

\$~5

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 9th July, 2021

+

W.P.(C) 6345/2021, CM APPLS. 19972-74/2021 & 19997/2021

CENTRAL BOARD OF TRUSTEES

E P F ORGANISATION

..... Petitioner

Through: Mr. Rajesh Kumar, Advocate.

versus

B2R TECHNOLOGIES PVT

..... Respondent

Through: Ms. Sanjana Bali, Advocate.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through video conferencing.
2. The present petition has been filed challenging the impugned order dated 19th April, 2021 passed by the CGIT-cum-Labour Court. Vide the impugned order, the Tribunal has allowed the appeal of the Respondent-Company challenging the original order dated 27th February, 2020 passed by the RPFC-II under Section 14B of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (*hereinafter, 'EPF Act'*) imposing damages of Rs. 1,72,434/- on the Respondent-Company. The operative portion of the order reads:

"The appeal be and the same is allowed. The impugned order dated 27.02.2020 passed by the RPFC u/s 14B is hereby set aside. The Respondent is directed to refund the entire damage amount recovered from the appellant during the pendency of the appeal within one month from the date of communication of this order without interest failing

which the amount shall carry interest @9% per annum from the date of recovery and till the payment is made. No order can be passed to direct the respondent to refund the interest recovered in excess since the tribunal lacks jurisdiction in respect of any order passed u/s 7Q of the Act. The appellant is at liberty of moving the appropriate forum for refund of the same.”

3. The challenge is to the effect that the damages which were imposed by the RPFC-II were justified in as much as there was a delay by the Respondent-Company in depositing the provident fund dues, which delay is admittedly between 15 to 50 days.
4. The submission of Mr. Rajesh Kumar, ld. counsel is that mere financial difficulty, which is pleaded by the Respondent-Company, cannot be a ground to not levy damages, especially when delay was within the knowledge of the Respondent-Company and was knowingly incurred. He relies upon the judgment of the ld. Supreme Court in ***Hindustan Times Ltd. v. Union of India & Ors., (1998) 2 SCC 242*** which clearly lays down the proposition that power cuts, financial problems etc. cannot be a ground for not levying damages.
5. On the other hand, Ms. Sanjana Bali, ld. counsel appearing for the Respondent-Company, submits that the initial notice which was received was itself completely defective. She submits that though the entire record is not filed here, the Company had made a detailed representation giving complete particulars as to the manner in which the payments were made and the reasons for the delay. In fact, according to her, the reasons were completely justified and would show that there was no *mens rea* or even *mala fide* intended by the

Respondent-Company. She submits that the Tribunal has gone into the merits of the case to adjudicate the issue in favour of the Respondent-Company and this case is not one for remand.

6. A perusal of the chronology of events in the present case shows that an inquiry was initiated by the Petitioner under Section 14B and 7Q of the EPF Act for the period January, 2011 to July, 2018. Summons were issued to the Respondent-Company vide notice dated 18th September 2019. The Respondent-Company filed a detailed representation before the authority and thereafter, a revised calculation sheet was issued. It was brought to the notice of the authority, in the representation, that some of the periods for which violation was alleged in the summons are overlapping with an earlier proceeding and notice issued where the Respondent-Company has already been granted interim protection. The Department representative, thereafter, submitted his final report after considering the representation of the Respondent-Company. Vide order dated 27th February, 2020, the RPFC-II passed an order directing payment of damages to the tune of Rs.1,72,434/-. The relevant extract of the said order reads as under:-

“It is directed that the employer in relation to the establishment shall deposit an amount of Rs. 1,72,434/-(Rupees One Lakh Seventy Two Thousand Four Hundred Thirty Four only) towards Damages for the period 04/2015 to 07/2018 as specified above, failing which further interest on above amount u/s-7Q and action under section 8B to 8G of the Act shall be invoked. A copy of challan in proof of remittance shall have to be submitted to the undersigned. However, if any other payment found delayed in this period which did not reflect in

the statement of delay of remittance supplied to you will be considered for levy of damages in future.”

7. The said order passed under Section 14B was challenged before the CGIT, which noticed various factors which led it to conclude that there was no *mens rea* in present case. The facts noticed by the CGIT as contained in the order are:

“Bereft of unnecessary details, the facts pleaded by the appellant is that it is a Pvt. Ltd. Company engaged in training and providing employment to the Rural Youth in the state of Uttarakhand. Summon dated 18.09.2019 was served on the appellant with a direction to appear before the respondent for hearing in the proceeding initiated u/s 14B and 7Q of the Act alleging delayed remittance during the period January/2011 to 11/2013 proposing Rs. 8,77,376/- as damage u/s 14B and Rs. 04,46,756/- as interest u/s 7Q. The A/R for the appellant appeared before the respondent and submitted a representation pointing out the discrepancies in the calculation proposing levy of damage and interest as per the summons. In the said representation it was pointed out that there is an over laping period and the said period was the subject matter of inquiry as per a previous notice dated 04/12/2015. It was also pointed out that during the previous inquiry the entire interest assessed was paid and as such the inquiry u/s 7Q was closed by order dated 11th July 2016 and order on the same day was passed for the damage only. The said order is subject matter of adjudication in the appeal filed by the appellant numbered as ATA No. 831(4) of 2016. On receipt of the said

representation during the impugned inquiry the commission directed the EO damage section to give a detailed reply to the objections mentioned in the representation of the appellant. Accordingly the matter was heard and a revised calculation dated 18.12.2019 was issued. In the meantime the appellant also made deposit of the entire interest amounting to Rs 94,297/- proposed to be levied as per the notice.

...

Perusal of the record shows that the commissioner at the end of the inquiry has passed a very short and cryptic order in which no finding has been rendered on the mens rea and/or actus reus on the part of the appellant at the relevant time of default. Though the respondent in his written submissions has stated that the appellant did not offer any reason to contest the rates at which the damage was proposed to be levied, the written representation of the appellant submitted during the inquiry and available in the record clearly explains the circumstances for which the deposits were not made in time. The reasons assigned is that the company being a startup incurred huge operating losses. Despite the loss the company struggled to survive instead of closing down. The company was diligent in making the deposit of PF dues barring few instances. But as seen from the impugned order these submissions of the establishment were neither countered by the department representative nor answered by the commissioner while passing the order.

...

A plain reading of the provision laid u/s 14-B of the

Act lead to a conclusion that E.P.F Commissioner can exercise the discretion which is evident from the use of the word “may.” Not only that the provision also prescribes that the said damage shall not exceed the amount of arrear. This implies that the upper limit of the damage can be quantified to the amount of arrears. While fully agreeing with the argument advanced by the Ld. Counsel for the appellant, with regard to the discretion of the E.P.F Commissioner in imposing damage and in computing the damage, it is pertinent to mention here that the discretion, whenever is vested with a statutory authority, the same is exercised with full care and caution considering the fact and circumstance of a given case.”

8. A perusal of the above order of the CGIT shows that the CGIT has given factual findings as under:-

- (i) The original order of the authority did not give any finding of *mens rea*.
- (ii) Company is involved in providing training employment to Rural youth in the State of Uttarakhand.
- (iii) The interest amount which was levied under Section 7Q has already been deposited by the Company.
- (iv) The Company is a social enterprise and it was set up for creating livelihood for rural youth in a sustainable manner.
- (v) The calculation sheet shows that the initial summon itself was relating to an overlapping period.
- (vi) No reasons have been given in the order of the RPFC-II for imposition of the damages.

(vii) The order of the authority has been passed in a mechanical manner.

9. Under these circumstances, the imposition of damages has been set aside.

10. The legal position in this regard is quite well-settled. A perusal of the settled law, as also Section 14B itself shows that until and unless there is *mens rea* which is found for the non-payment and non-deposit of the provident fund amounts, damages cannot be levied. This legal position has been recently considered by this Court in ***M/s. Durable Doors and Windows v. Assistant P. F. Commissioner, Gurugram [W.P.(C) 8281/2020, decided on 21st October 2020]***. The relevant extract of the same is set out herein below:

*“7. The legal position in this regard is well settled. As per the judgement of the Supreme Court in ***McLeod Russel India Limited v. Regional Provident Fund Commissioner, Jalpaiguri and Ors. 2014 (142) FLR 406 (SC)***, which was recently affirmed in ***Assistant Provident Fund Commissioner EPFO and Ors. v. Management of RSL Textiles India Pvt. Ltd. 2017(153) FLR 214 (SC)***, the finding of *Mens Rea* is an essential condition required to be satisfied before passing of an order of damages under Section 14B.”*

11. In the present case, the interest has already been deposited by the Company. The reasons given by the CGIT are valid, considering the settled position of law. The facts in the present case do not reveal *mens rea* and do not warrant interference. The counsel for the Petitioner raises an apprehension that the CGIT's order may be treated as a precedent. The said apprehension is unfounded, because the question whether there is *mens rea* or not and whether

the ingredients for imposing damages under Section 14B are made out or not would have to be determined in the facts of each case. The impugned order of the CGIT cannot be treated as a precedent in case of other assesses or entities. However, in the facts of the Respondent, the same is affirmed and it is held that the Company would not be liable to pay damages.

12. Accordingly, the amount of Rs.1,72,434/- shall be refunded to the Company on or before 25th July, 2021. If the same is refunded by 25th July, 2021, no interest would be payable. However, if there is any delay in refunding of the said amount, simple interest @ 9% per annum from 20th May, 2021 would be liable to be paid to the Company.

13. With these observations, the present petition, along with all pending applications, is disposed of. The digitally signed copy of this order, duly uploaded on the official website of the Delhi High Court, www.delhihighcourt.nic.in, shall be treated as the certified copy of the order for the purpose of ensuring compliance. No physical copy of orders shall be insisted by any authority/entity or litigant.

PRATHIBA M. SINGH
JUDGE

JULY 9, 2021
MR/T