

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE**

**BEFORE:
HON'BLE JUSTICE RAJA BASU CHOWDHURY**

**WPO/976/2022
M/S. ALAM TANNERY PRIVATE LIMITED AND ANR.
-VS-
THE ADDITIONAL COMMISSIONER AND REGIONAL DIRECTOR
EMPLOYEES STATE INSURANCE CORP. WB AND ORS.**

For the petitioners	:	Mr. S. Dasgupta, Adv. Mr. A.K. Mukherjee, Adv. Mr. S. Prasad, Adv.
For the Respondent Nos. 2 to 4	:	Dr. S.K. Patra, Adv.
For the Union of India	:	Ms. S. Das De, Adv.
Heard on	:	27.03.2023, 27.06.2023, 03.07.2023 & 12.07.2023.
Judgment on	:	26 th September, 2023

RAJA BASU CHOWDHURY, J:

1. The present writ application has been filed, *inter alia*, challenging an order dated 10th January, 2022, passed by the respondent no.1, whereby a sum of Rs.1,11,697/- has been levied as and by way of damages under section 85-B of the Employees' State Insurance Act, 1948 (hereinafter referred to as the "said Act") on the petitioners on account of delayed payment of contributions, for a period from October 2010 to April 2017, and another order of even date, whereby the

respondent no.1 has levied a sum of Rs.26,52,247/- towards damages under section 85-B of the said Act, on the petitioner no.1 on account of delayed payment of contributions for the period from April 2009 to March 2016.

2. The petitioners claim to be engaged in the business of manufacture and export of leather and allied products. During the year 2008, due to global slowdown in the leather industry, there was a direct impact on the petitioner no.1. As a consequence thereof, the petitioner no.1 had suffered losses of Rs.67 lakhs during the period of 2011-12. Owing to financial difficulties, the petitioners could not make payment of the employer's contributions for periods of 2009 and 2010 within time.
3. It is the petitioners' case that the petitioners had eventually paid off the entire outstanding along with the accrued interest thereon. On three previous occasions, orders under section 85-B of the said Act had been passed without giving any opportunity of hearing to the petitioners. Such orders were ultimately set aside by the Hon'ble Court with a further direction upon the respondents to issue fresh notice on the petitioners and to hear out and deal with the petitioners' contention and to pass a reasoned order.
4. Records would reveal that by two several show cause notices, both dated October 25, 2021, the petitioners were informed that the respondent no.1 proposed to determine and recover damages in terms of the provisions of section 85-B(1) of the said Act. Upon receipt of

such show cause notices, the petitioners had participated in such proceedings, whereupon the final orders, which are impugned in the present application, had been passed.

5. Mr. Dasgupta, learned Advocate representing the petitioners, by drawing attention to the show cause notices both dated October 25, 2021, submits that from the aforesaid show cause notices, since, it was difficult to ascertain the reasons for objective satisfaction of the respondents as regards their decision to levy damages on the petitioner no.1, the petitioners, by notices in writing dated November 15, 2021, had called upon the respondents to revisit the aforesaid show cause notices and supply the petitioners with the reasons, for the petitioners to appropriately respond to the same.
6. Despite receipt of such notices, the respondents did not provide the petitioners the reasons, based on which they proposed to levy damages.
7. It is, in the circumstances as aforesaid that the petitioners' representative while attending the personal hearing, highlighted the aforesaid facts and had also brought to notice of the respondent no.1 that unless, the respondent no.1 satisfies himself as regards the grounds, and identifies the existence of mens rea or actus reus, damages ought not to be levied on the petitioner no.1. It is submitted that after hearing the petitioners, the respondent no.1 was pleased to reserve judgment, whereupon the orders impugned had been passed.

8. By drawing attention of this Court to the orders impugned in the present petition, it is submitted that the orders impugned do not record the objective satisfaction on the part of the respondent no.1, as regards the grounds for levy of damages or the existence of any mens rea or actus reus, for the said respondent to invoke the provisions of section 85-B of the said Act and to levy damages on the petitioner no.1. It is submitted that unless the respondent no.1 comes to the conclusion that it is absolutely imperative to levy damages, respondent no.1 cannot assume the jurisdiction to levy damages on the petitioner no.1 under section 85-B of the said Act.
9. It is still further submitted that the respondent no.1, in any event, could not have arrived at finding as regards existence of mens rea or actus reus, inasmuch as it was not imperative to levy damages, as no show cause notice to such effect had been issued. He says that there had been no deliberate or intentional delay on the part of the petitioners in making payment of the employer's contributions. The aforesaid orders passed by the respondent no.1 is otherwise bad in law and should be set aside. In support of his aforesaid contention, Mr. Dasgupta has placed reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***Employees' State Insurance Corporation v. HMT Ltd. & Anr.***, reported in **(2008) 3 SCC 35**, as also a judgment delivered by this Court on February 10, 2022, in the case of ***The Regional Provident Fund Commissioner-II, Kolkata v. Hooghly Mills Co. Ltd. & Ors.***, in **MAT/860/2009: FMA/295/2010**.

It is still further submitted that although, in the case of ***Horticulture Experiment Station Gonikoppal, Coorg v. Regional Provident Fund Organization***, reported in **(2022) 4 SCC 516**, the Hon'ble Supreme Court has returned a finding that default in payment of contribution is *sine qua non* for imposition of damages, however, the said decision has been rendered in relation to levy of damages under Section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the said judgment is otherwise distinguishable on facts.

10. *Per contra*, Dr. Patra, learned Advocate representing the respondent nos.1 to 4, submits that the petitioners have an alternative, efficacious remedy available under section 75(2) of the said Act. He says that in the instant case, the petitioners had duly been served with notices under section 85-B of the said Act. The petitioners had also attended the hearing and were given a reasonable opportunity to defend the same. As such, it cannot be said that there had been violation of the principles of natural justice.

11. It is submitted that the petitioner no.1 had never prayed for waiver of damages and unless the petitioner no.1 seek for waiver of damages, the respondents are not obliged to grant such waiver. By referring to the provisions of section 85-B of the said Act, it is submitted that the perusal of the aforesaid section would demonstrate that the primary object is to impose damages, only in case a waiver is claimed that the respondents are bound to consider the same. Since,

the petitioner no.1 did not ask for waiver, the same was not considered.

12. It is submitted that there is no infirmity in the orders passed by the respondent no.1. He, however, submits that in case application was made praying for waiver, such application would have been decided by the respondent no.1 by considering the existence and non-existence of mens rea and actus reus. Since, the petitioner no.1 did not make such an application, the respondent no.1 was not obliged to consider the existence of mens rea or actus reus or to record grounds for imposition of damages. In any event, it is submitted that mens rea or actus reus may no longer be relevant consideration for levy of damages, in the light of the judgement delivered in the case of ***Horticulture (supra)***.

13. Heard the learned advocates appearing for the respective parties and considered the materials on record.

14. I find that the petitioners primarily question the authority and jurisdiction of the respondent no.1, to levy damages under Section 85-B(1) of the said Act, on the ground that neither the show-cause notices nor the order passed under Section 85-B(1) of the said Act dated 10th January, 2022 would demonstrate the subjective satisfaction on the part of the respondents for levy of damages. It is noticed that the additional commissioner has purported to levy damages on the ground of failure on the part of the petitioner no.1 to adhere to the statutory provisions. Delay in payment of statutory dues has been taken to be

the sole criteria for determination and levy of damages on the petitioner no.1. In other words, going by the tenor of the orders which are impugned, the same would lead to the inevitable conclusion that whenever there is a delay, levy of damages is inevitable. I, however, find that it has been the stand of the respondents' advocate that the very section which authorises and confers jurisdiction on the respondents to levy damages also curves out an exception, so as to authorise the respondents to reduce or waive damages. Since, the petitioner no.1 did not apply for waiver, damages had been imposed. In case, the petitioner no.1 had applied for waiver, the existence and non-existence of mens rea or actus reus would have been considered. In other words although, the respondents have been authorised to levy damages, the same can be waived by them. To appreciate the aforesaid submission, it is necessary to ascertain whether in all cases it is mandatory for the respondents to levy damages or is it obligatory for them to consider the issue of waiver or reduction in the levy of damages. To understand the same the relevant provision of the said Act is extracted hereinbelow:

“85-B. Power to recover damages. — (1) Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover ⁴[from the employer by way of penalty such damages, not exceeding the amount of arrears as may be specified in the regulations] :

Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard :

⁵[Provided further that the Corporation may reduce or waive the damages recoverable under this section in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in regulations.]”

15. From a perusal of the said Section, it would appear that although, an authority is conferred on the respondents to levy damages the same cannot be said to be mandatory. From the nature of language used to the aforesaid section, it would be apparent that a discretion has been given to the respondents to consider the levy of damages, either in full or reduce or to waive the same. As rightly pointed out by Mr. Dasgupta learned advocate representing the petitioners, it is, thus, not mandatory for the respondents to levy and recover damages. The Division Bench of this Hon’ble Court in the case of **Regional Provident Fund Commissioner-II (supra)**, while deciding the object of enactment of Section 14B of the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952, and the nature of its application in relation to levy of damages, had clearly returned a finding that the said provision cannot be held to be mandatory and the

authority, has a discretion to determine as to when penalty may be recovered and if recoverable, the quantum that can be recovered from the defaulting employer. The provisions of Section 14B of the Employees' Provident Funds and Miscellaneous Act, 1952 are *pari-materia* with Section 85-B(1) of the said Act. The Hon'ble Supreme Court in the case of **HMT Ltd., (supra)** has clearly held that Section 85 of the said Act uses the word "may recover", and while interpreting of the said Section has, *inter alia*, observed as follows:

"21. A penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that penalty must be levied in all situations. Such an intention on the part of the legislature is not decipherable from Section 85-B of the Act. When a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative. Even otherwise, an endeavour should be made to construe such penal provisions as discretionary, unless the statute is held to be mandatory in character."

16. Having, thus, held that a discretion is vested with the authority, the Hon'ble Supreme Court had concluded that the existence of mens rea and actus reus must also be held to be a necessary ingredients for levy of damages and quantum thereof.

17. In this contest, I must note that the Hon'ble Supreme Court in the case of ***Horticulture (supra)*** has clearly returned a finding that the case of ***HMT Ltd., (supra)*** which is based on the judgment delivered in the case of ***Dilip N. Suroff v. CIT***, reported in **(2007) 6 SCC 329** has been over ruled in the case of ***Union of India v. Dharmendra Textiles***, reported in **(2008) 13 SCC 369**. By further placing reliance on the judgment delivered in the case of ***Dharmendra Textiles (supra)***, the Hon'ble Supreme Court in the case of ***Horticulture (supra)*** went on to observe that mens rea or actus reus is not an ingredient for levy of damages under section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

18. Having regard to the aforesaid, I am unable to accept the contention of Mr. Dasgupta that in absence of finding of mens rea or actus reus, no damages could be levied. At the same time, taking note of the provision of Section 85 of the said Act, which in itself incorporates waiver and reduction on imposition of damages, I am of the view that issue of waiver ought to have been considered by the respondent no.1, while passing the orders impugned. Although, it has been contended by the respondents that in absence of any application, case for waiver could not have been considered, in this case I find that the petitioners had repeatedly argued against levy of damages. Since, the Act itself recognises discretion in the levy of damages, such direction must be exercised in consonance with the provisions of the Act. As a corollary, the respondents would be obliged to consider,

waiver, reduction on imposition of damages, as the case may be, while deciding a case.

19. In view thereof, and in the peculiar facts of this case, I am of the view that a fresh decision should be taken by the respondent no.1. Simply because no application for waiver was made, the same does not absolve the respondent no.1 to comply with the statutory obligation with regards exercise of its discretion.

20. For reasons morefully discussed hereinabove, since, the orders impugned not only appear to be mechanical, the same also does not demonstrate valid exercise of discretion. Thus, the same cannot be sustained. The aforesaid orders are accordingly, set aside and quashed. The respondent no.1 is directed to revisit the case, in the light of the observations made herein upon giving opportunity of hearing to all interested parties.

21. The writ application being **WPO 976 of 2022** is allowed.

22. There shall be no order as to costs.

23. Urgent Photostat certified copy of this order if applied for we made available to the parties on priority basis upon compliance of all formalities.

(RAJA BASU CHOWDHURY, J)