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

+ **LPA 688/2018 & CM APPL. 51448/2018**

M/S DENTSU MARCOM PVT LTD

..... Appellant

Through: Mr. Ranvir Singh and Mr. Rajiv
Arora, Advocates.

versus

CENTRAL BOARD OF TRUSTEES, THROUGH: ASSISTANT P F
COMMISSIONER DELHI (SOUTH)

..... Respondent

Through: Ms. Inderjeet Sidhu, Advocate along
with Mr. Sunil Ranjan, EOC (Legal)

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE SANJEEV NARULA

ORDER

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24.01.2019

Dr. S. Muralidhar, J.:

1. This is an appeal against an order dated 12th November 2018 passed by the learned Single Judge disposing of W.P.(C) 12089/2018 filed by the Respondent, Central Board of Trustees of the Employees' Provident Fund Organisation (hereafter the 'PF Authority').

2. The background facts are that two show cause notices (SCNs) were issued on 22nd April 2014 by the Assistant Provident Fund Commissioner (hereafter the 'Competent Authority') to the Appellant making demands for payment of damages/interest under Section 14-B of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (EPF Act) for the

sum of Rs. 1,07,64,211/- and interest of Rs. 51,95,297/- under Section 7-Q of the EPF Act for the period from March, 2010 till April 2014 and in the sum of Rs. 22,40,679/- as damages under Section 14-B and Rs. 10,87,850/- as interest under Section 7-Q for the period April, 2005 till March 2010. However, in both SCNs it was stated that the demands were for the period from 1st April 1996 to 22nd April 2014.

3. Pursuant to the said SCNs, a hearing took place before the Competent Authority on 18th June 2014 during which two written replies were handed over by the Appellant to the Competent Authority. Copies of both replies, which are undated, have been enclosed with the present appeal as Annexure 'A-4'. Both mention the relevant period as 1st April 2005 to 22nd April 2014. In one reply the Appellant stated that they had already deposited a sum of Rs. 53,00,384/- towards interest and in the other that they had deposited Rs. 9,04,976 towards interest. According to the Appellant the balance amount payable by it under one SCN was Rs. 1,14,481 towards interest under Section 7-Q of the EPF Act and Rs.1,07,60,295 towards damages under Section 14-B of the EPF Act. The amounts due under the second SCN were Rs. 1,70,920 towards interest under Section 7-Q of the EPF Act and Rs. 22,19,357 towards damages under Section 14-B of the EPF Act.

4. An order was passed by the Competent Authority on 3rd January 2015, a copy of which was dispatched to the Appellant under a covering letter dated 23rd January 2015. The Competent Authority referred to the replies of the Appellant. The Competent Authority then discussed the merits and concluded that the Appellant had defaulted in remitting the PF and allied

dues from 1st April 1996 to 13th March 2014 within the stipulated time frame i.e. within 15 days from the end of every month. The Competent Authority proceeded to levy damages under Section 14-B of the EPF Act for the entire period from 1st April 1996 to 12th September 2014 in the sum of Rs. 1,30,46,614/- and interest under Section 7-Q of the EPF Act in the sum of Rs. 63,05,099/-.

5. On receiving the above order, the Appellant wrote a letter on 10th March 2015 to the Competent Authority pointing out that they had already deposited Rs. 62,05,360/- towards interest under Section 7-Q of the EPF Act. The Appellant enclosed the year-wise calculation of the interest, copies of relevant *challans* and bank statements. The Competent Authority was asked to give credit to the deposited amount and “revise the demand accordingly”.

6. On 21st April 2015, another communication was sent by the Competent Authority to the Appellant, this time revising the damages under Section 14-B of the EPF Act to Rs.1,21,29,791/- and interest under Section 7-Q to Rs. 10,16,562/-.

7. The Appellant filed Appeal No. ATA 461 (4) 2015 before the Employees Provident Fund Appellate Tribunal questioning both the order dated 23rd January 2015 as well as the subsequent communication dated 21st April 2015 of the Competent Authority. *Inter alia* in the memorandum of appeal, it was urged that a demand could not have been made for a period prior to the date of issue of the SCN as per the departmental Circular issued by the PF Authority on the advice of the Central Government on 28th November

1990. It was further pointed out that damages sought from the Appellants was more than 100 % of the arrears and interest was also charged at 12 % per annum for a period beyond what was indicated in the SCN. The orders were also assailed as not returning a finding of *mens rea*, being non-speaking and without application of mind by the Competent Authority.

8. *Inter alia* in the reply filed, the Competent Authority referred to the decision of the Supreme Court in ***Hindustan Times Ltd. v. Union of India (1998) 2 SCC 242*** to urge that default on part of the employer based on financial problems or delay in realization of amounts paid by cheques or drafts would not be justifiable grounds for the employer to escape liability. The said decision was also relied upon for contending that even if proceedings were initiated after several years, unless the proof of payment of dues and interest was shown by the employer, such proceedings would still be maintainable.

9. By an order dated 18th September 2018, the Presiding Officer of the Central Government Industrial Tribunal-cum Labour Court (hereafter the Appellate Authority) set aside the order dated 23rd January 2015 and the subsequent letter dated 21st April 2015 of the Competent Authority and directed the latter to refund to the Appellant the sum of Rs. 62,05,360/- deposited by it. Following the above order, an application was filed by the Appellant before the Appellate Authority under Section 21 of the EPFAT (Procedure Rules 1997) in which the Appellate Authority issued a direction on 30th October 2018 to the Competent Authority to release the aforementioned sum of Rs. 62,05,360/- to the Appellant.

10. Questioning the above orders of the Appellate Authority, the Respondent PF Authority filed W.P. (C) 12089/2018 before the learned Single Judge of this Court. The learned Single Judge in the impugned order noted that the Circular dated 28th November 1990 issued by the PF Authority *inter alia* limited the period within which recovery proceedings would be initiated to three years prior to the show cause notice and observed that “aforesaid circular is not of statutory character”. Referring to the decision of ***Hindustan Times Ltd.*** (*supra*), the learned Single Judge observed that “on the delay aspect alone”, the order of the Appellate Authority could not be maintained “as the issue of *mens rea* is a determinative factor in the instant proceedings”. It was observed that neither the Competent Authority nor the Appellate Authority had gone into this “vital aspect of *mens rea*” and even if the communication dated 21st April 2015 stood “excluded from consideration, still the validity of the revised calculation sheet to be determined by the Competent Authority”. Consequently, the learned Single Judge was of the view that the Appellate Authority, while setting aside the Competent Authority’s order dated 23rd January 2015 ought to have remanded the matter to the Competent Authority for a fresh decision since the Appellant in its communication dated 10th March 2015 “has not specifically disputed the revised calculation sheet.”

11. Noting that no reply had been given by the Appellant to the SCNs, the learned Single Judge set aside the orders of the Appellate Authority including the one requiring the amount deposited by the Appellant to be refunded to it. The learned Single Judge directed the Competent Authority to

pass a fresh order under Sections 7-Q and 14-B of the EPF Act while returning a finding on the aspect of *mens rea*. The Competent Authority was asked to do so within a period of sixteen weeks after affording an opportunity to both sides and being uninfluenced by any observation in the order of the Appellate Authority or the earlier order dated 23rd January 2015 of the Competent Authority which had already been set aside. An opportunity was asked to be granted to the Appellant to reply to the SCN within a period of four weeks and thereafter to expeditiously proceed in accordance with law.

12. When the present appeal was listed herein on 7th December 2018 while directing notice to issue, this Court stayed the impugned order of the learned Single Judge and listed the appeal for hearing on 3rd April 2019. Thereafter, on an application filed by the PF Authority, the date was advanced.

13. Mr. Ranvir Singh and Mr. Rajiv Arora, learned counsel appearing for the Appellant submitted that since the SCNs issued by the Competent Authority were themselves time barred in terms of the said Circular dated 28th November 1990 of the PF Authority, no purpose would be served by remanding the matter to the Competent Authority for a fresh decision. It was submitted that the Appellate Authority had rightly set aside the order of the Competent Authority since the latter had returned no finding of *mens rea* which was a mandatory requirement of a determination in terms of Section 14-B read with 7-Q of the EPF Act. Reliance was placed on the decision in ***Assistant Provident Fund Commissioner, EPFO v. Management of RSL Textiles India Pvt. Ltd. (2017) 3 SCC 110.***

14. Ms. Inderjeet Sidhu, learned counsel appearing for the PF Authority, on the other hand, submitted that there was a clear admission by the Appellant of its liability in its initial response to the SCNs where it only contested the correctness of the amounts demanded under Sections 14-B and 7-Q of the EPF Act. She pointed out that before the Competent Authority the Appellant did not raise the plea of limitation on the basis of the Circular dated 28th November 1990. She submitted that in any event, in view of the decision of the Supreme Court in *Hindustan Times Ltd. v. Union of India* (*supra*), the plea of limitation could not be raised by the Appellant. She added that the Circular dated 28th November 1990 had never really been implemented by the PF Authority. She nevertheless agreed that the entire matter can be examined afresh by the Competent Authority including the aspect of limitation. She urged that the amount already deposited by the Appellant should not be asked to be refunded.

15. The above submissions have been considered. A perusal of the order dated 23rd January 2015 of the Competent Authority reveals that indeed there is no finding on the aspect of *mens rea*. This was undoubtedly an essential requirement as pointed out by the learned counsel for the Appellant. Also since no plea concerning limitation was raised by the Appellant at that stage, there was no occasion for the Competent Authority to examine whether the Circular dated 28th November 1990 issued by the PF Authority would apply or whether the decision in *Hindustan Times Ltd.* (*supra*), which incidentally does not discuss the said Circular, answers the said plea.

16. Before this Court, many of the essential facts that were necessary to be pleaded for the Court to arrive at any determination, were not discernible from the memorandum of appeal. For instance, there was no clarity as to the dates on which deposits were made by the Appellant towards PF dues, although it was claimed that the Appellant was “regular” in making such deposits. Also, it was not clear whether the Appellant made those deposits soon after deducting the employees’ contribution of the PF or later. These facts were essential not only for the purposes of determination of the question of *mens rea* but even as regards limitation which invariably is a mixed question of fact and law.

17. Consequently, the Court sees no reason to interfere with the impugned order of the learned Single Judge in so far as remitting the matter to the Competent Authority for a fresh determination is concerned. For that matter, even the direction in the impugned order that the Appellant must be given four weeks’ time to properly reply to the SCNs dated 22nd April 2014 and thereafter the Competent Authority should proceed afresh without being influenced either by its own earlier order dated 23rd January 2015 or of the order of the Appellate Authority does not call for any interference.

18. The Court would like to add that in making a fresh determination, the Competent Authority will also not be influenced by any observation of the learned Single Judge including the observation that the circular dated 28th November 1990 does not have the force of law. The Competent Authority will also not be influenced by the observations on the merits of the case by

this Court in the present order. In other words, all contentions of both parties are left open to be urged before the Competent Authority who will decide the matter afresh in the manner indicated.

19. The Court directs that the sum of Rs. 62,05,360/- deposited by the Appellant with the PF Authority shall be kept by the PF Authority in a fixed deposit with a nationalized bank initially for a period of six months and should be kept renewed during the pendency of the proceedings before the Competent Authority, who will issue appropriate directions in relation thereto at the time of final disposal of the SCNs.

20. The Appellant as well as the PF Authority are at liberty to place all the relevant facts and documents before the Competent Authority. The Appellant will file its reply to the SCNs dated 24th April 2014 not later than 1st March 2019. The Competent Authority will hear the parties and endeavor to render its decision not later than 30th June 2019.

21. The interim order passed by this Court stands vacated. The appeal and application are disposed of in the above terms.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

JANUARY 24, 2019

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