

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Order: November 12, 2018

+ **W.P.(C) 12089/2018 & CM 46825/2018**

CENTRAL BOARD OF TRUSTEES, EPF THR. RPFC

.....Petitioner

Through: Ms. Inderjeet Sidhu, Advocate

versus

M/S DENTSU MARCOM PVT. LTD.

.....Respondent

Through: Mr. Rajiv Arora and Mr. S.P.
Arora, Advocates

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

ORDER

(ORAL)

1. Impugned order of 18th September, 2018 sets aside petitioner's order of 23rd January, 2015 in proceedings under Section 14-B & 7 Q of *the EPF & MP Act, 1952 (hereinafter referred to as 'aforesaid Enactment')* while holding that revised calculation sheet submitted by Enforcement Officer does not take into consideration the deposit of ₹62,05,360/- voluntarily made by respondent and since the revised calculation sheet is incomplete and does not depict true and correct liability of the employer-establishment, therefore, the levy of damages vide order of 23rd January, 2015 has been set aside.

2. Impugned order also holds that the modified/revised order of 21st April, 2015 does not rectify any clerical or arithmetical mistake apparent on the face of record and concludes that competent authority has not

conducted the proceedings independently. The impugned order also notes that no finding of *mens rea* has been returned by the competent authority. While holding so, reliance has been placed by the appellate authority on Supreme Court's decision in *Assistant Provident Fund Commissioner EPFO and Another v. Management of RSL Textiles India Private Limited through its Director*, (2017) 3 SC 110 and also upon a decision of High Court of Bombay in *Union of India and Others v. Super Processors*, (1993) IT LLJ 203Bom.

3. The challenge to impugned order by petitioner's counsel is on the ground that the impugned order erroneously discards petitioner's Communication of 21st April, 2015 as in the said Communication, deposit made by respondent has already been taken into consideration and thereafter, the damages levyable are to the tune of ₹1,32,00,000 odd. It is submitted on behalf of petitioner that the revised calculation sheet has been accepted by respondent and to submit so, attention of this Court is drawn to respondent's Communication of 10th March, 2015 (*Annexure P-3 colly.*). It is further submitted by petitioner's counsel that to the show-cause notice issued by the competent authority, no reply was given by respondent and so, the aspect of *mens rea* could not be considered by the competent authority. Reliance is placed by petitioner's counsel upon Supreme Court's decision in *M/s. Hindustan Times Limited v. Union of India and Others*, 1998 LAB.I.C.483 to submit that on the ground of delay, the order of competent authority cannot be set aside and so, it is submitted that the impugned order deserves to be quashed.

4. Respondent's counsel refutes the aforesaid stand taken on behalf of petitioner and supports the impugned order. Reliance is placed upon Sections 20 & 21 of the aforesaid Enactment to submit that the Circular of 28th November, 1990 prescribing limitation of three years for levying damages was not brought to the notice of Supreme Court in the case of *M/s. Hindustan Times Limited (supra)* and that petitioner is bound by Circular and thus, the impugned levy of damages is time barred. Reliance is also placed upon Supreme Court's decision in *Management of RSL Textile India (Supra)* to submit that in the absence of finding regarding *mens rea* of the employer, action under Section 14-B of the aforesaid Enactment cannot be sustained. It is submitted on behalf of respondent that respondent's Communication of 10th March, 2015 (*Annexure P-3 colly.*) does not indicate that the revised calculation made by petitioner was accepted. Respondent's counsel submits that revised calculation sheet was not supplied to respondent. Reliance is placed by respondent's counsel upon decision of High Court of Bombay in *Super Processors (supra)* to submit that petitioner is bound to apply aforesaid Circular of 28th November, 1990 while determining liability of the employer.

5. Upon hearing and on perusal of impugned order, material on record and the decisions cited, I find that the Circular of 28th November, 1990 was not brought to the notice of Supreme Court in the year 1998 when the decision in *M/s. Hindustan Times Limited (supra)* was rendered. Otherwise also, aforesaid Circular is not of statutory character. In the instant case, the delay in levying damages is of about 18 years whereas the delay in the case of *M/s. Hindustan Times Limited (supra)* was of 14

years. To my mind, on the delay aspect alone, the impugned order cannot be maintained as the issue of *mens rea* is a determinative factor in the instant proceedings. Neither the competent authority nor the appellate authority has gone into this vital aspect of *mens rea*. It is true that petitioner's Communication of 21st April, 2015 does not disclose that any typographical or any arithmetical error was sought to be corrected. Even if the aforesaid Communication of 21st April, 2015 is excluded from consideration, still the validity of the revised calculation sheet has to be determined by the competent authority.

6. In the considered opinion of this Court, while setting aside competent authority's order of 23rd January, 2015, appellate authority ought to have remanded the matter back to the competent authority for decision afresh as respondent in its Communication of 10th March, 2015 (*Annexure P-3 colly.*) has not specifically disputed the revised calculation-sheet. Another infirmity, which is apparent on the face of record, is that to the show-cause notice issued by petitioner, no reply was given by respondent. In view of Supreme Court's decision in *Management of RSL Textiles India Private Limited (supra)*, the issue of *mens rea* is required to be determined, which cannot be done in the writ proceedings. In light of the aforesaid, impugned order directing refund of amount deposited by respondent cannot be maintained and is accordingly set aside. However, impugned order so far as it sets aside competent authority's order of 23rd January, 2015 (*Annexure P-2*) is maintained with the rider that competent authority is required to pass an order under Section 14B&7Q of *the EPF & MP Act, 1952* while returning a finding

on the *mens rea* aspect. Let the needful be done by the competent authority within a period of sixteen weeks or so. It is made clear that the competent authority shall afford an opportunity to both the sides and will not be influenced by any observation in the impugned order or in its earlier order of 23rd January, 2015, which has already been set aside.

7. In the facts and circumstances of this case, let an opportunity be granted to respondent to give a reply to the show-cause notice within a period of four weeks from today and thereafter, expeditiously proceed further in accordance with the law.

8. With the aforesaid directions, this petition and the application are disposed of.

Copy of this order be given *dasti* to counsel for both the sides.

NOVEMBER 12, 2018
v/s

(SUNIL GAUR)
JUDGE