

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

RESERVED ON: 31.01.2022

DELIVERED ON: 10.02.2022

CORAM:

**THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

MAT 983 OF 2011

**THE REGIONAL PROVIDENT FUND COMMISSIONER-II, KOLKATA
VERSUS
HOOGHLY MILLS COMPANY LIMITED & ANR.**

WITH

MAT 860 OF 2009 (FMA 295/2010)

**THE REGIONAL PROVIDENT FUND COMMISSIONER-II, KOLKATA
VERSUS
HOOGHLY MILLS COMPANY LIMITED & ANR. AND JYOTI SHARMA**

(APPEAL NOT FOUND)

Appearance:-

**Mr. Shiv Chandra Prasad
Mr. Nikhil Kumar Gupta**

.....for the Appellant

**Mr. Shyamal Sarkar, Senior Advocate
Mr. Kumar Gupta
Mr. Meghajit Mukherjee
Mr. Dibesh Dwivedi**

.....for the Cross-Objector/Respondent

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. The appellant in MAT No. 860 of 2009 is the Regional Provident Fund Commissioner-II, Kolkata. The order impugned in the said appeal was passed in Writ Petition No. 438 (W) of 2009, filed by the first respondent i.e The Hooghly Mills Company Limited, which was allowed by order dated 08.07.2009. The other application which is before us, taken along with MAT No. 860 of 2009 is a Memorandum of Cross Objection filed by the writ petitioner, Hooghly Mills Company Limited, questioning that portion of the order passed in the writ petition which was decided against the writ petitioner. In the penultimate paragraph of the impugned order dated 08.07.2009, the Learned Single Bench has held that the writ petition succeeds and the order under challenge is set aside, yet two issues which were framed for consideration were decided against the writ petitioner hence the cross objection.
2. Before we, go into as to under what circumstances the litigation has travelled thus far, we are to take note of the objections raised by Mr. Prasad, Learned Standing Counsel for the Provident Fund Organization, opposing the prayer made by the writ petitioner to condone the delay in filing the Memorandum of Cross Objection. This objection raised by Mr. Prasad is predicated on the order passed by the Division Bench dated 08.12.2009. It is submitted that in the said order the Division Bench directed that the time to file cross objection if any, will run from the date of the order. Therefore, it is submitted that the Memorandum of Cross Objection having been filed much after the period fixed for filling the same which commenced from the date of

the order of the Division Bench dated 08.12.2009 cannot be entertained and this Court would not exercise discretion and condone the delay in filing the Memorandum of Cross Objection.

3. We have heard Mr. Shyamal Sarkar, Senior Advocate assisted by Mr. Kumar Gupta, Mr. Meghajit Mukherjee and Mr. Dibesh Dwivedi, Learned Counsels for the respondent on the above submission.
4. After going through the order dated 18.12.2009 passed by the Division Bench as well as the provisions of the Code of Civil Procedure in particular Order 41, we find that the objection raised by Mr. Prasad is not tenable. Firstly, the time for filing cross objection would commence from the date on which the notice of appeal is served on the cross objector/respondent in the appeal. Thus, the Provident Fund Organization should be able to establish that the notice of appeal in MAT No. 860 of 2009 was served on the writ petitioner and that in spite of the same, no steps were taken by the writ petitioner to file the Memorandum of Cross Objection within the period of limitation for doing so. The appellant organization has not been able to show that the notice of appeal filed by them was served on the writ petitioner. Thus, in the absence of service of the notice of appeal, the time fixed by the Division Bench in its order dated 08.12.2009 would not be an embargo for this Court to entertain the cross objection. While on this issue we take note of the decision of the Hon'ble Supreme Court in the case of *Tukaram Kana Joshi and Others Vs. Maharashtra Industrial Development Corporation and Others*,¹ wherein the Hon'ble Supreme Court held that the delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief.

¹ (2013), 1 SCC 353

However, there is yet other facet wherein the Court is required to exercise judicial discretion and the said discretion is dependent on facts and circumstances of the case and delay and laches being one of the facets to deny exercise of discretion and the same is not an absolute impediment. Further, it was held that there may be a case where the demand for justice is so compelling, that the High Court would be inclined to interfere in spite of the delay and ultimately it would be a matter within the discretion of the Court and such discretion must be exercised fairly and justly so as to promote justice and not to defeat it. Further, it was pointed out that no hard and fast rule can be laid down as to when the High Court should refuse to exercise the jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches.

5. It is equally well settled principle of law that to deny relief to a litigant on technicalities is not a sound principle. Under normal circumstances no party would stand to be benefitted by lodging an appeal belatedly. Equally well settled is the principle that the length of delay is always not a criteria. If the opposing party is able to establish that the delay has occasioned on account of certain malafide reasons and supine indifference even if the delay is for a negligible period, the Court would refuse to exercise discretion to condone the delay.
6. Bearing the above legal principle in mind, if we examine the facts before us, we are of the clear view that the Memorandum of Cross Objection filed by the writ petitioner should not be thrown out on the alleged grounds of delay and laches. We support our conclusion with the following reasons:-

7. The Learned Single Bench while allowing the writ petition by the impugned order dated 08.07.2009 had framed three issues for consideration. Of the two issues, namely issue No. (a) and (b) are legal issues.

8. For better appreciation the three issues which were framed by the Learned Writ Court are quoted here under:-

(a) Is the provision contained in Section 14B of the Employees Provident Fund and Miscellaneous Act, 1952, mere directory?

(b) Is the impugned order bad because the authority concerned did not go into the question of mens rea?

(c) Is the impugned order irrational? Does it offend Article 14 of the Constitution of India?

9. From the above issues, it is seen that the issue No. (a) and (b) are legal issues, though the issues may have a bearing on the facts of the case as well. As the Learned Single Bench had answered issue No. (a) and (b) against the writ petitioner, they have preferred the Memorandum of Cross Objection in which we are required to consider the legal position and answer the issues. Therefore, we exercise the discretion and entertain the Memorandum of Cross Objection.

10. The Provident Fund Organization passed an order dated 04.12.2008 under Section 14B of the Employees' Provident Fund and Miscellaneous Provident Fund Act 1952, (the Act for brevity) levying the damages on the writ petitioner for the delay in payment of the statutory dues to the organization. The writ petitioner contended that proposal to recover damages under Section 14B is in addition to the power to recover interest provided under Section 7Q of the said Act and such interest which had been assessed had been paid by

the writ petitioner. It was submitted that a comparison needs to be made between Section 14B and Section 7Q and upon careful reading of both the provisions shows that Section 14B is directory rather than mandatory and that the concerned authority can in an appropriate case, recover damages but not as a rule in all cases. Further, the expression “may recover” in Section 14B would clearly show that the existence of “mens rea” is a necessary ingredient for invoking the power under Section 14B of the Act.

11. The appellant organisation contended that the liability under Section 14B is a statutory liability and on going with the scheme of the Act, Section 14B has been inserted in the statute to ensure compliance of the requirements under the statute and the imposition of penalty under Section 14B is not merely to provide compensation for the employees, it is levied on the employer for breach of the statutory provision. Thus, the twin objective of Section 14B is to penalize the defaulting employer and provide reparation for the amount of loss suffered by the employees. On the above lines, parties agitated their respective contentions before the Learned Writ Court.
12. The Learned Writ Court had framed the three issues which we have noted above. The Learned Writ Court opined that the expression “may recover” used in Section 14B of the Act, merely empowers the authority to apply discretion as regards the rate of penalty. Furthermore, the Court observed that there is also public purpose sought to be achieved by the said provision and therefore, it is not possible to water down the provision by holding that it is merely directory. Thus, issue No. (a) was answered against the writ petitioner. With regard to the question as to whether mens rea was an essential ingredient for imposing damages under Section 14B of the Act,

the Court held that the writ petitioner management failed to establish that the default in payment of statutory dues was unintentional. The writ petitioner had argued that the jute industries were facing various difficulties during the relevant time, presumably to justify that there was no intention to default in payment of the statutory dues. The Learned Writ Court brushed aside such contention by holding that they are general in nature and when the writ petitioner could pay salary to its employees, it is very difficult to believe that they cannot remit the statutory dues. Accordingly, issue No. (b) was decided against the writ petitioner. So far as the third issue is concerned, the Court held that criminal jurisprudence should be applied in fixing the quantum of penalty and that the authority which passed the order which was impugned in the writ petition failed to follow the said principle and accordingly answered issue No.(c) in the affirmative leading to setting aside the order dated 04.12.2008 and remanding the matter to the authority for fresh consideration. Thus, the appellant organization as well as cross objector/writ petitioner are both aggrieved by the judgment dated 08.07.2009 passed in the writ petition.

13. We have elaborately heard Mr. Shiv Chandra Prasad, Learned Counsel assisted by Mr. Nikhil Kumar Gupta Learned Counsel and Mr. Shyamal Sarkar, Learned Senior Advocate assisted by Mr. Kumar Gupta, Mr. Meghajit Mukherjee and Mr. Dibesh Dwivedi for the cross objection.
14. The first question to be decided is whether Section 14B of the Act is mandatory in character or in other words does it mean that levy of damages in all situations would be imperative. The said provision states where an employer makes default in the payment of any contribution to the fund or in

the payment of any charges payable under the provisions of the Act or any scheme or any condition is specified in Section 17, the Central Provident Fund Commissioner or such other officer as may be authorized by the Central Government may recover from the employer by way of penalty such damages not exceeding the amount of arrear as may be specified in the scheme.

15. The Learned Writ Court in the impugned order has held that the damages which being in the nature of penalty is mandatory when there is default committed by employer in payment of the statutory dues.
16. These legal issues are no longer “res-integra” and has been considered and settled by the Hon’ble Supreme Court in the case of *Employees’ State Insurance Corporation Vs. H.M.T Limited and Another* ² while interpreting Section 85B of the Employee State Insurance Act which in pari materia with Section 14B of the Act. The question framed for consideration was whether the amount of damages specified in Regulation 31-C of the Employees’ State Insurance (General) Regulation 1950, is imperative in character or not. The Hon’ble Supreme Court held that it is well-known principle of law that subordinate legislation must conform to the provisions of the legislative Act and that Section 85-B of the said Act provides for an enabling provision, it does not envisage mandatory levy of damages. Further, it was held that there is an obligation on the employer to compulsorily insure the employee under the said Act and make his part of the contribution, the same does not mean that the levy of damages in all situations would be imperative. As in Section 14B of the Act in Section 85 B of the said Act the words “may recover” is

² (2008) 3 SCC 35

used. Similarly the ESI Act also limits jurisdiction of the authority to levy penalty i.e not exceeding the amount of arrears. The Court referred to the decision in the case of *Hindustan Times Limited Vs. Union of India*,³ wherein the Hon'ble Supreme Court held that the authority under Section 14B has to apply his mind to the facts of the case and reply to the show cause notice and pass a reasoned order after following principles of natural justice after giving a reasonable opportunity of being heard and while doing so the authority usually takes into consideration the number of defaults, period of delay, frequencies of default and the amount involved. The default on the part of the employer based on plea of power cut, financial problems, where held to be not justifiable grounds for the employer to escape liability. Further, in certain situations the employer can claim the benefit of "irretrievable prejudice" in a case a demand for damages is made after several years. In HMT Limited it was further held that only because the provision has been made for levy of penalty, the same by itself would not lead to the conclusion that the penalty must be levied in all situations. After considering the intention of the legislature in words employed in Section 85 B, it was held that when a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling the provision, the same cannot be construed as imperative. The decision in HMT Limited was referred to in *Mcleod Russel India Limited Vs. Regional Provident Fund Commissioner, Jalpaiguri*,⁴ after noting the said decision the Court held that Section 85B of the ESI Act which was the subject matter of interpretation in HMT Limited

³ (1998) 2 SCC Page 242

⁴ (2014) 15 SCC 263

was in pari materia Section 14B of the EPF Act, and therefore, the decision in HMT Limited assumes great importance. The Court observed that the decision in HMT Limited does not prescribe that damages or penalties cannot or ought not be imposed. 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 of damages since it is not inflexible that 100 % of the arrears have to be imposed as penalty in all cases. Further, it was held if damages have been imposed under Section 14B it will be only logical that mens rea and/or actus reus was prevailing at the relevant time. The Hon'ble Supreme Court also noted the decision in the case of *Organo Chemical Industries Vs. Union of India* wherein the constitutional validity of Section 14B of the Act was challenged. The Court while upholding the constitutional validity of Section 14B held that the interpretation of the said provision was to deter and thwart employers from defaulting in forwarding contributions to the funds, most often with the ulterior motive of misutilising not only their own but also the employees contribution. The Court clarified that the word "damages" has been employed to mean penalty on recalcitrant employers as well as reparation for loss caused to the funds. The Court repelled the contention that the damages were merely compensatory in nature and therefore should not exceed the interest that would have been accrued in favour of the funds had the contribution been diligently dispatched to the funds. Further it was pointed out that Section 14B of the EPF Act while imposing damages does not assume criminal prosecution so as to stand prescribed in so far as the transfer of establishment from one management/employer to its successor is concerned. In the light of the above

said legal principle, it has to be necessarily held that the Section 14B conferred power on the authority to levy damages would not be imperative in all situations in any other words it cannot be held to be mandatory. Further going by the law laid down by Hon'ble Supreme Court in the aforementioned decision, we have necessarily hold that authority has to apply his mind to examine as to whether the stand taken by the employer to escape from the levy of damages were acceptable or not or in a sense as to whether there was an intention to commit a default thereby making mens rea applicable to them. Mr. Prasad placed reliance on the decision in *Regional Provident Fund Commissioner Vs. Hooghly Mills Company Limited and Others* ⁵ . This decision was mainly relied upon to show that the defaulter in the said case was none other than the writ petitioner/respondent herein. Secondly, it is submitted that the respondent/writ petitioner is an exempted establishment and invited our attention to certain observations made by the Hon'ble Supreme Court while answering questions as to whether the employer of an establishment which is exempted establishment under the Act is subject to the provisions of Section 14B and whether the proceedings for recovery of damages can be initiated against the employer of an exempted establishment. The Hon'ble Supreme Court held that the EPF Act is a beneficial, social, welfare legislation to ensure benefits to the employees and therefore, the interpretation of the Act must not only be liberal but it must be informed by the values of the Directive Principles of State Policy and therefore construed the provisions of Section 14B and 17(1) (a) to adopt a purposive approach, an approach which promotes the purposes of the EPF Act. The decision in Hooghly Mills

⁵ (2012) 2 SCC 489

Company Limited was relied on by Mr. Prasad to buttress his submission that when default occurs damages can be imposed. There can be no quarrel to the said proposition as it has been held so in the judgment of the Hooghly Mills itself, that there is a default in payment of contribution to a scheme it amounts to contravention of Section 14B and damages can be levied.

17. The question before us in the present case is whether the said provision is mandatory and whether in all cases of default by the employer damages equal to 100 % of the arrears should be recovered as damages. This question has been answered by us in the preceding paragraph by holding that the provision cannot be held to be mandatory and the authority has discretion to determine as to when penalty may be recovered and if recoverable the quantum that can be recovered from the defaulting employer. At this juncture, it would be beneficial to refer to the decision of the Hon'ble Supreme Court in *Assistant Provident Fund Commissioner, EPFO and Another Vs. Management of RSL Textiles India Private Limited*, ⁶ in the said decision the Hon'ble Supreme Court followed the decision in the case of *Mcleod Russel India Limited Vs. Regional Provident Fund Commissioner, Jalpaiguri and Others*, ⁷ wherein it was held that the presence or absence of mens rea and/or actus reus would be a determinative factor in imposing damages under Section 14B as also the quantum thereof since it is not inflexible that 100% of the arrears have to be imposed in all cases. Further it was held that when there is no finding rendered by the original authority or the appellate

⁶ (2017) 3 SCC 110

⁷ (2014) 15 SCC 263

authority with regard to the mens rea and/or actus reus, except showing financial crisis cannot be the reason to escape.

18. The Madras High Court, the Andhra Pradesh High Court, the Bombay High Court and the Punjab & Haryana High Court, in the decisions reported as *90 Factories Journal Reports 220 Snap Tap Machine Accessories (India) Pvt. Ltd. Vs. Regional Provident Fund Commissioner*, *34 Factories Journal Report 140 Pioneer Sports Works Pvt. Ltd. Vs. State of Punjab*, ⁸ *(Dhandava Co-operative Sugar Ltd. Vs. Regional Provident Fund Commissioner*, ⁹ *Regional Provident Fund Commissioner Vs. The South India Flour Mills Pvt. Ltd. and MANU/MH/0472/1994: 10 Vegetable Vitamins Food Co. Ltd. Vs. Regional Provident Fund Commissioner* have consistently taken a view that the Commissioner is bound to take into account aggravating and mitigating circumstances while determining damages and cannot levy damages mechanically.

19. Thus, the finding rendered by the Learned Single Bench on issue No. (a) and (b) are necessarily to be reversed and they are accordingly reversed on the above terms.

20. With regard to the issue No. (c) is concerned, the Learned Single Bench was of the view that the Provident Fund authority has not considered the reply given by the assessee in the manner which is required to be done. It opined that there was no material placed before it by the writ petitioner management that default was unintentional yet remanded the matter to the

⁸ (1998) III LLJ (Supp.)

⁹ (1986) Lab IC 650

¹⁰ (1995) I LLJ 1145

concerned authority to pass an appropriate order in accordance with law, after hearing the parties, which would mean fresh order have to be passed. Though we find that no specific reason has been assigned by the Learned Single Bench for remanding the matter for reconsideration, in the light of the fact that we have interfered with the conclusion arrived at by the Learned Single Bench on issue No. (a) and (b) above were inclined to confirm the order of remand passed by the Learned Single Bench with a direction to the authority to reconsider the matter.

21. For all the above reasons, the cross objection filed by the respondent writ petitioner is allowed to the extent indicated and consequently the appeal filed by the Provident Fund Organisation is dismissed. The Concerned Authority shall afford an opportunity of hearing to the respondent Management, consider their contentions and pass fresh orders in accordance with law. No costs.

(T.S. SIVAGNANAM, J)

I agree.

(HIRANMAY BHATTACHARYYA, J)

(P.A- SACHIN)