



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 15.10.2020

CORAM:

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

AND

THE HONOURABLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

W.A.[MD]No.1169 of 2011

and

M.P.(MD) No.1 of 2011

M/s.Anna Co-operative Spinning Mills Ltd.,

Andipatti - 625 512

Theni District.

Rep. By its Administrator.

: Petitioner / Appellant

Vs.

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

2) The Regional Provident Fund Commissioner - II,
EPF Organisation,
Regional Office,
Madurai 625 002

: Respondents/Respondents

PRAYER: Writ Appeal filed under Clause 15 of Letters Patent, against the order dated 06.09.2011 passed in W.P(MD)No.2703 of 2010 on the file of this Court.

Prayer in WP(MD). 2703/ 2010 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue a WRIT OF CERTIORARI, call for the records in the order passed by the 1st respondent herein in A.T.A.No. 480(13)/ 2009 dt. 27.01.2010 and quash the same.

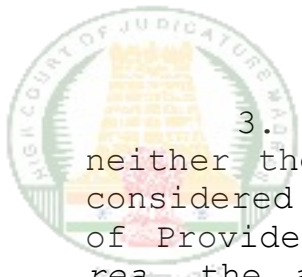
For Appellant	: Mr.M.Elanchezhian
For R-1	: No appearance
For R-2	: Mr.A.John Xavier

J U D G M E N T

[Delivered by **SENTHILKUMAR RAMAMOORTHY, J.**]

This Appeal is directed against the order dated 06.09.2011 in W.P.(MD) No.2703 of 2010.

2. We heard the learned counsel for the appellant and the learned counsel for the respondents.



3. The learned counsel for the appellant submitted that neither the Provident Fund Commissioner nor the Appellate Tribunal considered as to whether there was *mens rea* in the belated payment of Provident Fund dues. He submitted that in the absence of *mens rea*, the appellant should not have been directed to pay damages under Section 14(B) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred as the 'Act'). In support of his contention, he relied upon a Division Bench judgment of this Court in **R.D.34. Ariyakudi Primary Agricultural Co-operative Bank v. Employees' Provident Fund Appellate Tribunal** reported in 2020 LLR 229, wherein this Court surveyed various judgments of the Hon'ble Supreme Court and held as under:

"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



WEB COPY

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."

4. By relying upon the judgment of the Division Bench, the learned counsel submitted that the present case is squarely covered by the said judgment.

5. In response, the learned counsel for the Provident Fund Authority also submitted that the matter may be remanded to the Provident Fund Authorities for reconsideration with regard to the question of *mens rea*.

6. In light of the aforesaid submission, the impugned order of the learned single Judge and the orders impugned therein are set aside and the matter is remanded to the second respondent. The second respondent is directed to consider the issue of *mens rea* and, thereafter, determine as to whether the appellant is liable to pay damages as per Section 14(B) of the Act.

7. The second respondent / Provident Fund Authority shall provide a reasonable opportunity to the parties before deciding the matter within three months from the date of receipt of a copy of this order. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (P&A)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

Note :

In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

sts/krk

JUDGMENT MADE IN
W.A.[MD]No.1169 of 2011
15.10.2020

VR(CO)
KB(29.10.2020) 4P 1C