BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE **M.DHANDAPANI**

W.P.(MD)No.7551 of 2011

and

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

A-2190 Jamputhurai Kottai Primary
Agricultural Co-operative Bank,
Rep. by its Special Officer,
Jamputhurai Kottai, Kodai Road,
Nilakottai Taluk,
Dindigul District. ... Petitioner

versus

The Recovery Officer,
The Employees Provident Fund
Organization,
Sub Regional Office,
Lady Doak College Road,
Madurai – 2. ...Respondent

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 attachment order passed by the respondent made in M1/TN/MDU/24321/RECY/RO/11, dated 15.06.2011 and quash the same.

For Petitioner : Mr.R.Saravanan

For Respondents : Mr.K.Muralisankar
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 attachment order passed by the respondent made in M1/TN/MDU/24321/RECY/RO/11, dated 15.06.2011 and quash the same.

2. The case of the petitioner is that the petitioner Bank is a Co-operative Institution and constituted under the Tamil Nadu Co-operative Societies Act 1983. According to the petitioner, they have remitted the Employees Provident Fund contribution to the respondent regularly till 2011. Thereafter, due to the scarcity of water, unseasoned rains, the members of the petitioner Bank, who borrowed agricultural loan for agricultural

purpose, have not remitted the loan amount as well as interest. Therefore, the petitioner Bank was also not in a position to pay the salary to its employees from the year 2001 to 2006. But, it was paid belatedly with interest. However, the respondent, vide his order dated 14.03.2011, passed an order, levying damages of Rs.2,37,315/- for the period from 8/2003 to 10/2006. Aggrieved over the same, the petitioner filed an appeal before the Employees' Provident Fund Appellate Tribunal at New Delhi and the same was informed to the respondent. While so, the respondent, vide its order dated 15.06.2011, issued a demand notice for attachment of movable goods for attachment of movable goods under Section 85B to 85G of the Act for non remittance of 14 B damages of Rs.2,34,315/-. Challenging the same, the present writ petition has been filed.

4. The learned counsel appearing for the petitioner submits that due to the scarcity of water, unseasoned rains, the members of the petitioner Bank, who borrowed agricultural loan for agricultural purpose, have not remitted the loan amount as well as interest and therefore, the petitioner Bank had not paid the PF contribution in time, however, it was paid belatedly with interest. The respondent, before passing the impugned order, ought to have considered as to whether there is any *mens rea* or not. Without considering the said aspect, the respondent mechanically passed the order of levying damages. More over, when the appeal as against the order of levying damages is pending, the order of attachment passed by the respondent, which is totally unsustainable in law and the same is liable to be set aside.

5. 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 respondent 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 respondent are set aside and the writ petition is allowed by remitting the matter back to the 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 (T&P)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

To

The Recovery Officer,
The Employees Provident Fund
Organization,
Sub Regional Office,
Lady Doak College Road,
Madurai - 2.

+1 CC to M/s.K.MURALISANKAR, Advocate(SR-13845[F] dated 26/03/2021)

+1 CC to M/s.R.SARAVANAN, Advocate(SR-14127[F] dated 29/03/2021)

W.P.(MD)No.7551 of 2011
25.03.2021

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