BEFORE THE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT-II, ROUSE AVENUE, DISTRICT COURT COMPLEX, DELHI.

Present:

Smt. Pranita Mohanty,

Presiding Officer, C.G.I.T.-Cum-Labour

Court-II, New Delhi.

ATA No. D-2/19/2018

M/s. National Association for the Blind Appellant

VS.

APFC, Faridabad Respondent

ORDER DATED :-17/10/2022

Present:- Shri S K Khanna & Shri H. D Sharma, Ld. Counsel for the Appellant.

Shri B B Pradhan, Ld. Counsel for the Respondent.

This appeal challenges the composite order dated 06/03/2018 passed by the APFC Faridabad imposing Rs. 17,73,941/- and Rs 7,54,887/- as damage and interest respectively u/s 14B and 7Q of the EPF and MP Act against the appellant establishment for delay in remittance of the PF dues of it’s employees.

Notice being served the respondent appeared through its counsel and filed a written reply. Both parties argued in detail in support of their respective stand taken in the appeal.

The stand of the appellant is that it is an establishment which imparts integrated Education and Vocational Training to the persons who are visually impaired with the sole object of making them self sufficient and self dependent. Basically it is a non profit organization and NGO, which runs with the help of donations and grant received from the Ministry of social justice. Though it has no income of it's own, in order to meet the day to day work of the managing board/ organization, it has engaged several persons as employees and to facilitate deposit of the PF contribution of those employees, the PF code No has been obtained availing the scope of the voluntary coverage scheme lunched by the Respondent. On 12/02/2015, a notice was issued to the establishment along with the detail statement proposing imposition of damage and interest. On receipt of the same the appellant establishment through it's AR appeared and made oral as well as written submission stating that the delay in remittance was never intentional but for various circumstances beyond it's control. By filing several written submissions on different dates of the inquiry proceeding, the appellant had explained the mitigating circumstances leading to delay in deposit. It also drew the attention of the higher authorities of the Respondent to the said situation. But the commissioner without considering any of the oral and written submission of the appellant establishment passed the impugnedcomposite order, which is also based upon a wrong method of calculation. Not only that no finding has been rendered by the commissioner on the mensrea while imposing the penal damage. The commissioner imposed the penal interest and damage for the period 1.04.2000 to 23.01.2015, in clear violation of the established principle of law and the revision incorporated in the table in Para 32A of the EPF&MP Scheme. Thus relying on the judgment of the Hon'ble SC in the case of Mcleod Russel India Ltd,and RSL Textiles he submitted that a finding on the mensrea behind the delayed remittance is sine qua non for imposition of penal damage. The commissioner, a quasi judicial authority is guilty of ignoring the law settled by the Apex court of the country. He thereby pleaded to set aside the impugned cryptic order solely accepting the submission made by the department representative. Thereby the appellant has pleaded that the impugned order which is a composite order is unreasonable and unsustainable in the eye of law. The other stand taken by the appellant is that it is an order in which the commissioner has not assigned any reason for imposition of the damage at the maximum percentage prescribed under the scheme as if it is a liability under the tax legislation. The appellant has thereby pleaded for setting aside the impugned order.

The respondent in his written reply has fully supported the impugned order. It has been stated that the sufficient opportunity was given to the appellant for production of records. The establishment did not co operate and no records were produced as has been observed in the order by the commissioner. No dispute on the calculationwas ever raised by the establishment during the inquiry. The establishment though called upon to produce the challan copies showing remittance, never produced the same. The non responding behavior of the establishment left the commissioner with no other option than considering the documents available with the department. The stand of the establishment with regard to financial crunch for non receipt of grant was duly considered and rejected in view of the judicial pronouncements. Hence relying upon the judgment of the Hon’ble SC in the case of **Hindustan Times Ltd vs. UOI, 1998 SC (2) 242**, and in the case of **Ess Kay Machinery Pvt. Ltd vs. RPFC, 1998 LLJ 925 (Orissa DB),** the Responded pleaded that financial difficulty is not at all a circumstance to be considered for imposition of penal damage. All other stand taken by the appellant has been denied.

During course of argument the appellant mainly raised two questions i.e no finding has been rendered on the mensrea behind the delayed remittance and the calculation of damage has been made following the old table though the law is well settled that the rate of damage prevalent at the time of inquiry was to be followed were strenuously canvassed by the appellant.

Counsel for the respondent on the contrary, vehemently challenged both the stand taken by the appellant and argued that for the recent pronouncements by the Hon'ble Supreme Court in the case of Horticulture **Experiment Station, Gonikoppal, Coorg vs. the RPFC (Civil Appeal No. 2136 of 2012 order dated 23.02.2022) mensrea**is no more the required condition for levy of damage or interest as has been done in this case. He argued that in the case of Horticulture Experiment referred supra the Hon'ble Supreme Court have discussed and distinguished all the earlier judgments including **Organo Chemical Industries vs. UOI, ESI vs. HMT, Mcleod Russel vs. RPFC, APFC vs. the management of RSL Textile** and came to hold that the liability for damage under the EPF and MP Act being for the breach of a civil obligation and the delaycommitted by the employer being the sine qua non for imposition of penalty/ damage the element of mensrea is not required. He thus, argued that the impugned order cannot be found with fault for want of finding on mensrea. He emphasized that the judgment of the Hon'ble Supreme Court in the case of Horticulture Experiment, referred supra being the latest judgment has the overriding effect on the earlier judgment of the bench of similar strength.

The Ld. Counsel for the appellant further argued relying upon the judgments of the Hon'ble Supreme Court in the case of **McleodRussel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri& Others reported in (2014)15 S.C.C 263** and **DCW Employees Co-operative Canteen Pvt. Ltd vs. P.O.EPFAT, 2018 LLR 672**, decided by the Hon'ble High Court of Madras, that mensrea is the factor to be considered for levy of damage. Unless existence of the mensrea is pleaded and established against the employer the levy of damage u/s 14B cannot be done automatically as every delay cannot be termed as willful or intentional delay and it depends on the facts and circumstances of each case. The adjudicating authority has to give a specific finding as to why the damage will be levied. He thereby argued that the impugned order which is not only a non speaking order also lacks the finding on mensrea. The Ld. Counsel for the appellant besides relying upon the judgments of Mcleod Russel and DCW Employees referred supra has also placed reliance in the case of **Assistant Provident Fund Commissioner vs. Management of RSL Textile India Pvt. Ltd., reported in 2017LLR 337.**

The argument advanced by the counsel for both the parties on the necessity of a finding on the mensrea before assessing penal damage and for the reliance placed by them on judgments of the Hon'ble SC having contradictory views, it is felt expedient to arrive at a decision as to which judgment, earlier or the later, is to be followed for reaching at a decision on the necessity of the finding on mensrea.

The admitted facts are that in the impugned order the commissioner has not rendered any finding on the mensrea. The learned counsel for the Respondent argued that the later judgment in this regard is to be followed and the Hon'ble SC in the latest judgment i.e Horticulture Experiment referred supra, have clearly held that mensrea or actusreus is not an essential element for imposing penalty or damage for breach of civil obligation and liability. He also argued that the Hon'ble SC while passing the judgment in Horticulture Experiment have considered and distinguished the earlier judgments passed in **Mcleod Russel and RSL Textiles**. Not only that, the Hon'ble SC in the case of Horticulture Experiment have also observed that the Judgment of **ESI vs. HMT Ltd (2008)3SCC,35**, which was relied in the judgment of **Mcleod Russel and RSL Textiles** is not binding as the said judgment were passed considering the judgment of the division bench of the Hon'ble SC in the case of Dillip N Shroff and the judgment of Dillip N Shroff has been overruled by the Hon'ble SC in the case of **UOI vs. Dharmendra Textile Processors(2008)13, SCC 369**. The learned counsel for the Respondent Shri Pradhan, thus emphasized in his argument that all the earlier judgments governing the field being discussed and distinguished in Horticulture experiment, and the case of Dharmender Textile referred supra and relied in the judgment of Horticulture Experiment being the judgment delivered by a larger bench of three judges, is binding on the courts and Tribunals on the necessasity of the finding on mensrea for levying damage on breach of a civil obligation.

The counter argument advanced by Mr. Khanna the learned counsel for the appellant is that the judgments passed in the cases of Mcleod Russel and RSL Textiles are directly on the law relating to the provisions of EPF&MP Act and governing the field for a pretty long period. Those judgments were passed in the year 2014 and 2017 respectively by the division Bench of the Hon'ble SC comprising of two judges. A bench of similar strength cannot overrule the earlier judgment of the co ordinate bench. He also argued that over ruling of the judgment of Dillip N Shroff , relied in the case of Mecloed Russel ,shall not have the effect of automatically over ruling the later judgment unless the same is so done by a larger bench. He thus argued that the judgment and principle decided in the case of Mecloed Russel and R S L Textile still governs the field and the judgment of Horticulture Experiment being the later judgment of the co ordinate bench, the earlier judgment in MecloedRussel shall prevail.

To support his argument he has relied upon the judgments of the Hon'ble SC in the case of **Sandeepku Bafna vs. State of Maharastra & others, AIR 2014 SC 1745** and submitted that the statement of law pronounced by a division bench is considered binding on the subsequent division bench of same strength or lesser no of Judges. If any contrary view is expressed by the said later bench, the same would fall in the category of per incuriam and the earlier judgment of the co ordinate bench shall prevail. He thereby argued that the view taken in Mecloed Russel and RSL Textiles, in respect of the finding on mensrea still governs the field being the earlier judgment of the co ordinate bench. He has also placed reliance in the judgments of the Hon'ble SC in the case of **Union of India vs. Raghubir Singh(1989(2) SCC 754 Const Bench)**, **Chandra Prakash vs. State of UP (AIR2002 SC 1652 Const Bench)** and **SahaFaesal& others vs. Union of India(AIR 2020 SC 3601)** to argue that the constitution bench of the Hon'ble Apex Court have time again ruled that in order to promote consistency in the development of law and it's contemporary status, the statement of law by an earlier division bench is binding on the subsequent division bench of same or lesser no. of judges.

For the argument advanced by the counsel for both the parties with regard to the effect of the judgment passed by the Hon'ble SC in the case of Horticulture Experiment referred supra, the short and important question before this Tribunal is which judgment is to be followed. At the cost of repetition, be it stated here that this Tribunal is not competent to examine the correctness of the judgments referred supra and only required to take a decision as to which judgment is to be followed.

In the case of Raghubir Singh referred supra, the Hon'ble Constitution Bench of the Apex Court have held

Para 27-

> "There is no constitutional or statutory prescription in the matter, and the point is governed entirely by the practice in India. It is in order to guard against the possibility of inconsistent decisions on point of law by different Division

Benches, the rule has been evolved in order to promote consistency and certainly in the development of law and it's contemporary status, that the statement of law by a division bench is considered binding on the division Bench of similar strength or of lesser no of judges."

The same view was again taken by the Hon'ble SC in the case of **Chandra Prakash vs. State of UP (AIR 2002 SC 1652)** which has been relied by the learned counsel for both the parties. In the case of Chandra Prakash the view taken by the Apex court in the case of **Pradeep Candra Parija vs. Pramodku Patnaikh (2002 1 SCC 1)** has been followed.

Not only that, in the case of **SahaFaesal& others vs. Union of India (AIR 2020 SC 3601)**the Hon'ble bench of Five judges have held that:-

Para 23 "it is now a settled principle of law that the decision rendered by a co ordinate bench is binding on the subsequent bench of equal or lesser strength.

Para 31" therefore the pertinent question before us is regarding the application of the "Rule of Per in curiam". This court while deciding Pranay Sethi case referred to an earlier decision rendered by a two judge bench in the case of **SundeepBafna vs. State of Maharastra (2014)16 SCC 623**,where in the application of the Rule of Per in curium was emphasized.

While considering the argument advanced, it is necessary to say that in the case of Sundeepku Bafna referred supra the Hon'ble SC have clearly observed that

> "A decision or judgment can be per incuriam to any provision in a statute, Rule or Regulation which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger bench, or if the decision of a high court is not in consonance with the views of this court. It must immediately be clarified that per-incuriam rule is strictly and correctly applicable to the ratio decidendi and not to the obiter dicta. It is often encountered in High Court orders that two or more mutually irreconcilable decisions of Supreme Court are cited at the bar. With that the inviolable recourse is to apply the earlier view as the succeeding one would fall in the category of per in-curiam.

On a careful reading of the judgments cited by the Ld. Counsel for both the parties it is found that when there are two judgments of coordinate bench with two contrary views taken, the earlier judgment shall be followed as the later judgment falls in the category of per incuriam. The argument of Mr. Pradhan, the Ld. Counsel for the respondent that Horticulture Experiment judgment though has been delivered by a Division Bench having two judges, infact the case of Dharmender Textile referred supra delivered by a division bench of Hon'ble three judges have been discussed therein and thus, it has a overruling effect on the earlier judgments in the case of Macleod Russel and R.S.L Textile, does not sound convincing for the reason that the judgment of Dharmender Textile was not with relation to the EPF Act and the judgment of horticulture experiment has not overruled the judgment of Macleod Russel and RSL Textile. Thus applying the ratio in the case of Sandeep Kumar Bafna referred supra the earlier judgment of Macleod Russel and RSL Textile are to be followed.

Now coming to the facts of the present appeal it is evident from the record that the establishment had filed written submissions during the inquiry and copies of the same have been placed on record as AnnextureA3 and A4. The document marked as A4 contains the seal of the respondent dated 12/08/2015 acknowledging receipt. The appellant has also filed office copy of several other written submissions submitted during the inquiry. In those written submissions the establishment had indicated the mitigating circumstances behind the delayed remittance. But surprisingly none of those submissions were dealt and considered by the commissioner. On the contrary, the commissioner has observed in the order that the establishment, even though notices on several occasions were sent including in the residential address of the director, no body appeared and submitted records and submissions in defence. It seems that the commissioner in a technical manner and by following the table of Para 32A passed the impugned order. It is more surprising to note that the commissioner without considering the difficulty as pleaded in the written submission by the establishment concluded relying on some judgments of the Hon'ble SC that financial difficulty of the establishment is not a defence to avoid the imposition of penal damage. The commissioner, discharging a quasi judicial function, it seems is ignorant of the legal position that each case is different from the other on facts and a straight jacket formula is not available for adjudication on factual as well as legal grounds.

The other objection taken by the appellant is in respect of the method of calculation of damage. He argued that before 25.09.2008 the rate of damage indicated in the table was inclusive of 12% interest. After the amendment effective from 26.09.2008, the damage and interest are to be calculated separately. Since 12% interest has been excluded from the earlier rate of damage proposed, two separate orders need to be passed and in appropriate cases the revised rate of damage is to be imposed. But in this case the commissioner has passed a composite order following the old table and without assigning any reason as to why the damage was imposed at the highest rate prescribed. This makes the impugned order illegal and liable to be set aside.

The learned counsel for the Respondent counter argued that the commissioner making the inquiry is not empowered to reduce the damage prescribed in the scheme and the said power is vested with the CBT only .he further argued that the period of inquiry starts from 01.04.2000, when the old rate was prevalent. Hence the new rate of damage prescribed under Para 32A is not applicable. He also argued that no illegality has been committed since the interest has been calculated separately @12% following the new table.

On perusal of the impugned order it appears that the damage and interest has been calculated separately. But it is not clear if the rate of damage was calculated as per the old or new table under Para 32Aof EPF Scheme, para 5 of the pension Scheme and Para 8A of the EDLI Scheme. The period of inquiry since covers partly the period before amendment and partly after the amendment, the order of the commissioner should have clearly indicated the method of calculation and the rate of damage applied. That having not been indicated, the conclusion is that the commissioner has passed the cryptic order in mechanical manner applying the table under the scheme.

Thus for absence of a finding on mensrea, for non consideration of the written submission of the establishment, for absence of a reasoning for imposition of damage at the highest rate and for the wrong and false observation that the establishment despite opportunity and notices served had failed to appear and give any record and submission, the order is held to have been passed without proper consideration of the facts and application of mind. The order passed imposing damage is wrong and liable to be set aside. However the order passed u/s 7Q calculating interest even though a part of the composite order appears to have been passed on the basis of the rate of interest applicable on the date of order and thus can not be interfered with.

It will not be out of place to mention that the EPFO had issued a circular on 28.11.1990 which provides that the cases in which damages are to be levied as on 30th June 1990 should be disposed of within 3 years and the cases of fresh default entailing damage shall be levied within the close of subsequent 3 financial years. The Ld. Counsel for the respondent though argued that the said circular is only an administrative guidance is not accepted as the quasi judicial authorities are required to function under the scope of the statute as well as following the administrative institution. The action of the respondent in initiating the inquiry proceeding in the year 2015 for the period starting from 2000, speaks upon the correctness of the order passed contrary to the department circular. The argument of the learned counsel for the respondent that the circular is for administrative guidance can not be accepted to remedy the said wrong as the administrative circulars are issued and followed for effective functioning of the lower functionaries only.

Now the other argument of the appellant with regard to the mensrea is to be dealt. After amendment of the EPF and MP Act the word Penal has been added in the provision u/s 14B which has made it obligatory for the inquiring authority to give a finding in respect of mensrea of the establishment attracting imposition of penal damage. In the preceding paragraph it has already been held that the law pronounced in the judgment of Macleod Russel and RSL Textile (supra) makes it mandatory of the part of the commissioner to give a finding on the mensrea. Absence of finding and non consideration of the mitigating circumstances makes the order illegal which is apparent from the impugned order.

Thus, from the totality of the circumstances, the pleas canvassed by both the parties during argument it appears that the impugned order u/s 14B has been passed without application of mind and without giving due consideration to the various legal objections taken by the appellant during the inquiry. Thus, it is held that the commissioner has committed patent illegality while passing the order u/s 14B of the Act which is not sustainable in the eye of law. But the order passed u/s 7Q needs no interference and hereby confirmed as a part of the composite order. Hence, ordered.

ORDER

The appeal be and the same is allowed in part. The impugned order passed u/s 14B of the EPF and MP Act is hereby set aside. The amount if any deposited relating to the damage by the appellant shall be refunded by the respondent within two months hence failing which the amount shall carry interest @ 6% per annum from the date of deposit and till the amount is refunded. The order passed u/s 7Q is confirmed. Consign the record as per Rules.

Presiding Officer

BEFORE THE HON'BLE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT, DELHI; ROOM No.208 ROUSE AVENUE, DISTRICT COURT COMPLEX, NEW DELHI-110002.

Appeal No. D-2/37/2022

M/s. Accuster Technology Pvt. Ltd. Appellant

Through:- Shri Kamlesh Anand, Ld. Counsel for the Appellant.

Vs.

RPFC, Gurugram (West) Respondent

Through:- Sh. B.B. Pradhan, Ld. Counsel for the Respondent.

ORDER DATED :-17.10.2022

Heard both the counsels. The Ld. Counsel for the Appellant requested for some time to amend the appeal memo. He may do so after supplying a copy of the same to the Ld. Counsel for the Respondent.

The Ld. Counsel for the Respondent requested the permission to file written reply to the Misc. Applications accompanying the appeal for condonation of delay in filing the appeal as well as application for waiver filed u/s 7 O of the EPF & MP Act, 1952. Time granted.

The Ld. Counsel for the Appellant also prayed for de-attachment of the bank account which was strongly opposed by the Ld. Counsel for the Respondent making submissions that the delay is still to be condoned and thereafter, application filed u/s 7 O is to be decided. This Tribunal is also of the opinion that no directions regarding de-attachment of the bank account can be issued at this stage.

List the matter on 07.11.2022 for hearing. Meanwhile, the Respondent authority is directed not to take further coercive measures for recovery of the amount as mentioned in the impugned order till next date of hearing.

Presiding Officer

BEFORE THE HON'BLE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT, DELHI; ROOM No.208 ROUSE AVENUE, DISTRICT COURT COMPLEX, NEW DELHI-110002.

Appeal No. D-2/25/2018

M/s. PoleStar Public School Appellant

Through:- Shri Sanjay Kumar, Ld. Counsel for the Appellant.

Vs.

RPFC, Gurugram Respondent

Through:- Shri B.B. Pradhan, Ld. counsel for the Respondent.

ORDER DATED :-17.10.2022

A Last opportunity is granted to Ld. Counsel for the respondent for filing reply to the application u/r 21 by the Ld. Counsel for the Appellant. 01.11.2022 for filing reply to the said application and consideration of the same.

Presiding Officer

BEFORE THE HON'BLE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT, DELHI; ROOM No.208 ROUSE AVENUE, DISTRICT COURT COMPLEX, NEW DELHI-110002.

Appeal No. 243(16)2017

M/s. Apra Auto (India) Pvt. Ltd. Appellant

Through:- Shri Amit, Proxy Counsel for the Appellant.

Vs.

APFC/ RPFC, Gurugram Respondent

Through:- Shri Satpal Singh, Ld. counsel for the Respondent.

ORDER DATED :-17.10.2022

The matter could not be taken up due to being busy in the matters filed under the Industrial Disputes Act, 1947. List the matter on 30.11.2022 for final arguments.

Presiding Officer

BEFORE THE HON'BLE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT, DELHI; ROOM No.208 ROUSE AVENUE, DISTRICT COURT COMPLEX, NEW DELHI-110002.

Appeal No. D-2/01/2019

M/s. Seasons Textiles Appellant

Through:- Shri Haribansh Manav, Ld. Counsel for the Appellant.

Vs.

APFC/ RPFC, Noida Respondent

Through:- Shri , Ld. counsel for the Respondent.

ORDER DATED :-17.10.2022

The matter could not be taken up due to being busy in the matters filed under the Industrial Disputes Act, 1947. List the matter on 10.01.2023 for final arguments.

Presiding Officer

BEFORE THE HON'BLE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT, DELHI; ROOM No.208 ROUSE AVENUE, DISTRICT COURT COMPLEX, NEW DELHI-110002.

Appeal No. D-2/26/2019

M/s. Sanya Hospitality Pvt. Ltd. Appellant

Through:- Shri Puneet Saini, Ld. Counsel for the Appellant.

Vs.

APFC/ RPFC, Gurugram Respondent

Through:- Shri S.C. Gupta, Ld. counsel for the Respondent.

ORDER DATED :-17.10.2022

The matter could not be taken up due to being busy in the matters filed under the Industrial Disputes Act, 1947. List the matter on 30.11.2022 for final arguments.

Presiding Officer

BEFORE THE HON'BLE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT, DELHI; ROOM No.208 ROUSE AVENUE, DISTRICT COURT COMPLEX, NEW DELHI-110002.

Appeal No. D-2/30/2019

M/s. Greater Noida Industrial Development Authority Appellant

Through:- Shri Raj Kumar, A/R for the Appellant.

Vs.

APFC/ RPFC, Noida Respondent

Through:- Shri S.N. Mahanta, Ld. counsel for the Respondent.

ORDER DATED :-17.10.2022

The matter could not be taken up due to being busy in the matters filed under the Industrial Disputes Act, 1947. List the matter on 30.11.2022 for final arguments.

Presiding Officer