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

W.P.(MD)No.7142 of 2011
and
M.P.(MD)No.1 of 2011

Viswabharathi Textiles (P) Ltd.,
Rep. by its Managing Director,
Mr.R.Subramaniam,
Vadamadurai,
Dindigul,
Dindigul District. ... Petitioner

versus

1. The Presiding Officer,
Employees' Provident Appellate Tribunal,
Scope Minor, Core-II-4th Floor,
Lakshmi Nagar,
New Delhi - 110 092.

2. The Assistant Provident Fund Commissioner,
Employees' Provident Fund Organization,
Regional Office,
Lady Doak College Road, Chokkikulam,
Madurai - 625 002.

3. The Recovery Officer,
Employees Provident Fund Organization,
Regional office, Madurai - 2. ...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 from the file of the 1st respondent herein in No.ATA 29 (13)/2006 and to quash the order dated 18.05.2011 passed therein in relating to damages and interest.

For Petitioner	:	Mr.C.Karthikeyan, for M/s.P.Chandrabose
For Respondents	:	Mr.K.Muralishankar 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 18.05.2011 and quash the same.

2. The case of the petitioner is that the petitioner Mill is a Textile Mill. From the year 1999 onwards, the Textiles Industries in India are facing severe crisis. Due to the drought prevailed in Tamil Nadu and other parts of the India, the domestic market was also not favourable for the intake. Apart from that, the petitioner Mill faced Labour unrest during the period from August 2000 to February 2003. In spite of taking steps to solve the labour problems, the workers had not co-operated with the petitioner, which resulted in low production and machine fault. Further, the machineries were not fully utilized from the month of August 2000 to December 2002 and due to fault of one machinery, the machineries were not operated. Further, due to the disconnection of electricity, the mill was not fully functioned. These facts affected the Mill in remitting the EPF contribution in time. Further, the Mill was not able to pay the salary to the workers at a right time and paid the wages on installment basis. For the delayed remittance of contribution, the second respondent, on 26.04.2005, issued a notice for damages and interest for the bleated remittance. Thereafter, the second respondent, without giving an opportunity of personal hearing, passed an order dated 27.10.2005 imposing damages to the tune of Rs.78,21,782/- and interest to the tune of Rs.25,66,144/-. Challenging the said order, the petitioner Mill filed an appeal in A.T.A.No.29(13)/2006 before the first respondent, which was also dismissed, vide order dated 18.05.2011. Aggrieved over the same, the present writ petition has been filed.

3. 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 Mill suffered huge loss which disabled them even to pay salary to their employees in time and therefore, there was a delay in remitting the EPF amount. 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*, only then damages can be imposed. However, without rendering a said finding, the second respondent has mechanically passed the order dated 27.10.2005 under Sections 14-B and 7-Q of the EPF Act, levying damages and interest, which are 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 *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:*
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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 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 petition is closed.

Sd/-

Assistant Registrar (CSII)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

To

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