BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.03.2021

CORAM:
THE HONOURABLE MR.JUSTICE M.DHANDAPANI

W.P.(MD)No.649 of 2011
and
M.P.(MD)Nos.2 and 3 of 2011

A2731, The National Co-operative Sugar Mills Ltd.,
B.Mettupatti - 625 502,
Vadipatty Taluk, Madurai District
Tamil nadu State
Through its Special Officer ...Petitioner

versus

1.The Presiding Officer,
Employees Provident Fund Appellate Tribunal,
Scope Minar, Core-II-4th Floor,
Lakshmi Nagar District Centre,
Lakzhmi Nagar, New Delhi - 110 092 (East Delhi)
2.The Assistant Provident Fund Commissioner,
Employees Provident Fund Organization,
Regional Office, Lady Doak College Road,
Madurai - 625 002.
3.The Recovery Officer,
Employees' Provident Fund Organization,
Regional Office, Lady Doak College Road,
Madurai - 625 002.
4.The Branch Manager,
State Bank of India - Main Branch,
Madurai.
5.The Branch Manager,
Madurai District Central Co-operative Bank Ltd.,
Main Branch - H.O., Madurai ...Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of Writ of Certiorarified Mandamus to call for the records from the file of the 1st respondent herein and to quash the order dated 28.12.2010 passed by the 1st respondent in A.T.A.No.1005(13)2005 and consequently, direct the 3rd respondent to repay the collected amount of Rs.6,66,000/- from the petitioner.

For Petitioner :Mr.C.Karthikeyan
for M/s.P.Chandrabose
For Respondents :Mr.K.Muralisankar for R2 and R3
Mr.Ananth C.Rajesh for R4
Mr.D.Shanmugaraja Sethupathi for R5

ORDER

This writ petition has been filed by the petitioner seeking for the issuance of Writ of Certiorarified Mandamus to call for the records relating to the order dated 28.12.2010 passed by the 1st respondent in A.T.A.No.1005(13)2005 and quash the same and consequently, direct the 3rd respondent to repay the collected amount of Rs.6,66,000/- from the petitioner.

2. The case of the petitioner is that the petitioner Mill is a Co-operative Sugar Mill. The cane growers, who have supplied came to the Mill, were small farmers. The crushing capacity of the Mill is 2500 Tones of cane per day. The mill need 4.30 lakhs M.T. cane per crushing season for its full capacity utilization. In the past years, the crushing capacity of the mill has not been utilized to the full extent due to (i) the lack of rainfall (ii) the arrival of new establishments (iii) drought condition, (iv) formation of ring road and (v) real estate business, etc. and thereby, the petitioner sugar mill faced financial crisis. Therefore, the petitioner Mill moved the Government to sanction advance of Rs.15 Crores to run the mill or to suspend 2002-2003 crushing season temporarily and sought permission to suspend the business. The Government of Tamilnadu, by its G.O.(2D)No.15, Industries (MICI) dated 26.05.2003, permitted to suspend the crushing season of the sugar mill for the year 2002-2003, based on that, the petitioner mill applied for permission for lay off. The Government of Tamil Nadu, by its G.O.(D)No.633, Labour and Employment Department, dated 28.06.2003 permitted the Mill to lay off the petitioner's employees subject to the payment of lay off compensation to be paid to the workers. Challenging the same, the petitioner Mills' staff union filed a writ petition in W.P.No.19758 of 2003 and this Court, vide its order dated 12.08.2003, directed the State Government to make a reference before the Industrial Tribunal, Chennai. The Tribunal, by its order dated 28.06.2006, justified the layoff for the period from 29.06.2003 to 17.07.2005. However, the petitioner Mill paid 50% of wages as lay off compensation prior to the award passed by the Tribunal and remitted the EPF contribution for the compensation paid to the workers. While so, the second respondent, by his order dated 27.10.2005, passed an order, under Section 14B of the EPF Act, 1952, claiming damages for the period from March 2003 to February 2004 for an alleged belated remittance of contributions for the layoff compensation paid to the employees. Aggrieved over the same, the petitioner Mill preferred an appeal before the 1st respondent in A.T.A.No.1005(13)/2005 under Section 7-I of the EPF Act 1952, which was dismissed, by its order dated 28.12.2010. Thereafter, the 3rd respondent issued notice dated 11.01.2011 to the 4th and 5th respondents for freezing of the Bank of Accounts of the petitioner. Challenging the order of the first respondent, the present writ petition has been filed.

3. The learned counsel appearing for the petitioner submits that due to the lack of rainfall and the arrival of new establishments, there was a short fall in the production of sugar cane, as a result of which, the petitioner Sugar Mill faced financial crisis. Therefore, the petitioner Mill obtained permission to suspend the crushing season for the year 2002-2003 and layoff their employees. They also paid layoff compensation to their employees and remitted the EPF contribution. Therefore, there was no willful negligence on the part of the petitioner Mill in paying the contribution belatedly. Further, a layoff compensation paid to the employees cannot be treated as wages under Section 2(b) of the EPF Act. Hence, the order of levying damages was passed by the second respondent under Section 14B of the EPF Act, which is unsustainable in law. The appellate Tribunal also, without considering the said facts, dismissed the appeal, which is non-est in law.

4. The learned counsel for the petitioner further submits that it is not mandatory on the part of the authority to impose damages in each and every cases. The authority has to consider the prevailing situation for non-payment of contribution at the relevant point of time. Only if the authority comes to the definite conclusion, on the basis of materials, that there is no *mens rea*, then only, damages can be imposed. Attention of this Court was drawn to the decision of the First Bench of this Court in ***R.D.34 Ariyakudi Primary Agricultural Co-operative Bank vs. Employees' Provident Fund Appellate Tribunal, New Delhi & Ors.*** and, therefore, submitted that similar order be passed in the present case as well.

5. On the above contention, this Court heard the learned counsel appearing for the respondents and perused the materials as also the decisions relied to by the learned counsel for the petitioner.

6. Similar issue fell for consideration before the First Bench of this Court in ***R.D.34 Ariyakudi Primary Agricultural Co-operative Bank vs. Employees' Provident Fund Appellate Tribunal, New Delhi & Ors.*** A perusal of the facts of the said case reveal that in the said case, the company failed to remit the PF dues in time and being not satisfied with the explanation given by the Company to the show-cause notice issued in the proceedings u/s 14-B of the Act, order levying damages was passed, which was challenged before the Appellate Tribunal, which was dismissed against which challenge was made before this Court. The First Bench, after referring to the decisions of the Hon'ble Supreme Court, remitted the matter to the authorities for consideration of the issue on the question of *mens rea* before levying damages. The relevant portion of the said order reads as follows:

> *"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 MANU/SC/0561/2014 : (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., MANU/SC/0488/2008 : (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 this 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 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*

interest 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 judgemnt 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 MANU/SC/0028/2017 : (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."

7. A perusal of the facts in the present case is identical to the facts as were placed before the First Bench of this Court in the decision supra. In such circumstances, this Court is of the considered view that an order, in identical terms, remitting the matter back to the concerned authority, requires to be passed in this case as well to decide on the question of *mens* rea.

8. In the aforesaid circumstances, following the ratio laid down in the decision supra, the orders passed by the authorities below are set aside and the writ petition is allowed by remitting the matter back to the second respondent to consider the issue of *mens rea* before levying the damages and pass appropriate orders after giving an opportunity of personal hearing to the concerned parties. The said exercise shall be completed within a period of six months from the date of receipt of a copy of this orders. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (W)

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/ /2021

Sub Assistant Registrar(CS)

To:

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+1 CC to M/s.K.MURALISANKAR, Advocate (SR-14174[F] dated 29/03/2021)

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25.03.2021

RP (17.05.2021) P 7C