BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **16.12.2019**

CORAM:

**THE HONOURABLE MR.JUSTICE A.P.SAHI, CHIEF JUSTICE**

**AND**

**THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD**

**W.A.[MD]No.516 of 2012**

**and**

**M.P.[MD]Nos.1 and 2 of 2012**

M/s.R.D.34 Ariyakudi Primary Agricultural Co-operative Bank,
Ariyakudi,
Karaikudi - 630 202.
Sivagangai District,
represented by its
Secretary : Appellant

Vs.

1.Employees' Provident Fund Appellate Tribunal,
4th Floor, Scope Minar, Core-II,
Laxmi Nagar,
New Delhi - 110 092.

2.The Assistant Provident Fund Commissioner,
EPF Organisation,
Regional Office, Post Box No.1,
Lady Doak College Road,
Chokkikulam,
Madurai - 625 002. : Respondents

**PRAYER:** Writ Appeal filed under Clause 15 of Letters Patent, against the order dated 14.06.2012 passed in W.P(MD)No.7958 of 2012.

**Prayer in WP(MD). 7958 of 2012 :**

To issue a Writ of Certiorari to call for the records of the impugned order passed by the 1st respondent in A.T.A No. 241 (13)/2012 dated 18.04.2012 by confirming the order of the 2nd respondent in his proceedings in No.TN/RO/MDU/41415/Circle.4/PDC/LO/2011 , dated 13.02.2012 and quash the same.

For Appellant : Mr.K.Hemakarthikeyan
For Respondents : Mr.V.S.V.Venkateswaran for R.2
R.1 - Tribunal

**JUDGMENT**

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[Judgment of the Court was delivered by **Subramonium Prasad, J.**]

Heard both sides.

2. The short issue which arises for consideration in this case is to whether mere delay in depositing the contribution to the

Provident Fund is sufficient to attract levy of damages or not.

3. Section 14-B of the EPF Act reads as under:

> "**14-B. Power to recover 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 authorised 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 damages, 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."

4. The admitted fact in this case is that the appellant company failed to remit the PF dues in time and consequently in the proceedings conducted under Section 14-B of the Act, intimation was sent to the appellant to show cause as to why damages should not be remitted. The reason given by the appellant herein was that there was severe financial crisis faced by the company and therefore, non-deposit of the PF was unintentional. On going through the facts of the case, the second respondent passed the order levying damages which was challenged before the appellate Tribunal. The appellate Tribunal also dismissed the appeal on the ground that there was a delay in depositing the funds. Neither the Assistant Provident Fund Commissioner nor the Appellate Tribunal looked into the issue as to whether delay in deposit was intentional or not. The order of the Tribunal was challenged by filing the instant writ petition. The learned Single Judge dismissed the writ petition again on the ground that mere delay is sufficient to impose damages under Section 14-B of the Act. The same is assailed before us in this instant writ appeal.

5. Learned Counsel for the appellant placed reliance on the judgment of the Hon'ble Supreme Court in ***Mcleod Russel India Limited v. Regional Provident Fund Commissioner, Jalpaiguri and others*** reported in ***(2014) 15 Supreme Court Cases 263***, wherein the Hon'ble Supreme Court has held as under:



> "11. In HMT Ltd., [ESI Corpn., v. HMT Ltd., (2008) 3 SCC 35 : (2008) 1 SCC (L&S) 558], 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-a-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 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. We may also note that this Court had yet again reiterated the well-known but oft ignored principle that High Courts or any Appellate Authority created by a statute should not substitute their perspective of discretion on that of the lower Adjudicatory Authority if the impugned Order does not otherwise manifest perversity in the process of decision taking. HMT Ltd. does not proscribe imposition of damages; that would negate the intent of the legislature. The submission of the petitioner before us is that the liability was of the erstwhile management and since the petitioner was not the "employer" at the relevant time, default much less deliberate and wilful default on the part of the petitioner was

absent. However, it seems to us that once these damages have been levied, the quantification and imposition could be recovered from the party which has assumed the management of the establishment concerned."

6. The said judgment has been followed by the Hon'ble Supreme Court in ***Assistant Provident Fund Commissioner, EPFO v. Management of RSL Textiles India Pvt. Ltd., through its Director*** reported in ***(2017) AIR (SCW) 679.***

7. A perusal of the orders of the authorities below and the learned Single Judge shows that the authorities below and the learned Single Judge have not applied their mind to the fact as to whether the reason as put forward by the appellant is sufficient to waive payment or not and what should be the proportionality in imposing the damages.

8. In view of the fact that the authorities below have not applied their mind and in view of the fact that the Honourable Supreme Court has held that *mens rea* is an essential ingredient, the appeal is allowed and the impugned order of the learned Single Judge and the orders passed by the authorities below are set aside. The matter is remitted back to the Assistant Provident Fund Commissioner to once again consider the issue of *mens rea* before levying the damages and the said exercise may be completed within a period of twelve weeks from the date of receipt of a copy of this order. It goes without saying that the Assistant Provident Fund Commissioner will give reasonable opportunity to the appellant as well as the respondents. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar(CS)

MR/RSB

To

1.Employees' Provident Fund Appellate Tribunal,
4th Floor, Scope Minar, Core-II,
Laxmi Nagar,
New Delhi - 110 092.

2.The Assistant Provident Fund Commissioner,
EPF Organisation,
Regional Office, Post Box No.1,
Lady Doak College Road,
Chokkikulam,
Madurai - 625 002.



+2 CC to M/s.V.S.V.VENKATESHVARAN, Advocate ( SR-105263[F] dated 17/12/2019 )

+1 CC to M/s.K.HEMAKARTHIKEYAN, Advocate ( SR-105602[F] dated 18/12/2019 )

**JUDGMENT MADE IN**
**W.A.[MD]No.516 of 2012**
**and**
**M.P.[MD]Nos.1 and 2 of 2012**

**16.12.2019**

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