BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 03.10.2019

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THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

W.P.(MD)No.6877 of 2011
and
M.P.(MD)No.1 of 2011

Assistant Provident Fund Commissioner,
Employees Provident Fund Organisation,
Sub-Regional Office, NGO 'B' Colony,
Tirunelveli-627 007. ... Petitioner

vs.

1.The Employees' Provident Funds Appellate Tribunal,
New Delhi.

2.Express Publications (Madurai) Limited,
Harsha Complex, III Floor,
North Bye-Pass Road,
Vannarpettai, Tirunelveli -03. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, to call for the records of the impugned order passed by the first respondent, dated 08.03.2011 in ATA NO.674(13)2009 and quash the same and to direct the second respondent to pay the sum of Rs.1,04,207/- as per the order No.TN/TNY/55571/14B/PDC(1)/2009, dated 31.07.2009.

For Petitioner :Mr.K.Murali Sankar
For R1 :No Appearance
For R2 :Mr.P.Baskaran

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O R D E R

This Writ Petition is filed by the Employees Provident Fund Organisation challenging the order of Employees' Provident Funds Appellate Tribunal, New Delhi, allowing the appeal preferred by the second respondent, challenging the order levying damages under Section 14B of Employees Provident Fund Act.

2.The second respondent is an industrial establishment in Tirunelveli. It is not in dispute that the second respondent has committed default in payment of Provident Fund Contribution. However, it admitted that all the dues were settled, however with a delay. After collecting interest for the belated payment, the petitioner proceeded to assess damages under Section 14B of Employees Provident Fund Act. By order, dated 31.07.2009, the petitioner levied a sum of Rs.1,04,207/- by way of damages under Section 14B of the Employees Provident Fund Act, for certain period. This order was challenged by the second respondent before the first respondent Appellate Tribunal. The Appellate Tribunal has rendered a specific finding in paragraph 7 of the order, which runs as follows:

> *"The question that remains to be determined is whether the delay is a chronic and intentional one or not. The record reveals that the appellant was paying the dues regularly until the establishment faced the financial problem. So, the default does not appear to be intentional one. In the case of M/s.Shanthi Garments vs RPFC, reported in 2003 Vol.1 CLR at page 228, the Hon'ble High Court of Madras held that, "Where the default is found but no apparent fault the quantum of damage should be compensatory rather than penal in nature:.*
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> *8.Thus, in view of the discussion held above, the order of the Authority cannot be sustained. Hence ordered, the matter is remanded back to the EPF Authority with direction to assess the liability @ 22% {inclusive of interest}. The appellant is also directed to appear before the Authority within one month of receipt of this order to place its case, failing which, the Authority may decided the matter as per law. Copy of order be sent to the parties and the file be consigned to record room".*

3.It is unfortunate that after recording a specific finding that the delay in remittence was neither wilful nor wanton and that the delay was solely on account of financial problem faced by the Establishment, the first respondent remitted the matter with the direction to assess the liability @ 22% {inclusive of interest}. This order was challenged by the petitioner before this Court.

4.It is stated that the Honourable Supreme Court, in several cases, has held that the damages under Section 14B of the Act can be levied only in a case, where, the delay in remittence was caused intentionally and that in a case where, there is no *mens rea* or *actus reus* on the part of individual establishment, the levy of damages is wholly illegal and inequitable.

5.The learned Counsel for the second respondent relied upon the judgment of Honourable Division Bench of this Court in the case of ***Regional Provident Fund Commissioner II, Employees' Provident***

Fund Organisation, Madurai and another vs Sree Visalam Chit Funds Limited, Palathur and another, reported in ***2010 (4) L.L.N.706***, wherein, the Honourable Division Bench has held as follows:

> *"30.In our considered opinion, as we have already concluded, unless it is established that such failure to pay the contribution was attributable to the mens rea or actus reus on the part of the employer, question of levying damages under S.14B of the Act does not arise. It has been repeatedly held by Hon'ble Supreme Court that simply because the statutory provision enables an authority to impose penalty, it does not mean that such penalty should be imposed in a mechanical manner without looking into the attending circumstances and the facts as to whether there was any mens rea or actus reus on the part of the employer."*

6.The position has been clarified by the Honourable Supreme Court in the case of ***Employees' State Insurance Corporation vs H.M.T. Limited and another***, reported in ***2008 (1) L.L.N.491***, with reference to Section 85(B) of Employees' State Insurance Act, 1948. Though the said judgment was with reference to the payment of levy of damages under Employees' State Insurance Act, 1948, having regard to the fact that provisions under the Employees' State Insurance Act, 1948 and Employees Provident Fund Act, are in *pari meteria*, this Court is quiet justified in following the judgment of Honourable Supreme Court above referred to. The Honourable Supreme Court has held that existence of *mens rea* or *actus reus* to contravene a statutory provisions was held to be a necessary ingredient for levy of damages and/or the quantum thereof.

7.Following the precedents, this Court is able to see that factual issue has already been answered by the first respondent. The first respondent has agreed with the contentions of the second respondent that the delay in remittence was on account of financial problems and that there was no deliberate or wilful intention.

8.The question of levy of damages under Section 14B of the Act arose only when the employer fails to pay the contribution intentionally or without sufficient cause. Unless, there is *mens rea* or *actus reus* on the part of the employer, damages cannot be levied under Section 14B of the Act.

9.Considering the law reiterated by several precedents, this Court is of the view that the levy of damages under Section 14B of the Act is not automatic in every case and that the petitioner has to waive damages in case, there is no *mens rea* or *actus reus* in making belated payment.

10.In view of the settled position, this Court is of the view that there is no merit in the writ petition. As a result, this writ petition is dismissed as devoid of merits. The order passed by the first respondent, dated 08.03.2011 is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

Sub Assistant Registrar(CS)

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To

The Employees' Provident Funds Appellate Tribunal,
New Delhi.

+1 CC to M/s.K. MURALISANKAR, Advocate SR-91017.
+1 CC to M/s.K.K.SAMY, Advocate SR-91428.

W.P.(MD)No.6877 of 2011
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