BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 25.03.2021
CORAM:
THE HONOURABLE MR.JUSTICE **M.DHANDAPANI**

W.P.(MD)No.665 of 2011
and
M.P.(MD)No.1 of 2011

Sathani Primary Agricultural
Co-operative Bank,
Rep. by its Secretary,
Sathani,
Ilayankudi,
Sivagangai District. ... Petitioner

versus

1. The Assistant Provident Fund Commissioner,
Employees Provident Fund Organization,
Chinnachokkikulam,
Madurai - 625 002.

2. The Enforcement Officer,
Employees Provident Fund Organization,
Chinnachokkikulam,
Madurai - 625 002. ...Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of Writ of Certiorari to call for the records relating to the order passed by the first respondent in No.TN/RO/MDU/37544/RO/CIRCLE 5/PDC/LD/2008 dated 16.09.2008 and the consequent order of the second respondent, in M8/TN/MDU/37544/RECY/RO/2010 dated 12.11.2010 and quash the same.

For Petitioner : Mr.V.O.S.Kalaiselvam
For Respondents : Mr.V.S.V.Venkateshwaran, Standing Counsel

ORDER

This writ petition has been filed by the petitioner seeking for the issuance of Writ of Certiorari to call for the records relating to the order passed by the first respondent dated 16.09.2008 and the consequent order of the second respondent dated 12.11.2010 and quash the same.

2. The case of the petitioner is that the petitioner Bank is a Co-operative Institution registered under the Tamil Nadu Co-operative Societies Act and Rules made thereunder. The petitioner Bank is issuing agricultural loans to Agriculturists for their economic upliftment. To serve the purpose, seven employees are

working in the Bank including Salesman of fair price shop. Initially, there were 12 employees and now there are only seven employees including salesman in the fair price shops working in the society. The Management, by resolution, covered the employees under the Employees Provident Fund and Miscellaneous Provisions Act and contributions were regularly paid without any default.

3. It is the further case of the petitioner that due to huge loss suffered by the Bank, the Bank almost became defunct and no business transactions took place in the Bank and employees were not paid salary from 01.04.2003 to 31.03.2007. Thereafter, as per the Vaithianathan Committee Report, the NABARD has allotted funds and only thereafter, the wages were paid to the employees. Contributions were deducted from their wages and were remitted. However, the first respondent has passed the order dated 16.09.2008 under Section 14-B of the EPF Act, alleging delay in payment of contribution for the period from March 2002 to Feb 2005, after adjusting payment already effect and directed the petitioner to pay damages amounting to Rs.3,30,970/-. In pursuance to the same, Recovery Officer issued prohibitory order dated 12.11.2010 attaching the immovable properties of the petitioner. Challenging the same, the present writ petition has been filed.

4. The learned counsel appearing for the petitioner submits that crucial point that requires consideration is whether there is any *mens rea* for non-payment of contribution at the relevant point of time. In the present case, the petitioner Bank suffered huge loss which disabled them even to pay wages to their employees and only after allotment of funds from NABARD, wages were paid to the employees at which point of time, the employee contribution was deducted and deposited. 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. Only if the authority comes to the definite conclusion, on the basis of materials, that there is no *mens rea*, only then can damages be imposed. However, without rendering a said finding, the first respondent has mechanically passed the order dated 16.09.2008 under Section 14-B of the EPF Act and the subsequent prohibitory order dated 12.11.2010 was also passed by attaching the immovable properties of the petitioner, which are unsustainable in law. 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 standing 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:*
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> > *"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 impugned order passed by the first respondent dated 16.09.2008 and the consequential order of the Recovery Officer dated 12.11.2010 are set aside and the writ petition is allowed by remitting the matter back to the respondents 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 petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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TO,

1. The Assistant Provident Fund Commissioner,
   Employees Provident Fund Organization,
   Chinnachokkikulam,
   Madurai - 625 002.
2. The Enforcement Officer,
   Employees Provident Fund Organization,
   Chinnachokkikulam,
   Madurai - 625 002.

+1 CC to M/s.V.O.S.KALAISELVAM, Advocate (SR-13803[F] dated 26/03/2021)

W.P.(MD)No.665 of 2011

25.03.2021

GS (28.04.2021) 5P 4C