BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 26.09.2019

Order Reserved on: 17.09.2019	Order delivered on: 26.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE R.THARANI

W.A.(MD) No.840 of 2019
and
C.M.P.(MD) No.7136 of 2019

The Assistant Provident Fund Commissioner,
Employees, Provident Fund Organisation,
Sub-Regional Office,
66, Water Tank Road,
Nagercoil – 1,
Kanyakumari District. ... Appellant/Respondent

-vs-

M/s.D.R.Textiles and Garments,
Rep. by its Proprietor,
Mrs.S.Florence,
20/BB, Main Road,
Near Anna Statue,
Thuckalay,
Kanyakumari – 629 175. ... Respondent/Petitioner

Writ Appeal filed under Clause 15 of Letters Patent against the order dated 24.01.2019, made in W.P.(MD) No.5783 of 2010, on the file of this Court.

Prayer in WP(MD). 5783/ 2010 :
Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a WRIT OF CERTIORARI, by calling for the records, pertaining to the impugned orders dated 26-03-2010 passed by the Respondent in Ref.No.TN/NGL/55925/14B/100137/PDC(1)/2010 levying damages and quash the same.

For Appellant : Mr.K.Gurunathan

For Respondent : Mr.R.Vijayakumar

J U D G M E N T

[Judgment of the Court was delivered by T.S.SIVAGNANAM, J.]

This Appeal has been filed by the Assistant Provident Fund Commissioner, Employees Provident Fund Organisation, Nagercoil, Kanyakumari District. The order impugned is dated 24.01.2019, passed in W.P.(MD) No.5783 of 2010, filed by the respondent herein.

2.The Writ Petition was filed by the respondent, challenging the order passed by the appellant dated 26.03.2010, levying damages under Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (herein after referred as 'Act') for the belated remittance of the EPF dues.

3.The learned Single Bench by the impugned order held that the appellant can levy damages only if it comes to the conclusion that the element of *mens rea* is present and there is no such finding in the order of the appellant. Therefore, the order insofar as it levies damages under Section 14-B of the Act was set aside and accordingly W.P.(MD) No.5783 of 2010 was allowed. With regard to levy of interest under Section 7-A of the Act, a separate Writ Petition in W.P.(MD) No.5784 of 2010 was filed. The learned Writ Court held that the prayer for waiver of interest cannot be granted as the liability to pay interest follows as a matter of corollary and consequence. The appellant organization is aggrieved by the order passed in W.P.(MD) No.5783 of 2010, passed by the learned Single Bench setting aside the levy of damages under Section 14-B of the Act.

4.We have heard Mr.K.Gurunanthan, learned counsel appearing for the appellant and Mr.R.Vijayakumar, learned counsel appearing for the respondent/ Writ Petitioner.

5.The short question which falls for consideration in this Writ Appeal is whether *mens rea* is required to be present as a precondition to levy damages under Section 14-B of the Act. In order to answer this question, we should first take note of Section 14-B of the Act, which reads as follows:

> "Section **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."

6.The above provision empowers the appellant to recover damages from the employer when 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 (Employer) under Section 15 (2) or Section 17 (5) 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 and in such contingency 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.

7.The first proviso to Section 14-B provides for reasonable opportunity of being heard to be granted to the employer before levying and recovering damages. The second proviso empowers the Central Board to reduce or waive the damages in case of an establishment which is a sick industrial company or in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction.

8.The case of the respondent/writ petitioner is by relying on the decision of the Hon'ble Supreme Court in ***Provident Fund Commr. v. RSL Textiles (India) (P) Ltd. [(2017) 3 SCC 110]***. The said decision was rendered following an earlier decision in the case of ***McLeod Russel India Ltd. v. Regl. Provident Fund Commr. [(2014) 15 SCC 263]***. In fact, the learned counsel appearing for the appellant also placed reliance on the decision in the case ***McLeod Russel India Ltd.***, which was referred to in ***RSL Textiles (India) (P) Ltd.***, which is relied on by the learned counsel for the respondent. In ***RSL Textiles (India) (P) Ltd.***, the Hon' ble Supreme Court has referred to paragraph 11 of the judgment ***McLeod Russel India Ltd.***, recorded the finding rendered by the High Court in the judgment impugned before it and confirmed the same. Therefore, to ascertain as to what is the legal position, we have to necessarily fall back to the decision ***McLeod Russel India Ltd.***

9.In ***McLeod Russel India Ltd***, the Supreme Court noted the earlier decision in the case of ***ESI Corpn. v. HMT Ltd. [(2008) 3 SCC 35]***, which noted the beneficial nature of the Act and pointed that 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, the Supreme Court set aside the interference of the High Court vis-à-vis the imposition of damages and further held that imposition of damages by way of penalty was not mandated in each and every case. It was further pointed out that in ***HMT Ltd.***, it does not prescribe the damages or penalties cannot or ought not be to be imposed. Further, the presence or absence of *mens rea* or *actus reus* would be a determinative factor in imposing damages under Section 14B, 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 it was pointed out that if damages have been imposed under Section 14B, it will be only logical that *mens rea* or *actus reus* was prevailing at the relevant time.

10.In ***Assistant Provident Fund Commissioner v. Hi-Tech Vocational Training in LPA No.629 of 2011 dated 21.09.2015***, the Delhi High Court considered the question as to whether the appellant Organization is obliged to levy damages under Section 14-B of th Act and while doing so, is the authority bound to levy damages prescribed in paragraph 32-A of the Employees Provident Fund Scheme, 1952. The second question which was to be decided is whether the penalty can be levied under Section 14-B of the Act, if by the date proceedings are initiated under Section 14-B the assessee has paid necessary dues under the Act.

11.After noting the decisions of the various High Courts and the decision of the Hon'ble Supreme Court in ***HMT Ltd.***, in ***Hi-Tech Vocational Training*** it was pointed out that from the language of Section 14-B of the Act, it is apparent that the legislature has vested a discretion in the Commissioner to levy damages with further discretion to determine such damages as he may determine and accordingly answered the first question. After doing so, it was pointed out that the moneys payable into the fund are for the ultimate benefit of the employees and there being no provision by which the employees can directly recover these amounts, the Commissioner would be obliged to ensure that at least such amount which is necessary to recompense the employees should be levied by way of damages notwithstanding that in the statute book Section 7-Q was inserted and there being 12% statutory simple interest per annum payable on the defaulting amount. Further, it was pointed out that persistent and repeat defaulters should be dealt with sternly and visited with the maximum penalty, first time defaulters deserve sympathy. It was further pointed out that the statute nowhere contemplates that the default must be in existence on the day when proceedings under Section 14-B are initiated and if there is a default in making contribution to the fund, notwithstanding belated contribution being made to the fund, since the default has already taken place, the Commissioner would be within his power to initiate proceedings under Section 14-B of the Act. With the above reasoning the second question was answered in favour of the organization.

12.The learned counsel for the appellant referred to the decision of the Supreme Court in the case of ***Chairman, SEBI v. Shriram Mutual Fund [(2006) 5 SCC 361]*** to buttress his submission that it is not necessary to establish ***mens rea***, when there is intentional violation of the provisions of the Act and there was belated remittance. In our considered view, the decision in the case of ***Shriram Mutual Fund*** may not be of assistance to the case of the appellant as the same arises under a different enactment. The law laid down in the aforementioned decision would conclude to state that the Commissioner has discretion to levy damages and discretion to determine such damages as he may determine. Therefore, the conduct of the party assumes significance.

13.The learned counsel appearing for the respondent contended that there is a delay of 2½ years in initiating the proceedings under Section 14-B of the Act, after the respondent had paid the entire dues. The aforementioned decisions, more particularly ***Hi-Tech Vocational Training*** sets out the legal position that merely because proceedings under Section 17-B of the Act has been initiated after remittance of the dues by the establishment will not vitiate the proceedings. Therefore, the same may not be a ground to set aside the levy of damages.

14.When we examine the duties, which are cast upon the respondent establishment under the 1952 Scheme, we find that the liability is self-imposed as mentioned in paragraphs 35 and 38 of the Scheme. In terms of paragraph 38(1), the respondent/employer shall deduct the contributions as well as the employees contributions and pay the same within 15 days of the close of every month. In paragraph 38(2), the employer shall forward to the Commissioner within 25 days of close of month about the aggregate amount of recoveries made from the wages to be submitted by way of extract. In terms of paragraph 38(3), a consolidated Annual Contribution Statement in Form 6(A) should be submitted to the Commissioner. Therefore, the respondent is not required to be put on notice or a demand to be issued and it is their bounden duty to deduct their contribution as well as employees contribution and remit the same within the time frame stipulated. Admittedly the respondent failed to follow the same for the period from September 2003 to March 2007. This in our considered view cannot be treated to be a stray incident of default but a deliberate one. The plea raised by the respondent that on account of certain error in checking the default had occurred is a far fetched plea and such a plea cannot be accepted to be continuing for four years. Therefore, the appellant is right in their contention that the respondent does not require any leniency.

15.At this juncture, we reiterate the observations of the Hon'ble Supreme Court in ***McLeod Russel India Ltd.***, wherein it was held that if damages have been imposed under Section 14-B, it will be only logical that *mens rea* or *actus reus* was prevailing at the relevant time. As pointed out in ***Hi-Tech Vocational Training***, the person, who is ultimately affected is the employee, who is a workman with a meager salary and if such beneficial scheme is allowed to be flouted, then the purpose of having such legislation would be defeated.

16.While on this issue, we were refer to two decisions relied on by the learned counsel appearing for the appellant (i) in the case of ***Patiala Co-operative Sugar Mills Ltd. v. E.P.F. Appellate Tribunal [2017-I-LLJ-338 (P & H)].*** The Court considered the decision in the case of ***Hindustan Times Ltd. v. Union of India [1998-I LLJ-682 (SC)]*** and ***Organo Chemical Industries v. Union of India [LNIND 1979 SC 288]*** and held that the delay in taking action by the E.P.F. Organization would not condone the levy of damages and there is no limitation for assessing interest and damages and merely the use of the word “may” does not empower the competent authority to waive of interest and damages on the ground of financial crises and such power is vested with the Central Board and not with the Appellate Tribunal. (ii) In ***Supreme Tile Works v. Assistant Provident Fund Commissioner (Kar.) [2018 (3) LLN 176 (Kar.)]***, it was held that EPF Act is a beneficial legislation for labour class and if employer is absolved from liability to pay Damages and Interest, large number of Workmen would suffer and the writ petitioner cannot jeopardise law by citing personal reasons. The above two decisions support the conclusion we have recorded in the preceding paragraphs.

17.The learned counsel for the respondent referred to paragraph 6 of the affidavit filed in support of the writ petition and submitted that the appellant has waived the employees share of the Provident Fund Contribution. On a perusal of the counter affidavit filed in the writ petition and more particularly the averments set out in paragraph 5, it has been stated that while allowing damages, determination of interest amount of contribution waived has been excluded. Therefore, the averments made by the petitioner under no circumstances can be taken as a mitigating factor. Above all, the respondent has not denied the fact that there has been gross delay in the remittance of the dues to the appellant organization. Considering the period of delay, we have no hesitation to hold that it is wilful and as already observed remittance of the amount subsequently will not exonerate the respondent/writ petitioner from the clutches of the statute. Thus, for the above reasons, we are fully convinced that the order and direction issued by the Writ Court is liable to be set aside as it is not in consonance with law laid down in the decisions referred to above, more particularly on the facts and circumstances of the case on hand, wherein it has been established that respondent/writ petitioner was a wilful defaulter in paying the EPF Contributions.

18.In the result, the Writ Appeal is allowed and the the impugned order dated 24.01.2019, passed in W.P.(MD) No.5783 of 2010 is set aside. Consequently, connected Civil Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

Sub Assistant Registrar(CS)

sj

TO
The Assistant Provident Fund Commissioner,
Employees, Provident Fund Organisation,
Sub-Regional Office,
66, Water Tank Road,
Nagercoil – 1,
Kanyakumari District.

+1 CC to M/s.K.GURUNATHAN, Advocate (SR-89643[F] dated 26/09/2019)

+1 CC to M/s.R.VIJAYAKUMAR, Advocate (SR-89629[F] dated 26/09/2019)

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W.A.(MD) No.840 of 2019
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