

In the High Court of Punjab and Haryana at Chandigarh

CWP No. 1497 of 2014 (O&M)

Reserved on : April 24, 2018

Date of Decision: May 09, 2018

Regional Provident Fund Commissioner

... Petitioner

Versus

The Employees Provident Fund Appellate Tribunal and another

... Respondents

CORAM: HON'BLE MR. JUSTICE P.B. BAJANTHRI

Present: Mr. Rajesh Hooda, Advocate,
for the petitioner.

Mr. Atul Lakhanpal, Senior Advocate with
Mr. Arjun Lakhanpal, Advocate,
for respondent No.2.

P.B. Bajanthri, J.

1. In the instant writ petition, petitioner has challenged the validity of the order passed by Employees Provident Fund Appellate Tribunal (for short “EPFAT”) dated 17.10.2012 (Annexure P/18).

2. 2nd respondent – company was established in the month of September, 1997. Due to non remittance of EPF amount in the petitioner's EPF Department, Enforcement Officer submitted report on 26.02.2008 for the assessment period from April 2002 to August 2008. Competent authority drawn proceedings under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short “EPF Act”) and determined the EPF amount to the tune of Rs. 45,44,476/- on 08.10.2008.

The aforesaid amount is stated to have been deposited by the 2nd respondent

– company in three installments. Thereafter, EPF authorities proceeded to issue a show cause notice relating to assessment of interest as well as damages under Sections 7Q and 14B of EPF Act on 26.06.2009. 2nd respondent – company did not respond to the show cause notice dated 26.06.2009. Consequently, competent authority determined the interest as well as damages to the tune of Rs. 13,72,054 (interest) and Rs.31,72,988/- (damages). 2nd respondent-company deposited interest portion of Rs.13,72,054/- on 16.09.2009. Whereas levying of damages is concerned, 2nd respondent-company filed an appeal before the EPFAT and appeal was dismissed on 17.08.2011. Consequently, 2nd respondent – company filed rectification application and it was entertained by the EPFAT and allowed the 2nd respondent's appeal on 17.10.2012 with reference to the principle of *mens rea*. Hence, present petition.

3. Learned counsel for the petitioner submitted that 2nd respondent – company have not complied the provisions of EPF Act insofar as remittance of EPF amount timely during the period from April 2002 to August 2008 which is not disputed by the 2nd respondent – company in view of remittance of determined EPF amount as well as interest levied by the EPF authorities. It was further contended that pursuant to the show cause notice in respect of determination of interest as well as damages under Sections 7Q and 14B of the EPF Act on 26.06.2009 was not answered by the 2nd respondent – company to the extent of furnishing explanation with reference to the determination of interest as well as damages on the belated remittance of EPF amount. Therefore, 2nd respondent – company cannot maintain its appeal before the EPFAT. Having regard to the conduct of the 2nd respondent – company, both in not remitting EPF amount timely and so

also in not furnishing the explanation – reply to the show cause notice for determination of interest and damages on the EPF amount, principle of *mens rea* is not attracted. It was also submitted that levying of damages statutory provisions under the EPF Act is a mandatory provision as held by the Calcutta High Court Full Bench in the case of ***Dalgaon Agro Industries Ltd. vs. Union of India***, reported in **2005 (3) LLJ 356 (Para 53)**. Learned counsel for the petitioner has also relied on the following decisions:-

- i) ***The Chairman, SEBI vs. Shriram Mutual Fund and another*** reported in **AIR 2006 SC 2287 (Para No.16)**;
- ii) ***Regional Provident Fund Commissioner vs. Bharat Plywood and Timber (Pvt.) Ltd.*** reported in **1980, Lab IC 446 (Kerala)**;
- iii) ***Regional Provident Fund Commissioner vs. M/s Nijjar Agro Foods Ltd. and another*** – **CWP No. 9048 of 2011, decided by this Court on 03.11.2017.**

4. On the other hand, learned counsel for the 2nd respondent – company while resisting the contentions of the petitioner, submitted that beneficiaries were not identified, therefore, question of levying damages may not be correct in view of the fact that 2nd respondent has already deposited EPF amount determined under Section 7A of EPF Act. It was further contended that principle of *mens rea* is attracted and it has been appreciated by the EPFAT in para no.10 while doing so quoted Supreme Court's decision, namely, ***Employees' State Insurance Corporation vs. HMT Ltd. and another***, (2008) 3 SCC 35. The EPFAT has also taken note of that no inquiry or finding of fact relating to willfully and deliberately withheld the PF contribution by the 2nd respondent-company has been examined, therefore, rightly EPFAT held that levying damages on the 2nd respondent is not appropriate and so also taken note of that 2nd respondent is

not a willful defaulter. Hence, no interference is called for in respect of EPFAT's decision dated 17.10.2012. Learned counsel for 2nd respondent relied on the following decisions:-

- i) ***Christian Medical College and Brown Memorial Hospital, Ludhiana and others vs. Regional Provident Fund Commissioner, Chandigarh and others*** reported in 1989 (Sup2) SCC 95;
- ii) ***Assistant Provident Fund Commissioner, EPFO and another vs. The Management of RSL Textiles India Pvt. Ltd. through its Director*** reported in (2017) 3 SCC 110;
- iii) ***M/s Prestolite of India Ltd. vs. The Regional Director and another***, reported in 1994 (Sup3) SCC 690 (Para No.4);
- iv) ***Employees State Insurance Corporation vs. H.M.T. Ltd. & another***, reported in (2008) 3 SCC 35 (Para Nos. 12 and 17).

5. Heard learned counsel for the parties.

6. Before advertng to the contentions of the parties, it is necessary to read Section 14B of EPF Act which reads as under:-

“14-B. Power to recovery 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 damages, not exceeding the amount of arrears, as may be specified in the Scheme:

Provided that before levying and recovering such damage, the employer shall be given a reasonable opportunity of being heard:

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.”

Section 14-B of EPF Act enable power to recover damage. If an employer makes default in the payment of any contribution to the Fund subject to employer shall be given a reasonable opportunity of being heard. Further, Central Board is permitted to reduce or waive the damages levied under Section 14-B of EPF Act in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by BIFR established under Section 4 of the SIC Act, 1985.

7. In the present case, it is undisputed fact that before determining damages under Section 14-B of EPF Act, show cause notice was issued relating to hearing the 2nd respondent-company. However, the 2nd respondent-company did not avail the remedy of hearing. In other words, the 2nd respondent-company had not submitted reply to the show cause notice or any material has been produced seeking for reducing or waiver of damages levied against the 2nd respondent-company. Therefore, 2nd

respondent – company cannot seek any waiver of damages. They have not shown bona fide and their grievance do not lie in the 2nd proviso to Section 14-B of EPF Act.

8. Petitioner contended that EPF contribution was not timely remitted for the period from April 2002 to August 2008 and it is not disputed by the 2nd respondent – company and they have remitted EPF contribution as well as interest. Moreover, 2nd respondent – company did not reply to the show cause notice issued under Section 14-B of EPF Act. In other words, they have not utilized the opportunity of submission of explanation. Under what circumstances, levy of damages should be waived of in particularly with reference to 2nd proviso to Section 14-B of EPF Act. In the absence of submission of reply / say to the show cause notice under Section 14-B of EPF Act, 2nd respondent – company cannot contend that doctrine of *mens rea* is attracted. Having regard to the conduct of the 2nd respondent – company in not submitting explanation to show cause notice issued under Section 14-B of EPF Act, principle of *mens rea* not at all attracted, merely on the ground that in 7-A proceedings beneficiaries were not identified. Reducing or waiver of damages are permissible only under provisions of Section 14-B of EPF Act. 2nd respondent had cited a decision, namely, ***Employees State Insurance Corporation*** (cited supra) and other decisions (i), (ii) and (iii) are not helpful to the 2nd respondent – company having regard to the fact that 2nd respondent – company has not utilized the opportunity in submitting the explanation to show cause notice issued under Section 14-B of EPF Act. Moreover, even in the present petition, 2nd respondent – company has not made out a case so as to waive of the damages levied in particularly with reference to 2nd proviso to Section 14-B

of EPF Act. In fact, EPFAT has failed to take note of whether the 2nd respondent – company's grievance would fall under the 2nd proviso to Section 14-B or not. The criteria mentioned under 2nd proviso to Section 14-B has not been made out with factual aspects. Thus, EPFAT has erred in not appreciating the conduct of the 2nd respondent-company in not furnishing explanation read with 2nd proviso to Section 14-B of EPF Act.

9. Principle of *mens rea* is not applicable in the civil cases. What is the *mens rea* has been held by Supreme Court in the case of ***Director of Enforcement vs. M.C.T.M. Corporation Pvt. Ltd. and others***, reported in ***(1996) 2 Supreme Court Cases, 471***. Para nos. 7, 8 and 13 read as under:-

“7. "Mens rea" is a state of mind. Under the criminal law, mens rea is considered as the "guilty intention" and unless it is found that the "accused" had the guilty intention to commit the "crime" he cannot be held "guilty" of committing the crime. An "offence" under Criminal procedure Code and the General Clauses Act, 1897 is defined as any act or omission "made punishable by any law for the time being in force". The proceedings under Section 23(1)(a) of FERA, 1947 are "adjudicatory" in nature and character and are not "criminal proceedings". The officers of the Enforcement Directorate and other administrative authorities are expressly empowered by the Act to 'adjudicate' only. Indeed they, have to act "judicially" and follow the rules of natural justice to the extent applicable but, they are not 'Judges' of the "Criminal Courts" trying an 'accused' for commission of an offence, as understood in the general context. They perform quasi-judicial functions and do not act as "Courts" but only as "administrators" and "adjudicators". In the proceedings before them, they do not try "an accused" for commission of "any crime"

(not merely an offence) but determine the liability of the contravenor for the breach of his "obligations" imposed under the Act. They impose "penalty" for the breach of the "civil obligations" laid down under the Act and not impose any "sentence" for the commission of an offence. The expression "penalty" is a word of wide significance. Sometime, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a "penalty". When penalty is imposed by an adjudicating officer, it is done so in "adjudicatory proceedings" and not by way of fine as a result of "prosecution" of an "accused" for commission of an "offence" in a criminal Court. Therefore, merely because "penalty" clause exists in Section 23(1)(a), the nature of the proceedings under that Section is not changed from "adjudicatory" to "criminal" prosecution. An order made by an adjudicating authority under the Act is not that of conviction but of determination of the breach of the civil obligation by the offender.

8. *It is thus the breach of a "civil obligation" which attracts "penalty" under Section 23(1)(a) FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10, FERA, 1947 that would immediately attract the levy of "penalty" under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the "prosecution" to establish that the "accused" had the necessary guilty intention or in other words the requisite "mens rea" to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the*

provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947. It is the delinquency of the defaulter itself which establishes his "blameworthy" conduct, attracting the provisions of Section 23(1)(a) of FERA, 1947 without any further proof of the existence of "mens rea". Even after an adjudication by the authorities and levy of penalty under Section 23(1)(a) of FERA, 1947, the defaulter can still be tried and punished for the commission of an offence under the penal law, where the act of the defaulter also amounts to an offence under the penal law and the bar under Article 20(2) of the Constitution of India in such a case would not be attracted. The failure to pay the penalty by itself attracts 'prosecution' under Section 23F and on conviction by the 'court' for the said offence imprisonment may follow.

13. *We are in agreement with the aforesaid view and in our opinion, what applies to "tax delinquency" equally holds good for the "blameworthy" conduct for contravention of the provisions of FERA, 1947. We, therefore, hold that mens rea (as is understood in criminal law) is not an essential ingredient for holding a delinquent liable to pay penalty under Section 23(1)(a) of FERA 1947 G for contravention of the provisions of Section 10 of FERA, 1947 and that penalty is attracted Under Section 23(1)(a) as soon as contravention of the statutory obligation contemplated by Section 10(1)(a) is established. The High Court apparently fell in error in treating the "blameworthy conduct" under the Act as equivalent to the commission of a "criminal offence", overlooking the position that the "blameworthy conduct" in the adjudicatory proceedings is established by proof*

only of the breach of a civil obligation under the Act, for which the defaulter is obliged to make amends by payment of the penalty imposed under Section 23(1)(a) of the Act irrespective of the fact whether he committed the breach with or without any guilty intention. Our answer to the first question formulated by us above is, therefore, in the negative.”

Supreme Court in the case of ***Employees' State Insurance Corporation vs. HMT Ltd. and another***, reported in **(2008) 3 Supreme Court Cases 35**, in para nos. 16, 18 and 20, held as under:-

“16. It is a well-known principle of law that a subordinate legislation must conform to the provisions of the Legislative Act. Section 85-B of the Act provides for an enabling provision. It does not envisage mandatory levy of damages. It does not also contemplate computation of quantum of damages in the manner prescribed under the Regulations.

18. Section 85-B of the Act uses the words 'may recover'. Levy of damages thereunder is by way of penalty. The legislature limited the jurisdiction of the authority to levy penalty, i.e., not exceeding the amount of arrears. Regulation 31-C of the Regulations, therefore, in our opinion, must be construed keeping in view the language used in the Legislative Act and not de hors the same.

20. It was, however, opined that in certain situations, the employer can claim the benefit of 'irretrievable prejudice' in case a demand for damages is made after several years. In that case, this Court was concerned, inter alia, with a question in regard to the effect of levy of damages after a long time. The question which, inter alia, arose for consideration therein was as to whether suo moto revisional jurisdiction could be exercised by the

revisional authority at any time it desires. The Court made a distinction between the cases involving 'recovery of money' from an employer who had withheld the contributions made by the workmen in trust and other cases. It was in that situation the Court opined supra. We are not concerned with such a situation herein."

Supreme Court in the case of ***Hindustan Times Ltd. vs. Union of India and others***, reported in ***(1998) 2 Supreme Court Cases, 242***, in para nos. 25, 26, 27 and 29, held as under:-

"25. The Gujarat High Court in Gandhidham Spinning & Mfg. Co. Ltd, vs. Regional Provident Fund Commissioner & Another [1987 Lab. I.C. 659 (Guj.)] (to which, one of us Majmudar, J. was a party), laid down a principle that 'prejudice' on account of delay could arise if it was proved that it was "irretrievable". There it was observed that for purposes of Section 14-B, there is no period of limitation prescribed and that for any negligence on the part of the Department in taking proceedings the employees, who are third parties, cannot suffer. It was further observed:

"The only question that would really survive is the one whether on the facts and circumstances of a given case, the show cause notice issued after lapse of time can be said to be issued beyond reasonable time. The test whether lapse of time is reasonable or not will depend upon the further fact whether the employer in the meantime has changed his position to his detriment and is likely to be irretrievably prejudiced by the belated issuance of such a show cause notice." (emphasis supplied)

It was also stated that such a defence of irretrievable prejudice on account of delay, was to be pleaded and

proved in the reply to the show cause notice. We may add that if such a plea is rejected by the Department, it cannot be raised in the High Court unless specifically pleaded. The above principle of prejudice laid down by Gujarat High Court in Gandhidham Spinning & Mfg. Co. Ltd. (Guj.) has been followed by the Bombay High Court in Saoner Taluka Ginning, Pressing and Dal Mill Prakriya v. R.P.F. Commissioner [1996 (72) FLR 823 (Bom.)]; Super Processors vs. Union of India [1992 Lab. I.C.808 (Bom.)].

26. *A different aspect of prejudice was referred to in Sushma Fabrics (P) Ltd. vs. Union of India [1991 Lab. I.C.1946 (Bom.)] by a learned Single Judge of the Bombay High Court. It was stated that in some cases there could be serious prejudice on account of abnormal delay in taking proceedings under Section 14-B, either because the records or accounts of the defaulter are lost or on account of the personnel concerned acquainted with the facts of a bygone period no longer being available for unearthing the facts. But such pleas must be raised before the department and strictly proved. In case such facts are proved it is possible in some cases that there is irretrievable prejudice.*

27. *It has also been held rightly that mere delay on the part of the department could not be treated as amounting to waiver (Divisional Engineer, A.P.SEB vs. R.P.F. Commissioner [1979 Lab. I.C. 187 (AP)]; Inter State Transport Agency vs. R.P.F. Commissioner [1983 Lab IC 940 (Patna)]; State of Punjab vs. Amir Chand [1970 (37) FJR 92 (P&H)]. This view is, in our opinion, correct.*

29. *From the aforesaid decisions, the following principles can be summarised:*

The authority under Section 14-B has to apply his mind to the facts of the case and the reply to the show

cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on pleas of power-cut, financial problems relating to other indebtedness or the delay in realisation of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages under Section 14-B. The fact that proceedings are initiated or demand for damages is made after several years cannot by itself be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings under Section 14-B would be taken; mere delay in initiating action under Section 14-B cannot amount to prejudice inasmuch as the delay on the part of the department, would have only allowed the employer to use the monies for his own purposes or for his business especially when there is no additional provision for charging interest. However, the employer can claim prejudice if there is proof that between the period of default and the date of initiation of action under Section 14-B, he has changed his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an "irretrievable" nature: he might also claim prejudice upon proof of loss of all the relevant records and/or non-availability of the personnel who were, several years back in charge of these payments and provided he further establishes that there is no other way he can reconstruct the record or produce evidence; or there are other similar

grounds which could lead to "irretrievable" prejudice; further, in such cases of "irretrievable" prejudice, the defaulter must take the necessary pleas in defence in the reply to the show cause notice and must satisfy the authority concerned with acceptable material; if those pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that effect."

Even assuming that principle of *mens rea* is taken into consideration, it should be within the ambit of 2nd proviso to Section 14-B of EPF Act. That apart conduct of 2nd respondent – company is to be taken into consideration like not participated in the determination of damages and interest under statutory provisions of EPF Act. In view of these factual and legal aspects, EPFAT erred in entertaining rectification application while allowing the appeal. Accordingly, EPFAT order dated 17.10.2012 vide Annexure P/18 is set aside.

10. CWP stands allowed.

May 09, 2018
vkd

[P.B. Bajanthri]
Judge

Whether speaking / reasoned : Yes

Whether reportable : Yes