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W.P.No.14255 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on : 03.01.2025

Orders pronounced on : **23.01.2025**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

W.P.No.14255 of 2020
and W.M.P.Nos.8683 of 2024 and 17727 of 2020

The Assistant Provident Fund Commissioner,
Employees Provident Fund Organization,
Sub-Regional Office, S.J.Plaza,
Swarnapuri,
Salem - 636 004.

.. Petitioner

Versus

M/s.Salem Textiles Limited,
Rep. by its Director,
Selliampalayam, Narasingapuram,
Attur, Salem District - 636 108.

.. Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India
praying for a Writ of Certiorari to call for the records relating to the
proceedings of Employees Provident Fund Appellate Tribunal, dated



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02.07.2020 in E.P.F.A.No.38 of 2019 and quash the order passed therein.

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For Petitioner : Mrs.R.Meenakshi

For Respondent : Mr.B.Kumarasamy,
for Mr.R.Manoharan

ORDER

A. The Petition:

The Writ Petition is filed by the Employees' Provident Fund Organisation ('E.P.F.O' for short) aggrieved by the order, dated 02.07.2020 passed by the Employees' Provident Fund Appellate Tribunal in E.P.F.A.No.38 of 2019. By the said order, the appeal filed by the respondent, M/s.Salem Textiles Limited was partly allowed. By the said order, the Tribunal interfered with the quantum of damages levied under Section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter '*P.F Act*').



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B. The case of the Establishment:

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2. The respondent is a Textile Yarn Spinning Mill. It is their case that the mill was started in the year 1967. Its P.F Code Number is TN/6517. From March 1997, due to the recession, the business went downhill. The management was not in a position to pay the salaries of the workmen. The payment of the salary and also P.F contribution to E.P.F.O was delayed. In the meanwhile, the mill was declared as a sick unit. Subsequently, with effect from 25.11.2014, the properties of the mill were taken over by its bankers under the provisions of the SARFAESI Act. The mill made continuous losses from the year 1997 up to the year 2016. The properties were sold by the bankers and subsequently, the Asset Reconstruction Companies. While so, by the order, dated 29.10.2018, a sum of Rs.8,46,51,183/- was levied as damages and after adjusting a sum of Rs.1,45,37,782/-, the balance sum of Rs. 7,01,13,401/- was ordered to be paid, as against which the appeal, is filed. The authorities omitted to take into account that the entire dues were already recovered. There was a great



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recession in the Textile Industry. The mill was declared as a sick unit and it made continuous loss. The assets, both immovable and movable properties, were taken possession of by the creditors and were sold. These facts should be taken in mind and hence the order leaving damages is liable to be set aside.

C. The case of the E.P.F.O:

3. The E.P.F.O's case is that the mill failed to pay the Provident Fund, Pension Fund, Employees Deposit Linked Insurance Fund Contribution and the administrative charges as prescribed with the due dates as per para 30 of the Employees' Provident Funds Scheme, 1952 for the period March 1997 to October 2016. Thus, it is liable to pay damages as per Section 14B of the *P.F Act*. A show cause notice was issued on 31.07.2018. The mill appeared before the authority for hearings. After providing the details as prayed for and conducting hearings on various dates, final orders were passed on 29.10.2018 levying damages of Rs.8,46,51,183/- and after adjusting the



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already available sum of Rs.1,45,37,782/-, the balance of Rs.7,01,13,401/- was ordered to be paid. The object of the provision is to impose exemplary, punitive damages to prevent employers from making defaults. The rates are prescribed under para 32A of the Scheme. For the delays exceeding six months upto 25.09.2018, the quantum was 37% and after the said date, it is 25%. Financial crunch and other difficulties are not reasons for waiving damages. The damages levied under the Act are unique. It is not a formality. The provisions of the Act are beneficial in nature. No *mens rea* is needed. The damages get attracted once there is a violation of the statutory obligation. The E.P.F.O is liable to pay interest to the employees as per the Scheme. Therefore, the appeal was without any merit.

D. The findings of the Appellate Tribunal:

4. The Appellate Tribunal held that para 32A of the Scheme cannot override the discretionary nature of power under Section 14B of the *P.F Act*. It gives an element of discretion to impose damages. The authorities could



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have exercised their discretion and imposed a lesser amount. The case of the appellant needs a sympathetic consideration. The mill was declared as a sick unit on 30.08.2005. The assets were taken over and sold under SARFAESI Act. The Enforcement Officer, under the *P.F Act* sold the movable properties of the mill for a sum of Rs.4,00,60,001/- and after adjusting the payable dues, still a balance amount of Rs.1,45,37,782/- was available which was adjusted towards the damages payable. The Appellate Tribunal also considered that *mens rea* is a necessary ingredient as per the decision of the Hon'ble Supreme Court of India in ***Employees' State Insurance Corporation Vs. HMT Ltd. and Anr.***¹. The Tribunal considered the delay of 24 years in the exercise by relying upon the judgment of the Hon'ble Supreme Court of India in ***Regional Provident Fund Commissioner Vs. K.T.Rolling Mills Private Limited***² and the judgment of this Court in ***Aditya Agro Industries Private Limited Vs. Regional Provident Fund Commissioner***³. Thereafter, placing reliance upon the

1 (2008) 3 SCC 35

2 (1995) 1 SCC 181

3 1996 SCC OnLine Mad 569



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judgment of the Hon'ble Supreme Court of India in *K.Streetlite Electric Corporation Vs. Regional Provident Fund Commissioner, Haryana*⁴, the
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Tribunal held that the amount of Rs.1,45,37,782/-, already recovered, would be just and adequate and restricted the damages to the said amount and modified the order accordingly and held that no further amount need be remitted by the respondent herein. Aggrieved thereby, the Writ Petition is filed by the E.P.F.O.

E. The Submissions:

5. *Mrs.R.Meenakshi*, the learned Counsel for the E.P.F.O, would submit that there is no dispute over the fact that the mill did not pay the contributions in time. The E.P.F.O therefore had jurisdiction to levy damages. Though Section 14B of the *P.F Act* reads as if it is discretionary, the same is statutorily guided by para 32A of the Scheme. Rates have been prescribed. Accordingly, the damages are calculated. There is no power of waiver of damages. Under paragraph 32B, power is vested only in the

⁴ (2001) 4 SCC 449



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Board. Only if the Company is a sick Company, the entire damages can be waived. The respondent Company was not a sick Company. It had furnished false particulars to Board for Industrial and Financial Reconstruction and had got its petition admitted. However, ultimately, it was not declared as a sick unit and no scheme for rehabilitation was framed. Thus, even the Board cannot waive more than 50% of the damages. Financial difficulties are not grounds to waive damages.

5.1. The Appellate Tribunal erred in holding that *mens rea* is necessary. The later judgment of the Hon'ble Supreme Court of India in ***Horticulture Experiment Station, Gonikoppal, Coorg Vs. Regional Provident Fund Organisation***⁵ has laid down that no *mens rea* or *actus reus* necessary and upon delay in payment of contribution, damages are payable. The second finding of the Appellate Tribunal relating to delay is erroneous inasmuch as it is the mill that approached the Board for Industrial and Financial Reconstruction under the *Sick Industrial Companies (Special*

⁵ (2022) 4 SCC 516



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Provisions) Act, 1985 with false particulars to avail the benefit of
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moratorium and upon its petition being ultimately dismissed, the delay cannot be attributed to E.P.F.O. Relying upon other decisions, she would submit that in this case, when the delay is huge and when the establishment has willfully chosen not to pay the contributions in time, then the levy of damages was in accordance with law. The Tribunal has no jurisdiction to reduce the damages.

5.2. Per *contra*, Mr.B.Kumarasamy, learned Counsel for the respondent, relying upon the Full Bench decision in ***Sun Pressings (P) Ltd., Vs. The Presiding Officer, Employees' Provident Fund Appellate Tribunal and Anr.*** (W.P.(MD).No.7339 of 2013 etc. (batch cases)), would submit that still the Appellate Tribunal can consider whether there was *mens rea* or not. He would rely upon Section 7L of the *P.F Act* to contend that the Appellate Tribunal has been conferred with express powers to modify the orders also. When the Board has powers to waive, when the authorities have powers to



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levy, certainly the Tribunal, while sitting on appeal over the decisions of the Organisation, has powers to reduce, modify or annul the damages. In this case, apart from the actual contributions, a huge sum of 17% of damages is also realised. Therefore, there need not be any interference in the order of the Tribunal. Relying upon certain judgments of this Court, he would submit that in cases where the Company was a sick Company as that of the mill herein, reduction even up to 100% was also allowed by this Court. Therefore, when discretion is exercised by the Tribunal in accordance with law, the same does not call for any interference.

F. The points for consideration :

6. Upon considering the arguments and perusing the material records, the following points arise for determination:

1. Whether *mens rea* and *actus reus* to be considered vis-à-vis damages under 14B of the *P.F Act*?
2. Whether the exercise of jurisdiction by the Appellate Tribunal is in



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order?

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G. Point No. 1:

7. Section 14B of the *P.F Act* is extracted hereunder for ready

reference:-

"14B. Power to recover damages.—Where an employer makes default in the payment of any contribution to the Fund, the Pension Fund or the Insurance Fund or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 or in the payment of any charges payable under any other provision of this Act or of any Scheme or Insurance Scheme or under any of the conditions specified under section 17, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:

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

Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and 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,



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subject to such terms and conditions as may be specified in the Scheme."

7.1. It is true that in ***Employees' State Insurance Corporation*** (cited *supra*) and certain other cases, earlier the Hon'ble Supreme Court of India had held that unless it is established that failure to contribute was attributable to *mens rea* on the part of the employer, levying of damages does not arise. The same was also held in the case dealing with the Provident Fund. This position later stood altered in view of the judgment of the Hon'ble Supreme Court of India in ***Horticulture Experiment Station, Gonikoppal, Coorg*** (cited *supra*), whereby it is held that these judgments did not take into account the earlier authoritative pronouncements and held that *mens rea* and *actus reus* are not relevant considerations for levy of statutory damages in these beneficial enactments. Under these circumstances, the matter has been dealt with in detail and answered by the Full Bench of this Court in ***Sun Pressings (P) Ltd.***, (cited *supra*). The Full Bench, speaking through Hon'ble Justice S.S.Sundar, framed the questions



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in paragraph No.5 and it is useful to extract the same as follows:-

"5.This Court, having regard to the scope of Section 14-B, the relevant provisions of the Act, the EPF Scheme, and the arguments on either side relying upon several precedents, found it appropriate to frame the following issues for consideration :

(a) Whether an element of mens rea or actus reus is essential for levy of damages under Section 14-B of the Act or whether the default or delay in payment of the EPF contributions by the employer attract levy of damages under Section 14-B of the Act without an element of mens rea ?

(b) Whether levy of damages is compulsory in all cases even if it is held that mens rea is not essential ? In what cases levy of damages should be avoided ?

(c) What are the principles to be followed while determining the quantum of damages under Section 14-B of the Act ?"

7.2. After considering all the relevant decisions in detail, the Hon'ble

Full Bench answered the questions and it is relevant to extract paragraph

Nos.38 and 39 which read as follows:-

"38.In Para 32-B of the Employee-s Provident Funds Scheme, 1952, the Central Board has authorised to reduce or waive damages. In respect of sick companies, 100% of the damages can be waived. Similarly, waiver of damages upto 100% can be allowed as per the recommendations of the Board of Industrial and Financial Reconstruction (BIFR). There may be situations and variety of reasons which would justify the non-payment of



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contribution within the prescribed time by the employer. There cannot be a discrimination between a sick company and sick industry which does not fall under SICA. After the SARFAESI Act, to save the industry, an employer may be forced to pay huge amounts by accepting OTS proposals. There may be similar circumstances where the employer has no option but to borrow money from private financiers. A decision of a private employer to save the industry will instantly save the employment of seizable number of employees. For variety of reasons, there may be default, despite an employer has always been honest but unable to pay the Provident Fund dues. There may be cases where the industrial operation is suspended temporarily or permanently due to power cut or labour strike or other valid reasons. In the absence of surplus funds available with the employer, it is quite possible that an employer is put to helpless situations. Therefore, there cannot be a straight jacket formula or a table which should be prescribed for levying damages under Section 14-B of the Act.

39. Therefore, following the principles reiterated by the Hon-ble Supreme Court and different High Courts including our High Court in similar circumstances, this Court hold that Section 14-B of the Act is an enabling provision and it does not envisage any compulsion to levy damages in all cases, and is inclined to frame the following guidelines:-

(i) Before levying damages in terms of Section 14-B of the Act, every authority is required to follow principles of natural justice. The particulars of the default, period, etc., and every adverse information that may be relied upon for levying damages should be indicated or furnished to the employer and a fair opportunity should be given to the employer to put forth his case in defence to the proposed action.

(ii) The authority, while exercising power under Section 14-B, shall keep in mind that the liability as per



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the table given in Para 32A of the Scheme, should be treated as upper limit within which damages can be levied for the delay in making contributions by the employer.

(iii) In appropriate cases where the employer is able to provide sufficient reasons or cause justifying the delay with verifiable materials, the authority is competent to waive or fix the quantum of damages less than what is shown in the table under Para 32A of the Scheme.

(iv) When an employer is not in a position to make payment in order to save the industry from closure or on account of protecting the industry or establishment from being put to face proceedings under the SARFAESI Act or other inevitable circumstances which compels the employer to divert the funds only to save the industry and the employees, there cannot be a levy of damages.

(v) The authority under the Act has to consider all the mitigating circumstances including financial difficulties projected by the employer and pass a reasoned order.

(vi) When the employer is able to produce all the documents or verifiable material within his reach to substantiate any mitigating circumstance, the authority exercising power under Section 14-B has to pass orders giving reasons, if he is unable to find truth or bona fides in the claim of the employer.

(vii) There shall be proper application of mind objectively on the merits of each case and in any case, the authority cannot resort to the arithmetical calculation or for levying damages as per Para 32A of the Scheme without considering the mitigating circumstances.

(viii) While assessing the quantum of damages, the past and present conduct of the employer also should be taken note of. For example, there can be levy of damages as per Para 32-A of EPF Scheme in every case when the employer is a chronic defaulter despite having surplus funds or found to have diverted funds.

(ix) There may be variety of circumstances to



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which the employer is put to while managing an industrial establishment or a factory within the purview of the Act. The proviso to Section 14-B gives a special power to the Board to waive damages when a rehabilitation scheme is pending before the BIFR. There may be similar circumstances for the employer of any industry to save the industry from the clutches of private/public financial institutions and the employer might be facing proceedings under the SARFAESI Act. Whenever the employer is forced to make huge amounts by mobilizing funds from other resources to save the industry from closure or to avoid similar situations, such payment need not be considered as an act to avoid payment of provident fund dues.

(x)The delay in payments by profit making establishments has to be seriously viewed and every profit making employer is bound to pay the provident fund contributions promptly, unless there are strong reasons or circumstances that prevent the employer from making the payment on the due dates. If there is an element of willful negligence in payment of Provident Fund dues, the Assistant Provident Fund Commissioner or the competent authority can levy damages exercising his discretion.

(xi)Though mens rea is not an essential ingredient, there cannot be levy of damages at the maximum limit merely because there is a default. Before levying damages, there must be definite finding or reason, after considering the explanation or reasons given by the employer for the delay in payment of dues and other mitigating circumstances. The discretion vested with the Assistant Provident Fund Commissioner or the competent authority shall be exercised judiciously in tune with the settled principles of law and keeping in mind the interest of the employees concerned."



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7.3. Thus, it can be seen that the legal position as it holds today is that *mens rea* or willfulness is not an essential ingredient for invoking Section 14-B and levying damages. However, the same can be a relevant factor as a mitigating circumstance while deciding on the exercise or quantum. It is stated that S.L.P.(Civil) No.25548 of 2024, is said to be pending before the Hon'ble Supreme Court of India. Since there is no interim order, this Court is bound by the authoritative pronouncement of the Hon'ble Full Bench.

H. Point No. 2:

8. There is no dispute that the establishment can file an appeal under Section 7-I of the *P.F Act* as against the levy of damages. Section 7L of the *P.F Act* reads as follows :

"7L. Orders of Tribunal.—(1) A Tribunal may after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the order appealed against or may refer the case back to the authority which passed such order with such directions as the Tribunal may think fit, for a fresh adjudication or order, as the case may be, after taking additional evidence, if necessary.

(2) A Tribunal may, at any time within five years



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from the date of its order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendment in the order if the mistake is brought to its notice by the parties to the appeal:

Provided that an amendment which has the effect of enhancing the amount due from, or otherwise increasing the liability of, the employer shall not be made under this sub-section, unless the Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

(3) A Tribunal shall send a copy of every order passed under this section to the parties to the appeal.

(4) Any order made by a Tribunal finally disposing of an appeal shall not be questioned in any court of law."

8.1. Paragraph 32A of the Scheme is extracted hereunder:

32A. Recovery of damages for default in payment of any contribution

(1) Where an employer makes default in the payment of any contribution to the fund, or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 of the Act or in the payment of any charges payable under any other provisions of the Act or Scheme or under any of the conditions specified under section 17 of the Act, the Central Provident Fund Commissioner or such officer as may be authorised by the Central Government by notification in the Official Gazette, in this behalf, may recover from the employer by way of penalty, damages at the rates given below: —

S.No. (1)	Period of default (2)	Rates of Damages (percentage of
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		arrears per annum) (3)
(a)	Less than two months	Five
(b)	Two months and above but less than four months	Ten
(c)	Four months and above but less than six months	Fifteen
(d)	Six months and above	Twenty-five

(2) The damages shall be calculated to the nearest rupee, 50 paise or more to be counted as the nearest higher rupee and fraction of a rupee less than 50 paise to be ignored.

8.2. Paragraph 32B of the Scheme reads as follows :

"32B. Terms and conditions for reduction or waiver of damages

The Central Board may reduce or waive the damages levied under section 14B of the Act in relation to an establishment specified in the second proviso to section 14B, subject to the following terms and conditions, namely: —

(a) in case of a change of management including transfer of the undertaking to workers' co-operative and in case of merger or amalgamation of the sick industrial company with any other industrial company, complete waiver of damages may be allowed;

(b) in cases where the Board for Industrial and Financial Reconstruction, for reasons to be recorded in its schemes, in this behalf recommends, waiver of damages up to 100 per cent may be allowed;

(c) in other cases, depending on merits, reduction of damages up to 50 per cent may be allowed."



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8.3. The Hon'ble Full Bench, in paragraph No.38 of its judgment, has considered the same and there cannot be any distinction between a declared sick company and a company which is also otherwise sick on account of financial difficulty etc., in respect of 100% waiver of damages. In view thereof, it cannot be said that the Appellate Tribunal exceeded its jurisdiction or that there was any statutory bar for the Tribunal to reduce the damages to 17% of the damages originally levied. On the facts, it can be seen that though initially, the mill's claim was rejected on the ground of manipulation of accounts, the matter went on appeal before the AIFR and ultimately it was declared as a sick unit by an order dated 30.08.2005. However, periodical orders were subsequently passed and an Assets Sales Committee was formed with an operational agency and further directions were periodically issued which can be seen from the proceedings of the Board for Industrial and Financial Reconstruction in Case No.252 of 1998



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dated 14.09.2011. It is also to be noted that there was no any express orders regarding waiver. In that factual position, it can be seen that the petitioner is a declared sick unit. However, there were no orders of waiver of damages or dues and the assets were directed to be sold through the Assets Sales Committee. In such a scenario, it can be seen that the delay happened due to these proceedings also. Further, their matter was not in the hands of the management alone after the initiation of the BIFR proceedings. The financial difficulty pleaded cannot be said to be a false or make-believe affair. In that background, I hold that the exercise of jurisdiction by the Appellate Tribunal is in tune with the dictum laid down by the Hon'ble Full Bench and as such does not call for any interference.

I. The Result:

9. The Writ Petition stands dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.



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