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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 09.07.2021

CORAM

THE HONOURABLE Mr. JUSTICE T. RAJA
AND
THE HONOURABLE Ms. JUSTICE P.T. ASHA

W.A.No.2435 of 2012

Sri Ramalinga Choodambikai Mills Ltd.,
B S Sundaram Road,
Tirupur 638 601
Rep by its Director

...Appellant/Petitioner

Vs.

1. Employees Provident Fund appellate Tribunal
(Ministry of Labour & Employment)
Government of India,
Scope Minor, Core II, 4th Floor,
Lakshmi Nagar District Centre, Lakshmi Nagar,
New Delhi 110 092.
2. The Assistant Provident Fund Commissioner,
Office of the Recovery Officer,
Employees' Provident Fund Organisation,
Bhavishya Nidhi Bhavan
Dr Balasundaram Road,
Coimbatore 641 018.
3. The Regional Provident Fund Commissioner,
Employees' Provident Fund Organisation
Bhavishya Nidhi Bhavan
Dr Balasundaram Road,
Coimbatore 641 018.

...Respondents

Writ Appeal filed under Clause 15 of the Letters Patent
against the Order passed in W.P.No.16838 of 2010 dated
21.06.2011.

Prayer in W.P.No.16838 of 2010:-

Filed under Article 226 of the Constitution of India to
call for the records of the 1st respondent by its order dated



10.07.2009 in A.T.A.740(13) 2003 and the consequential recovery order of the 2nd respondent dated 07.04.2010, in proceedings No.TN/CBE/RO/Recovery/47/2010, and the quash the same.

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For Appellant : Mr.Anand Gopalan for
M/s.T.S.Gopalan & Co

For Respondents : Ms.R.Meenakshi, (for R2 and R3)

R1 : Tribunal

JUDGMENT
(Delivered by P.T.Asha,J.)

This intra court appeal is filed challenging the order of the learned single Judge dismissing W.P.No.16838 of 2010 and a batch of Writ petitions.

2. It is necessary to briefly allude to the facts which has culminated in the filing of the above Writ Appeal. The Appellant had filed the above referred Writ petition seeking to quash the order, dated 10.07.2009 in ATA 740 (13) 2003 and the consequential recovery Order of the 2nd Respondent, dated 07.04.2010 in PRO.No. TN/CBE/RO/RECOVERY/47/2010.

3. The case of the Appellant was that in the year 1995, the Mill has closed down and their Workmen had moved out of the services of the Appellant. Nearly, 8 years later, the 2nd Respondent issued a notice, dated 05.03.2003 to the petitioner claiming damages under Section 14 B of the Employees Provident Fund Act, hereinafter called the Act in respect of the belated payments of the contributions for the period December 1982 to February 1993 to the tune of a sum of Rs.26,56,188/-. No reasons were given for the demand. There was also no determination as contemplated under Section 7 A of the Act. On 30.06.2003, the petitioner had sent a reply giving the reasons for the delay which were as follows:

- a. Overall crisis in the textile industry;
 - b. Lack of financial resources;
 - c. The Workmen have already received the dues and the Mill had stopped functioning long ago;
 - d. There was no wilful default on the part of the Appellant.
- The 2nd Respondent issued a notice dated 25.07.2003 asking the Appellant to be present for enquiry under Section 7 A of the Act at 11 am at Coimbatore on 07.08.2003. The Official of the



Appellant company had made arrangements to travel. However, just before the date of travel, he fell sick and therefore, he had sent a telegram seeking postponement of the enquiry. However, disregarding the genuine request, the 2nd Respondent, had proceeded to pass orders on 12.08.2003 and held the petitioner liable to pay damages to the tune of Rs.26,56,188/-.

4. On 28.08.2003, the petitioner had filed an application to set aside this exparte order as per the terms of Section 7 A (4) of the Act. It is the contention of the Appellant that the said petition was rejected by the 2nd Respondent stating that for damages under Section 14 B of the Act, there was no scope for reopening the enquiry.

5. The Appellant therefore filed ATA 740 (13) 2003 before the 1st Respondent. By an order dated 10.07.2009, the 1st Respondent had reversed the order of the 2nd Respondent and had restricted the damages to the tune of 10 % per annum of the arrears of contribution. The Tribunal had based its decision on the Judgment of the Orissa High Court reported in 1998 (2) LLJ 1044 in passing such orders.

6. The Appellant who was under the genuine impression that the Tribunal had reduced the arrears to 10 % of the demand made by the 2nd Respondent had accordingly remitted the equivalent amount under cover of their letter dated 29.10.2009. However, on 10.02.2010, the petitioner had received a letter from the 2nd Respondent asking them to pay the correct amount. This was immediately followed by the demand dated 07.04.2010 of the 2nd Respondent in his capacity as Recovery Officer directing the Appellant to remit a sum of Rs.9,47,871/-. The Appellant was advised that the review of the Tribunal's order cannot be made at this juncture and therefore the petitioner had come forward with the Writ Petition which is the subject matter of challenge in this appeal.

7. The 2nd Respondent had filed a counter in the above referred Writ Petition inter alia contending that the Appellant had not given any reasons whatsoever for their failure to attend the hearing on 07.08.2003. Further, as against the order of the 2nd Respondent dated 12.08.2003, the Appellant had filed W.P.No.1771 of 2004. The writ petition was filed since the appeal could not be taken up before the Tribunal for want of a Presiding Officer. This Court by an order dated 04.04.2004, was pleased to direct the petitioner to deposit a sum of Rs.12 lakhs within a period of eight weeks. This order was taken up on challenge by the Appellant in W.A.No.986 of 2006 and the Bench was pleased to confirm the order passed by the learned single Judge by their order dated 05.09.2006. However, though such an order was passed and confirmed by the Bench of this Court, the



Appellant has not made any payment till date. The 2nd Respondent has also challenged the order of the 1st Respondent dated 10.07.2009 in W.P.No.21135 of 2010

reducing the rate of contribution to 10%. The Respondent would further submit that though the employer, namely the Appellant, had deposited his share of the contributions belatedly, the Respondent had credited interest to the employees of the Appellant and settled their Provident Fund dues. It is this interest that is sought to be recouped by way of damages from the Appellant. The Respondent would also contend that the statutory provision for levying interest under Section 7Q of the Act was notified only with effect from 01.08.1988. However, in the instant case, the period of default is from December 1982 to February 1994 and damages under Section 14 B of the Act is being levied for this period. The damages, as per the order of the 1st Respondent works out to a sum of Rs.12,13,490/-. Therefore, the Respondent sought to have the Writ Petition dismissed.

8. This Writ Petition was heard along with a batch of similar Writ Petitions. The learned single Judge by his common order dated 21.06.2011, has dismissed the Writ Petitions filed by both the employers as well as the department. The learned single Judge had passed the order holding as follows:

a. the nature of power vested on the authority under Section 14 B of the Act for levying damages and the scope for levying such damages was elaborately considered in the Judgment of the Hon'ble Supreme Court reported in 1998 (2) SCC 242 in M/s.Hindustan Times Limited Vs Union of India & ors. The learned Judge has relied upon the paragraphs 15 and 17 of the said Judgment and held that prejudice being caused to the employer or the question of delay, would not come to the rescue of the erring employer.

b. the employer who had defaulted in making over the contribution to the trust fund had use of the monies which did not belong to them at all and therefore, the decision for levying the damages under Section 14 B of the Act stands on a different footing;

c. the Judgment in Hindustan Times case cited supra was quoted with approval in a subsequent Judgment reported in 2001 4 SCC 449 in K.Streetlite Electric Corporation Vs. RPF, Commissioner, Haryana.

9. Mr.Anand Gopalan, learned counsel appearing on behalf of the Appellant would make the following submissions:

i. That the Appellant was not given a hearing before the



order was passed by the 2nd Respondent despite their request for an adjournment of the hearing on 07.08.2003;

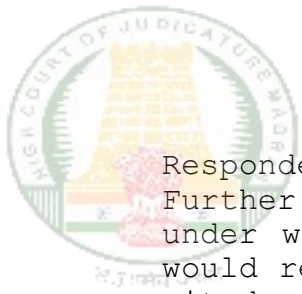
ii. That the Respondent were not able to establish mens rea / Actus reus on the part of the Appellant and in the absence of the same, the action under Section 14 B of the Act was totally unsustainable.

iii. That mens rea should be considered only on the date of issue of 14 B notice for damages. In support of this argument, the counsel would rely upon the Judgment of the Hon'ble Supreme Court reported in 2017 (3) SCC 110 in Assistant Provident Fund Commissioner, EPFO and anr. Vrs. The Management of RSL Textiles India Pvt. Ltd through its Director wherein the Hon'ble Supreme Court had upheld the Judgment passed by the Division Bench of this Court in W.A.Nos.1639 & 1640 of 2011, dated 13.11.2013 holding that an absence of a finding regarding mens rea on the part of the employer would render an action taken under Section 14 B of the Act, unsustainable.

10. Per contra, Ms.Meenakshi, learned counsel appearing on behalf of the department would submit that the conduct of the Appellant right through has been to avoid paying damages. The 2nd Respondent had also commented about the casual approach adopted by the Appellant in his order. The Appellant had not attended the hearing on 07.08.2003 and had also not sought for a postponement giving reasons. No document is filed in support of this. The notice of the enquiry was issued to the Appellant well in advance vide the notice of the 2nd Respondent, dated 25.07.2003 which was received by the Appellant on 29.07.2003 itself.

11. She would further submit that though the Appellant had deducted the contributions of the employees, they had failed to deposit them on time. Since the payments were not made in time, the Respondent had to pay interest on the EPF dues to the employees of the Appellant company and the same had also been calculated and paid to the employees. Therefore, damages were being levied only to offset the loss sustained by the department in settling the Provident Fund dues to the employees with interest. She would also argue that the department has also challenged the order of the learned single judge.

12. She would further question the order passed by the 1st Respondent as not being in conformity with the scheme of the Act. In para 32 A of the Scheme of the Act, schedule of the rate of damages for the respective periods of delay is provided for. In the case of the Appellant, the damages ought to have been calculated at the rate of 25 % of the arrears per annum, as the delay was beyond the period of six months. However, the 1st



Respondent had calculated it at the rate of 10 % per annum. Further Para 32 B of the Act would specify the contingencies under which there can be a waiver of payments of damages. She would rely on the Judgment of the Hindustan Times which has been cited supra. As regards the mens rea, it is her contention that the very conduct of the Appellant would clearly demonstrate the intention of the Appellant to wriggle out of its mandatory obligation. In fact, the 2nd Respondent has in the order commented on the cavalier approach of the Appellant. In their response, dated 30.06.2003, the Appellant had stated that they were unable to trace the records to verify the claim of the department. Such a response was totally baseless since the department had already supplied the statement showing the due date and date of deposit and the number of days delay, the request for adjournments, was nothing but an attempt to buy time. Further, the Appellants have themselves admitted to the delayed remittance. The dues were for the period 1982 - 1993 when the Mill was functioning.

13. Heard the counsels and perused the records.

14. The admitted facts in the instant case are that,

a. the employees of the Appellant company have contributed their share of the Employees Provident Fund as the accounts of the Appellant Company shows that the said sum was deducted from their respective salaries by the Employer, namely, the Appellant herein.

b. Such deposits have not been credited to the EPF accounts of the various employees by the Appellant company.

c. That the department has settled the EPF amount of the employees of the Appellant company with interest, though payments have not been made by the Appellant.

d. That the Appellant has totally deposited a sum of Rs.7 lakhs and odd towards the amounts due as per the impugned order and the consequential recovery order.

e. That the Appellant had initially complied with the order of the 1st Respondent by misconstruing the same and depositing a lower amount. After the 2nd Respondent had demanded payment as directed in the 1st Respondent's Order, the Appellant has challenged the order.

15. The Appellant would rest their case upon the arguments that since the department was unable to establish the existence of mens rea / actus reus, the proceedings under Section 14 B of the Act was not maintainable. In support of the above argument,



16. Considering the fact that the argument of the appellant is primarily based upon the fact that the department is unable to establish

17. The Bench had formulated the following two questions for consideration:-

ii. Whether Section 10 (1) of FERA, 1947 is not an independent provision making its contravention by itself punishable under Section 23(1) (a) of the FERA? or whether its contravention can arise only if there is some object of some direction issued by the Reserve Bank of India under Section 10 (2) of the FERA, 1947?

"7. "Mens-rea" is a state of mind. Under criminal law, mens-rea is considered as the "guilty intention" and unless it is found that the "accused" had the guilty intention to commit the "crime" he cannot be held "guilty" of committing the crime. An "offence" under Criminal procedure Code and the General clauses Act, 1897 is defined as any act or omission "made



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punishable by any law for the time being in force". The proceedings under Section 23(1)(a) of FERA, 1947 are "adjudicatory" in nature and character and are not "criminal proceedings". The officers of the Enforcement Directorate and other administrative authorities are expressly empowered by the Act to "adjudicate" only. Indeed they have to act "judicially" and follow the rules of natural justice to the extent applicable but, they are not 'Judges' of the "Criminal Courts" trying an 'accused' for commission of an offence, as understood in the general context. They perform quasi-judicial functions and do not act as 'Courts' but only as 'administrators' and 'adjudicators'. In the proceedings before them, they do not try 'an accused' for commission of "any crime" (not merely an offence) but determine the liability of the contravenor for the breach of his 'obligations' imposed under the Act. They impose 'penalty' for the breach of the "civil obligations" laid down under the Act and not impose any 'sentence' for the commission of an offence. The expression 'penalty' is a word of wide significance. Sometime, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a 'penalty'. When penalty is imposed by an adjudicating officer, it is done so in "adjudicatory proceedings" and not by way of fine as a result of 'prosecution' of an 'accused' for commission of an 'offence' in a criminal Court. Therefore, merely because 'penalty' clause exists in Section 23 (1)(a), the nature of the proceedings under that Section is not changed from 'adjudicatory' to 'criminal' prosecution. An order made by an adjudicating authority under the Act is not that of conviction but of determination of the breach of the civil obligation by the offender.

8. It is thus the breach of a "civil obligation" which attracts 'penalty' under Section 23(1)(a) FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10 FERA, 1947 that would immediately attract the levy of 'penalty' under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the 'prosecution' to establish that the 'accused' had the necessary guilty intention or in other words the requisite "mens-rea" to commit the alleged offence with which he is charged before recording his



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conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947. It is the delinquency of the defaulter itself which establishes his 'blameworthy' conduct, attracting the provisions of Section 23(1)(a) of FERA, 1947 without any further proof of the existence of "mens-rea". "

19. Ultimately, the bench had answered the 1st question as follows:- "blameworthy conduct" in the adjudicatory proceedings is established by proof only of the breach of a civil obligation under the Act, for which the defaulter is obliged to make amends by payment of the penalty imposed under section 23 (1) (a) of the Act irrespective of the fact whether he committed the breach with or without any guilty intention." The Bench held that the existence of "mens rea" as contemplated in criminal jurisprudence is not a necessary ingredient, in an adjudicatory process. The Bench had succinctly brought out the distinction in respect of civil obligation attracting penalty and a criminal case where the establishment of mens rea is a sine qua non for holding the accused guilty.

20. In the Judgment of RSL Industries Ltd. that the counsel for the appellant had relied upon, the Hon'ble Supreme Court held that an earlier Judgment of the Supreme Court in Mcleod Russel India Ltd Vs Regional Provident Fund Commissioner, Jalpaiguri - AIR 2014 SC 2573 where the issue of mens reas has been wholly covered would apply to the case. However, a reading of McLeod Russel's case would show that the issue placed for the consideration of the Bench was whether a Transferee Company could be mulcted with Section 14B damages for the period prior to the transfer. The learned Judges drew aid from an earlier Judgment reported in AIR 1979 SC 1803 = 1979 (4) SCC 573 - Organo Chemical Industries and Anr. Vs. Union of India & Ors to observe as follows in para 9 and 10 of the said Judgments:

" 9. The expression 'damages' is neither vague nor over-wide. Its precise import in a given context is not difficult to discern. A plurality of variants stemming out of a core concept is seen in such words as actual damages, civil damages, compensatory damages, consequential damages, contingent damages, continuing damages, double damages, excessive damages, exemplary damages, general damages, irreparable damages, pecuniary damages,



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prospective damages, special damages, speculative damages, substantial damages, unliquidated damages. But the essentials are (a) detriment to one by the wrong doing of another, (b) reparation awarded to the injured through legal remedies and (c) its quantum being determined by the dual components of pecuniary compensation for the loss suffered and often not always a punitive addition as a deterrent-cum-denunciation by the law. [74 B-D]

10. 'Exemplary damages' are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud or wanton and wicked conduct on the part of the defendant and are intended to solace the plaintiff for mental anguish laceration of his feelings, shame, degradation or other aggravations of the original wrong, or else to punish the defendant for his evil behaviour or to make an example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages, and (vulgarly) "smart-money". [74E-F]"

21. The learned Judges have placed emphasis on the fact that any interpretation of the provisions of a beneficial legislation which would facilitate the evasion of its provisions should be renounced. The Bench had also taken note of the fact that failure of the employer to make remittance of accumulations and contributions would undermine the very object and purpose of this beneficial legislation. The learned Judges had indeed underscored the liability of the Fund to pay interest to the subscribers regardless of whether the Employers pay their dues.

22. The Hon'ble Supreme Court in the Judgment in MCTM Corporation has drawn a fine distinction between the existence of mens rea in a criminal proceeding and an adjudicatory proceedings under criminal law. The existence of mens rea is prerequisite for convicting this guilty. In cases where administering authorities impose penalty for breach of civil obligation, they are not imposing a sentence for committing of an offence. This administrative authorities are performing a quasi judicial function and the penalty imposed by them in done so in "adjudicatory proceedings". Therefore, it would suffice if the Adjudicatory Authority is able to establish a blameworthy conduct. The Bench observed that "mens rea" was not an essential ingredient for holding a delinquent liable to pay penalty under the provisions of FERA, 1947 and that penalty would stand attracted as soon as a contravention of a statutory



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obligation is established. The Employees Provident Fund Act also contemplates levy of penalty for contraventions of some of its provisions, the instant case being a case of delay in paying the contributions. The authorities under this Act also perform the role of an adjudicating authority. Therefore, applying the ratio of this Judgment mens rea in the strict sense as in a criminal proceedings need not be established and it would be enough if the Adjudicating Authority shows a blame worthy conduct. The Judgment reported in 2017 (3) SCC 110 supra does not contain a detailed discussion as the Bench has only followed the Judgment in McLeod's case (AIR 2014 SC 2573). The ratio laid down in the case of McLeod Russel has been dealt with in para 20 and 21 supra. Any other factor to be noted is that the Judgment of MCTM has not been brought to the notice of the learned Judges, both in McLeod Russel as well as RSL Industries Ltd.

23. The facts of the case in hand should now be examined in the light of the Judgment in MCTM supra and McLeod supra. A perusal of the letter dated 30.06.2003 issued by the Appellant in response to the demand for payment of the damages clearly demonstrates that the contribution of employees are deducted. The Appellant would however contend that it is only in their accounts that the deductions from the employees is shown. In their letter dated 30.06.2003 to the demand notice dated 05.03.2003, the Appellant has made the following statement:- "On record, it is shown that PF contributions were deducted, but the fact was no real deduction was made". This statement if taken at its face value would only mean that the Appellant is in the habit of manipulating their accounts.

24. The Appellant who was intimated well in advance about the date of enquiry had neither participated in the hearing nor had they submitted any document to show the proof that a request for adjournment was sought for and declined. This once again indicates their conduct to buy time.

25. The period for which the damage is levied is for the period December 1982 to February 1993 and the Mill had closed down only in the year 1995. Further, despite orders of this Court directing the Appellant to deposit a sum of Rs.12 lakhs within a determined period, the same had not been complied with even till the date of passing of the order by the 1st respondent and thereafter. It was informed that thereafter the Appellant had deposited over a sum of Rs.7 lakhs. Another factor which has to be taken note of is that the Appellant accepting the order of the 1st Respondent had remitted a sum of Rs.2,65,619/-. Though in their letter, dated 29.10.2009 enclosing the demand Draft, the Appellant had stated that they would file a review with the 1st Respondent for a total waiver, but the same has not



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been filed. The Appellant had calculated the 10 % on the damages levied and not on the arrears of contribution. On 10.02.2010, the 2nd respondent had demanded the balance payment as per the order and only then the Writ Petition impugned in this appeal has been filed.

26. Therefore, for the above narration, the conduct of the Appellant is that of a "recalcitrant employer" as observed in Mcleods case supra and "a blameworthy conduct" as observed in MCTM supra. The Appellant having committed a breach of its obligations under the Act has been mulcted with the damages as provided under Section 14 B of the Act and the same has been further reduced by the 1st Respondent.

27. The learned Single Judge has placed reliance of the Judgment in Hindustan Private Ltd - 1998 (2) SCC 242 to uphold the order of the 1st Respondent and consequently dismissed the Writ Petition. We do not find any grounds to interfere with the order in W.P.No.16838 of 2010. Accordingly, the Writ Appeal fails and is dismissed. No costs.

Sd/-
Assistant Registrar (CS)

// True Copy//

Sub Assistant Registrar

vum

To

1. Employees Provident Fund appellate Tribunal
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Government of India,
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+1cc to M/S. T.S.Gopalan, Advocate, S.R.No.32388
+1cc to M/S. R.Meenakshi, Advocate, S.R.No.32456

W.A.No.2435 of 2012

PVS (CO)
SU(13/08/2021)