



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.04.2018

CORAM:

THE HONOURABLE MR. JUSTICE K.RAVICHANDRABAABU
AND
THE HONOURABLE MRS. JUSTICE T.KRISHNAVALLI

W.A[MD].No.1494 of 2011
and
M.P.(MD)No.1 of 2011

DCW Employees Co-operative Canteen Ltd.,
Sahupuram, - (Via) Arumuganeri - 628 229,
Thoothukudi District,
Through its Special Officer,

.. Appellant/Petitioner

Vs.

1.The Presiding Officer,
Employees Provident Fund Appellate Tribunal,
Scope Minor, Core - II - 4th Floor,
Laksmi Nagar - New Delhi - 110 092.

2.The Assistant Provident Fund Commissioner,
Employees Provident Fund Organization,
Bhavishyanidhi Bhavan - NGO "B" Colony,
Tirunelveli - 627 007.

... Respondents/Respondents

PRAYER: Appeal is filed under Clause 15 of Letters Patent Act, to set aside the order of the learned single Judge of this Court, dated 14.10.2011 in W.P.(MD)No.3673 of 2011.

Prayer in WP(MD). 3673/ 2011 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a Writ of Certiorari, to call for the records from the file of the 1st respondent in ATA 794(13) 2009 dated 19.07.2010 and the consequent order in ATA No.794 (13) 2009 dated 31.12.2010 and to quash the same.

For Appellant

: Mr.P.Chandrabose



JUDGEMENT

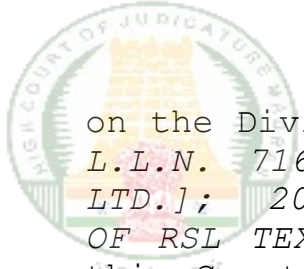
[Judgement of the Court was delivered
by K.RAVICHANDRABAABU, J]

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The appellant is the writ petitioner. As against the order levying damages under Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the appellant filed writ petition in W.P.(MD)No.3673 of 2011. The learned Judge allowed the writ petition in part and directed the writ petitioner to pay only 25% of the damages.

2.The writ petitioner is a Co-operative Society registered under the Tamil Nadu Co-operative Societies Act. The business of the petitioner's Society is to supply snacks and food pockets on subsidy and on marginal rates, to the employer, who in turn provides all infrastructure and bear the maintenance expenses and also grant substantial subsidy. The petitioner Society is running on 'No Profit and No Loss basis'. It is claimed that for a long time, the petitioner canteen used fire woods for fuel without the aid of electricity and only on 01.12.2004, electricity power was used for operating the wet grinders as well as the refrigerators for storage of vegetables. However, on the basis of such usage of power, notice claiming coverage under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, was issued to the petitioner with effect from 01.04.2004, even though such usage of electricity was only with effect from 01.12.2004. A sum of Rs.3,59,579/- was claimed by the respondents for the period from 01.04.2004 to 31.07.2007. The said sum was paid by the petitioner within seven days from the date of the order. Thereafter, notice under Section 14-B of the Act for levying damages was issued on the petitioner. Though the petitioner claimed that there was no delay in payment and that no damages can be levied, the respondents levied damages to the tune of Rs.2,02,694/- and the interest under Section 7-Q of the said Act to the tune of Rs.68,577/-. The attempt of the petitioner challenging the said order by way of filing appeal and review before the concerned authorities failed. Consequently, the above writ petition was filed before this Court, where the learned single Judge has passed an order, as stated supra.

3.The learned counsel appearing for the appellant submitted that there is no reason warranting levy of damages under Section 14-B of the said Act, when the writ petitioner has paid the claim within seven days from the date of the order passed under Section 7-A of the Act. He further submitted that even assuming that there is a delay, unless existence of *mens rea* is pleaded and proved, the respondents are not entitled to levy damages under Section 14-B of the Act. In support of his contention, the learned counsel relied



on the Division Bench decisions of this Court reported in 2010 (4) L.L.N. 716 [R.P.F. COMMISSIONER II v. SREE VISALAM CHIT FUNDS LTD.]; 2017 (153) F.L.R. 214 [A.P.F. COMMISSIONER v. MANAGEMENT OF RSL TEXTILES INDIA PVT. LTD. (S.C.)] and another decision of this Court in W.A.Nos.1639 and 1640 of 2011, dated 13.11.2013. He further pointed out that when the learned single Judge has specifically found that this is not the case, where the authority can levy damages and that no specific reasons are given for doing so, ought not to have directed the petitioner to pay 25% of the damages and on the other hand he ought to have allowed the writ petition in toto, instead of allowing it in part.

4. On the other hand, the learned counsel appearing for the respondents submitted that Section 14-B of the said Act empowers the authorities to levy damages and therefore, after issuing proper notice to the writ petitioner, the damages were levied. In support of his submission, the learned counsel relied on the Division Bench Decision of Karnataka High Court reported in 2018 L.L.R. 440 [M/s. SUPREME TILE WORKS v. THE ASST. PROVIDENT FUND COMMISSIONER].

5. Heard both sides.

6. The point for consideration in this writ appeal is as to whether the writ petitioner is liable to pay damages under Section 14-B of the said Act and consequently, whether the order of the learned single Judge in directing the petitioner to pay 25% of the damages can be sustained.

7. The issue as to whether existence of *mens rea* on the part of the employer is required for levying damages under Section 14-B of the Act, was already considered by the Division Bench of this Court in a case reported in 2010 (4) L.L.N. 716, wherein after considering various decisions of the Hon'ble Apex Court, the Division Bench at paragraph Nos.19, 20, 23 and 24, has observed as follows:-

"19. From the above discussion, it could be safely understood that the purpose of levying damages under Section 14(B) of the Act serves a dual purpose, viz., to penalize the employer for his default committed and also to compensate the employee.

20. The expressions "default" and "failure" are synonymous terms. Failure, in the dictionary sense means, "a falling short", "deficiency" or "lack". Default means "omission of that which ought to be done". From this, it could be understood that "failure" to constitute "default" must go with some animus to commit such failure. A failure without such an animus would not constitute a default in the sense of the expression, in which it has been used in Section 14(B) of the Act.



23. After having taken note of the above Judgments in Prestolite (India) Ltd., and Dilip N.Shroff v's case, the Hon'ble Supreme Court in Emp. State Insurance Corpn vs. HMT Ltd., reported in 2008 (1) Scale 341, has agreed with the view in Dilip N.Shroff v's case to hold that an element of mens rea is required before penalty can be imposed. While agreeing with the said view, the Hon'ble Supreme Court has given additional reasons also, which could be found in Paragraph Nos.20 and 21 of the said Judgment, which read as follows;-

20. We agree with the said view as also for the additional reason that the subordinate legislation cannot override the principal legislative provisions. 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 adjudicator one or compliance of the principles of natural justice is necessary thereunder.

21. 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.

24. A close reading of the above Judgment would make it undoubtedly clear that since what is imposed under Section 14 (B) of the Act is not only with a view to compensate the employee, but also by way of penalty, it is absolutely necessary that it should be proved that there was a mens rea or actus reus to contravene the statutory provision by the employer."

8.The above decision was followed by the another Division Bench of this Court, where one of us (KRCBJ) was a party, in a common Judgment rendered in W.A.Nos.1639 and 1640 of 2011, dated 13.11.2013. In the above said decision, the Division Bench has considered the scope of Section 14-B and found its applicability as follows:-

"17.A careful perusal of the above said provision would show that the Central Provident Fund Commissioner or such other Officer as may be authorised by the Central Government,



may recover from the employer who makes the default in payment of any contribution to the fund, etc., such damages not exceeding the amount of arrears by way of penalty. Before levying such damages, the employer shall be given a reasonable opportunity of hearing. Thus, what emerges from the reading of Section 14(B) of the said Act is as follows:

(a) There must be a default committed by the employer in making

the payment of contribution;

(b) The Authority empowered under the said provision may recover

from the employer by way of penalty of such damages not exceeding the amount of such arrears.

To attract section 14B to levy damages, the liability cannot be fixed automatically without there being a specific finding that failure to pay the contribution was attributable to the 'mens rea' or 'actus reus' on the part of the employer as held by the Hon'ble Division Bench of this Court reported in 2010 (4) LLN 706, *Regional Provident Fund Commissioner II, Employees' Provident Fund Organisation Madurai v. Sree Visalam Chit Funds Ltd. ...*

18.A perusal of the above said decision would show that the same came to be rendered even after discussing the decision relied on by the learned counsel for the respondents herein reported in AIR 1998 SC 688 (*cited supra*) also. Thus, it is seen that 'mens rea' or 'actus reus' is absolutely necessary and should be proved for levying damages under Section 14B. ...

19.It is also seen that the Apex Court in the decision reported in (2008) 3 S.C.C.35, *Employees' State Insurance Corporation v. HMT Ltd.*, has found that such penal provision is discretionary and the existence of mens rea or actus is a necessary ingredient. The relevant paragraphs 21 to 27 are extracted hereunder:

"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 endeavour should be made to construe such penal provisions as discretionary, <https://hcservices.eprints.org/hcservices/> and a statute is held to be mandatory in character.

22.In *Prestolite (India) Ltd. v. Regional Director*, 1994 Supp (3) SCC 690:1995 SCC (L&S) 202, this Court



rejected a contention raised by the Regional Director of Employees' Insurance that under the Employees' State Insurance General Regulations guidelines have been indicated showing as to how damages for delayed payment are to be imposed and since such guidelines have been followed, no exception should be taken thereto made to the impugned adjudication, stating: (SCC p.693, para 5)

"5.....Even if the regulations have prescribed general guidelines and the upper limits at which the imposition of damages can be made, it cannot be contended that in no case, the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter and it is bound to act mechanically in applying the uppermost limit of the table. In the instant case, it appears to us that the order has been passed without indicating any reason whatsoever as to why grounds for delayed payment were not to be accepted. There is no indication as to why the imposition of damages at the rate specified in the order was required to be made. Simply because the appellant did not appear in person and produce materials to support the objections, the employee's case could not be discarded in limine. On the contrary, the objection ought to have been considered on merits."

23. In *Dilip N. Shroff v. CIT*, (2007) 6 SCC 329, this Court stated : (SCC p.353, para 40)

"40. Thus, it appears that there is distinct line of authorities which clearly lays down that in considering a question of penalty, mens rea is not a relevant consideration. Even assuming that when the statute says that one is liable for penalty if one furnishes inaccurate particulars it may or may not by itself be held to be enough if the particulars furnished are found to be inaccurate is anything more needed but the question would still be as to whether reliance placed on some valuation of an approved valuer and, therefore, the furnishing of inaccurate particulars was not deliberate, meaning thereby that an element of mens rea is needed before penalty can be imposed, would have received serious consideration in the light of a large number of decisions of this Court."

24. We agree with the said view as also for the additional reason that the subordinate legislation cannot override the principal legislative provisions.

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 the proceedings 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 to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof.

27. The Division Bench of the High Court, therefore, in our opinion, was not wrong in opining that Section 85-B provides for an enabling provision. What, however, cannot be appreciated is that such a construction itself would lead to the conclusion that the High Court is entitled to substitute its view in place of the statutory authority. In our considered view, therefore, the matter should be considered afresh for determination of quantum of damages, etc. in the light of the observations made hereinbefore."

20. Thus, from the reading of the above decision of the Apex Court, it is very clear even from the language used under Section 14B that the competent authority "may" recover such damages from the employer. The word used "may" would indicate that the power conferred under section 14B is only the discretionary power. Even such discretionary power cannot be exercised in the absence of 'mens rea' or 'actus reus' on the part of the employer to contravene the statutory provision. ...

22. In another unreported decision of the Division Bench of Madurai Bench of this Court made in W.A.(MD) No.441 of 2013 dated 03.06.2013, wherein one of us (N. Paul Vasanthakumar, J.) was a party, it has been held as follows:

"4....It is also stated in the order of the learned single Judge that unless there is willful and deliberate withholding of provident fund contribution payable, damages cannot be ordered as there was financial difficulties faced by second respondent. The direction regarding payment of damages is compensatory as well as penal in nature and unlike claim of interest for the belated remittance while ordering damages, facts and circumstances of the case should be considered."

23. In this case, there is no finding rendered by the original authority or the appellate authority with regard to mens rea or actus reus, except saying financial crisis cannot be a reason to escape. Therefore, we are of the firm view that in the absence of any finding with regard to mens rea attributable on the part of the employer/appellant herein, we find that the order impugned in the writ petitions are not



sustainable and consequently, the same are liable to be set aside....."

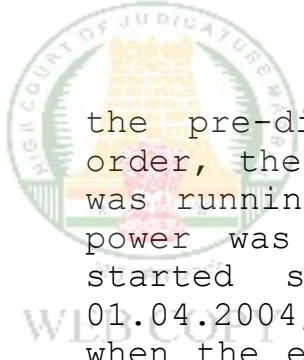
9. In a recent decision of the Hon'ble Supreme Court reported in 2017 (153) F.L.R. 214, it is observed at paragraph Nos.2, 3 and 4, as follows:-

"2. The High Court has taken a view that in the absence of a finding regarding mens rea/actus reus on the part of the employer, action under Section 14B of the Employee's Provident Fund and Miscellaneous Provisions Act, 1952 cannot be sustained.

3. This issue is now wholly covered against the appellants in the decision rendered by this Court in Mcleod Russel India Limited Vs. Regional Provident Fund Commissioner, Jalpaiguri and Others, reported in (2014) 15 SCC 263, wherein it has been held in paragraph 11 that ".....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 per cent of the arrears have to be 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."

4. In the impugned Judgment, at paragraph 23, it has been specifically held by the High Court that "In this case, there is no finding rendered by the original authority or the appellate authority with regard to mens rea or actus reus, except saying financial crises cannot be a reason to escape."

10. Therefore, from the perusal of the above said decisions of this Court as well as the Hon'ble Supreme Court, it is evident that unless existence of 'mens rea' is pleaded and established against the employer, the levy of damages under Section 14-B of the Act, cannot be done automatically. It is not that every delay is wilful and intentional. It depends on the facts and circumstances of each case, more particularly, based on the reasons stated for making such belated payments. In this case, it is stated that the writ petitioner was originally under the impression that they would not fall under the purview of the said Act, and that however, they paid the claim once it is determined, without delay. Further, in this case, very finding rendered by the learned single Judge would go to show that in fact, he has come to the conclusion that the very levy of damages is not sustainable. In paragraph No.4, the learned Judge has pointed that the petitioner paid the claim within seven days and that no damages can be levied, even as per the EPF Departmental circular, even for



the pre-discovery period. Likewise, in paragraph No.7 of his order, the learned Judge pointed out that this petitioner society was running on 'No Loss and No Profit basis' and the electricity power was used from 01.12.2004, but the respondent department started sending notice claiming coverage with effect from 01.04.2004, which is erroneous. He further pointed out that even when the entire amount have been paid with interest, it is not a case, where the authority must exercise the discretion in levying damages. Above all, the learned Judge has also pointed out in paragraph No.10 of his order, that for the purpose of levying damages, the respondent should have given specific reasons, which is lacking in this case.

11.Having given such categorical findings, as rightly pointed out by the learned counsel appearing for the appellant, the learned Judge ought to have allowed the writ petition in toto, instead of directing the writ petitioner to pay 25% of the damages. As already pointed out, in the absence of *mens rea*, there is no question of claiming damages from the writ petitioner. The learned Judge has specifically pointed out that no specific reasons are given for levying damages. When such being the factual finding, we do not find any justification in directing the petitioner to pay 25% of the damages, as ordered by the learned single Judge.

12.No doubt, the learned counsel for the respondent sought to rely on Division Bench Decision of Karnataka High Court reported in 2018 L.L.R. 440. Unfortunately, we are not in a position to apply the said decision to the present case, in view of the fact that the said decision was rendered without considering the decision made by the Hon'ble Supreme Court in a case reported in 2014 (142) F.L.R. 406 (SC) [MCLEOD RUSSEL INDIA LIMITED v. REGIONAL PROVIDENT FUND COMMISSIONER, JALPAIGURI AND OTHERS], which is subsequently followed in the recent decision reported in 2017 (153) FLR 214, which we referred supra. Moreover, as we are guided and supported by three Division Bench decisions of our High Court, we are inclined to follow the same to allow the writ appeal.

13.Accordingly, the writ appeal is allowed and the order of the learned single Judge insofar as directing the petitioner to pay 25% of the damages alone is set aside. Consequently, connected Miscellaneous Petition is also dismissed. No costs.

Sd/

Assistant Registrar (CO)

/True copy/



To

1.The Presiding Officer,
Employees Provident Fund Appellate Tribunal,
Scope Minor, Core - II - 4th Floor,
Laksmi Nagar - New Delhi - 110 092.

2.The Assistant Provident Fund Commissioner,
Employees Provident Fund Organization,
Bhavishyanidhi Bhavan - NGO "B" Colony,
Tirunelveli - 627 007.

+1cc to Mr.P.CHANDRA BOSE, Advocate, SR.No. 62234

+1cc to Mr.K.MURALISANKAR, Advocate, SR.No. 62303

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19.04.2018

RJ2

KK/KKR/11.05.2018/SAR-2/10P-5C