

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 12 OF 2012**

M/s Kare Health Specialties Pvt. Ltd.
Incorporated under the Provisions of Indian
Companies Act, 1956 (Act 1 of 1956), having
its corporate office at Kare House, Margao,
Goa.

Represented herein by its Director, Shri Kapil
Kare.

.... Petitioner

Versus

The Regional Provident Fund Commissioner-
II, having office at Bhavishya Nidhi Bhavan,
24, Patto Plaza, Panaji, Goa - 403 001.

.... Respondent

Shri Vijay Palekar, Advocate for the Petitioner.

Shri C.A. Ferreira, Advocate for the Respondent.

CORAM:- C.V. BHADANG, J.

DATE:- 17th January, 2018.

ORAL JUDGMENT:

The challenge in this petition is to the order dated 18.06.2007, passed by the respondent-Regional Provident Fund Commissioner (Commissioner, for short), which order has been confirmed by the Employees Provident Fund Appellate Tribunal, New Delhi (Tribunal, for short), thereby imposing damages by way of penalty, under Section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (Act, for short).

By the impugned order, a penalty of Rs.5,56,632/- has been imposed on account of the alleged default of the petitioner to deposit the provident fund contribution.

2. On behalf of the petitioner, reliance is placed on the decision of the Supreme Court in the case of **McLeod Russel India Limited Vs. Regional Provident Fund Commissioner, Jalpaiguri & Others, (2014) 15 SCC 263**, in order to submit that finding as to existence of mens rea/actus reus, is a necessary requirement for imposition of damages by way of penalty. It is submitted that neither the Commissioner nor the Tribunal has recorded a finding that there was mens rea on the part of the petitioner in defaulting the payment of provident fund contribution. The learned Counsel pointed out that there was a Trust created, which was duly acknowledged by the Income Tax Department and which was having an account with the State Bank of India, where the amount of contribution was regularly being deposited. It is submitted that some of the workmen had withdrawn the provident fund contribution and/or it was transferred to the Establishment to where the employees were transferred and this was subject to the approval of the Provident Fund Authorities. It is submitted that all these aspects have not been properly considered by the

Commissioner and the Tribunal. It is submitted that the judgment of the Tribunal is cryptic and without any reasoning and it needs to be set aside.

3. On the contrary, it is submitted by Shri Ferreira, the learned Counsel for the respondent that mens rea would only be relevant while deciding the quantum of damages. It is submitted that once there is a default, Section 14B of the Act steps in, as held by the Hon'ble Supreme Court in the case of **Arcot Textile Mills Limited Vs. Regional Provident Fund Commissioner & Others, (2013) 16 SCC 1**. The learned Counsel however, in all fairness, does not dispute that there is no finding as to the existence or otherwise of mens rea on the part of the petitioner, in the order passed by the Commissioner or the Tribunal.

4. On hearing the learned Counsel for the parties and on perusal of the record, it can clearly be seen that there is no finding recorded by the Commissioner or Tribunal on the aspect of existence or otherwise of mens rea on the part of the petitioner. The Hon'ble Supreme Court in the case of **Mcleod Russel India Limited** (supra) has held thus in para 11 (to the extent relevant for the present purpose) of the judgment:-

“In ESI Corporation Vs. HMT Ltd., (2008) 3 SCC 35, this Court noted the beneficial nature of the ESIC Act; that subordinate legislation must conform to the provisions of the parent Act. Despite giving due regard to the use of the words “may recover damages by way of penalty”, and mindful that mens rea and actus reus to contravene a statutory provision are necessary ingredients for levy of damages, this Court set aside the interference of the High Court vis-à-vis the imposition of damages and further held that imposition of damages by way of penalty was not mandated in each and every case. The dispute was remitted back to the High Court for fresh consideration i.e. to proceed on the premise that the levy of penalty under the Act was not a mere formality, a foregone conclusion or an inexorable imposition; and that the circumstances surrounding the failure to deposit the contribution of the employees concerned would also have to be cogitated upon. This decision does not prescribe that damages or penalties cannot or ought not to be imposed. Further, the presence or absence of mens rea and/or actus reus would be a determinative factor in imposing damages under Section 14B, as also the quantum thereof since it is not inflexible that 100 per cent of the arrears have to be imposed in all the cases. Alternatively stated, if damages have been imposed under Section 14B, it will be only logical that mens rea and/or actus reus was prevailing at the relevant

time."

(Emphasis supplied)

It can thus be seen that the finding as to the existence of mens rea assumes importance and would also be relevant, while deciding the extent of the damages, to be levied. The order of the Commissioner, which has been confirmed by the Tribunal, lacks finding on this aspect. In that view of the matter, it would be appropriate that the matter is remitted back to the respondent for deciding it afresh, in accordance with law, after hearing the parties.

5. In such circumstances, Rule is partly made absolute in the aforesaid terms, with no order as to costs. The petitioner or its representative shall appear before the respondent on 5th March, 2018. The amount deposited before this Court shall be returned to the petitioner along with interest, if any.

C. V. BHADANG, J.

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