loss of interest accrued on deposits.
5. In its rejoinder, the appellant has mainly reiterated its case.
6. I have heard arguments of Shri Uttam Maheshawari, learned counsel for the appellant and Shri J.K.Pillai, learned counsel for the respondent.

7. At the outset, it is mentioned here that the impugned order is a composite order under Section 7Q and 14B of the Act, hence the appeal against the impugned order in total is maintainable in the light of principle of law laid down by Hon'ble the Apex Court in the case of Arcot Textiles. Learned Counsel for Respondent also does not dispute this preposition.
8. Following points arise for determination in the case in hand, on perusal of record in the light of rival arguments.

(1)Whether the finding of the Respondent Authority that the Appellant Establishment is under obligation to pay interest on late payments of epf dues is correct in law or fact or not?"

(2)Whether the finding of the Respondent Authority that the Appellant Authority is liable to pay penalty/damages for late deposits of epf is correct in fact or law or not?".

9. POINT NO.1 FOR DETERMINATION:

Section 7Q of the Act is being reproduced as follows:-

The employer shall be liable to pay simple interest at the rate of twelve per cent. per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till date of its actual payment: Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank.

10. It has been observed by the Respondent Authority that the Act applies Suijuris to the establishment and it is established that it had

employed more than 20 employees for work as notified in the Act and it is argued that the appellant establishment itself volunteered for coverage. According to the Respondent Authority, since the Act applied on the date when the appellant establishment had employed more than 20 employees in area notified in the Act, appellant was under obligation to deposit employees provident fund dues in which it failed. Hence the employees were deprived of interest on the amount and to prevent their loss, amount of interest and penalty as damages is to be levied and recovered from the Appellant establishment.

11. The learned counsel for the appellant has disputed the finding of the Respondent Authority that it had employed more than 20 people right since 1997 and learned counsel has referred to annexure to show that the in fact till April-2010 the number of employees employed was less than 20. The Act does not lay down the bar for an establishment to apply for coverage, even it has employed less than 20 persons. Hence this argument of learned counsel for the appellant cannot be accepted. It is undisputed that this act is a welfare legislation. If a coverage has been adopted since 1997 and employees provident fund dues have been paid since that date the employees are entitled to interest of employees provident fund deposits since the date when the employees provident fund deposits were due. Hence the finding to the Respondent Authority with regard to liability of Appellant Establishment regarding payment of interest cannot be said to be justified in law and fact and is affirmed accordingly. **Point for determination No.1 is answered accordingly.**

12. POINT FOR DETERMIANTION NO.2:-

It has been observed by the Respondent Authority in the impugned order with respect to penalty that firstly the Act is applicable from the date the appellant qualifies for application of the

Act and not from the date of application for coverage. Secondly since the Act is a beneficial legislation and the Respondent has to ensure that the beneficiaries are not put to loss, hence the appellant establishment is liable to pay penalty for late payment.

13. The interest accrued on deposits is deposited in the respective account of beneficiaries. There is nothing on record to show that penalty levied on late deposits is also distributed between the beneficiaries. Learned Counsel for Respondent could not cite any Rule, law or circular showing this. Section 14-B of the Act reads as under:-

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.

14. It is clear that in fact the provision of Section 14B has been brought to deter the employers from defaulting payment of employees provident fund dues. The damages under Section 14B of the Act are not compensatory rather they are penal and they are

served in the form of penalty. IN the light of this fact, the finding of the Respondent Authority that penalty recovered on late deposits of employees provident fund dues is for preventing any loss to the beneficiaries, does not hold water and it is liable to be set aside. It is held that the damages and penalty under Section 14B of the Act are penal in nature.

15. 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.

16. 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.”

17. 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 damages and/or the quantum thereof.”

18. 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.”

19. 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”

20. 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”

21. 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 in the 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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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.”

22. 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.”

23. Thus, ongoing 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 ‘mensrea’ to contravene a statutory provision has also been held to be a necessary ingredient for levy of damages and quantum thereof.

24. Now analyzing the facts of the case in the light of above settled proposition and principle of law, it comes out that at least for the period between April-1997 to February-2010 there can be no mensrea on the part of the appellant establishment in the late deposit of employees provident fund dues because the whole deposits were made after voluntary coverage since April-1997 after receiving letter of coverage but as regards to penalty between the period March-2010 to October-2013 the presence of required mensrea cannot be ruled out in view of the fact that as per Para-38 of the Employees Provident Fund and Pension Scheme, the deposits were to be made

on 15th of next month, whereas there was a continuous default of seven months in deposit. The argument of learned counsel for the appellant is that it is an instrumentality of the Act, hence some delay happened does not hold water and cannot be accepted. Accordingly on the basis of the above discussion, the imposition of penalty under Section 14B by the Respondent Authority in the impugned order with respect to period April-1997 to February-2010 is held unjustified in law. The imposition of penalty/damages under Section 14-B for the period March-2010 to October-2013 is held justified in law. **Point for Determination No.2 is answered Accordingly.**

25. Accordingly the Appeal succeeds partly.

ORDER

A The order of the Respondent Authority holding the appellant establishment to pay interest under Section 7Q for the period April-1997 to February-2010 and March-2010 to October-2013 is affirmed.

B. The order of the Respondent Authority holding the Appellant Establishment liable to pay penalty/damages under Section 14B for late deposits of employees provident fund dues between the period April 1997 to February-2010 is set aside.

C. Order of Respondent Authority holding the appellant establishment to pay damages/penalty under Section 14B of the Act for late deposits of employees provident fund dues between the period March-2010 to October-2013 is affirmed.

D. Parties to bear their own costs.

E. Appeal stands disposed of accordingly.

(P.K.SRIVASTAVA)

PRESIDING OFFICER

JUDGMENT SIGNED , DATED AND PRONOUNCED.

(P.K.SRIVASTAVA)

PRESIDING OFFICER

Date:21/12/2021