# THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT/EPF APPELLATE TRIBUNAL, JABALPUR

**NO. CGIT/LC/EPFA-60-2019**

**PRESENT: P.K.SRIVASTAVA**
**H.J.S.(Retd.)**

**M/S IBD Universal Private Limited**
**IBD Kings Park, Near World Way School,**
**E-8 Extension, Bhopal(M.P.)**

**APPELLANT**

**Versus**

**The Employees Provident Fund Commissioner,**
**Regional Office-59, Arera Hills Bhopal(M.P.)**

**RESPONDENT**

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**Shri Pranay Choubey : Learned Counsel for Appellant.**

**Shri J.K.Pillai :Learned Counsel for Respondent.**

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## (JUDGMENT)

**(Passed on this 18th day of August-2022 )**

1. Under challenge in this appeal is order dated 9-8-2019 passed by the Respondent Authority under Section 14B of the Employees Provident Fund And Misc. Provisions Act,1952, herein after referred

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to the word Act", whereby the Respondent Authority has held the Appellant Establishment guilty of late deposit of employees provident fund dues relating to its employees within the period 18-2-2018 to 30-4-2019 and has computed the amount of Rs.5,18,282/- as damages for late deposit of the provident fund dues..

2. Facts connected in brief are that the Appellant Establishment is a private company. It was allotted provident fund code No.MP/13376 by Respondent Organization and has been depositing employees provident fund dues of its employees with all due diligence. The employees provident fund dues accrued during the period from June-2015 to May-2016 and April-2017 to December-2018 could not be paid in time rather they were paid within the period 18-2-2018 to 30-4-2019 due to bad financial condition of the Appellant Establishment coupled with turmoil in real estate business. The Respondent Authority issued notice dated 1-5-2019 to the Appellant Establishment under Section 7Q for interest and 14B of the Act for damages. The Appellant Establishment submitted its reply through its representation, explaining the delay in remittance which was poor financial condition of the Appellant Establishment during the period in question due to recession in real estate market resulting into non-performing assets with respect to bank loan. Even the auction sale notice of properties of Appellant Establishment hypothecated with the banks with respect to the loans obtained were issued. The Appellant Establishment also filed documents substantiating its defense but the Respondent Authority wrongly

failed to consider the defense in proper perspective in the light of settled principles and passed the impugned order under Section 14B of the Act, hence, this appeal. The grounds of appeal taken in the memo of appeal are mainly that the Respondent Authority committed error in law in not exercising its jurisdiction in a reasonable and judicious manner in passing the impugned order. The Respondent Authority wrongly held that bad financial condition of Appellant Establishment was not considered in law for assessing facts under Section 14B, hence committed error in law. The Respondent Authority committed error in law also in not considering the fact that all the employees provident fund dues stood deposited on the date of passing the impugned order.

3. In its counter, the Respondent has defended the impugned order with a case that the Appellant Establishment failed to remit statutory employees provident fund dues within time as provided in para-38(1) of the Employees Provident Fund Scheme-1952 within the period 1-4-1996 to 14-3-2014, hence proceedings under Section 14B for damages and 7Q of the Act for interest were initiated. The employees Provident fund dues were to be deposited by the Appellant Establishment by the 15th of next month in which the dues become payable to him. The settled law on this point is that in assessing the damages the Respondent Authority is not only bound to take into account the loss to the beneficiaries but also the default of the employer in making contribution which leads to infliction of damages which are cumulative in nature. According to the

Respondent Authority, the impugned order was passed after extending ample opportunity to the Appellant and after duly appreciating the submissions and records produced by the Appellant Establishment in which he was found failing to substantiate reasons behind the untimely remittance of employees provident fund dues.

4. No rejoinder was filed by the Appellant Establishment.

5. I have heard arguments of learned Counsel Shri Pranay Choubey appearing for Appellant Establishment and Shri J.K.Pillai, learned counsel appearing for Respondent Authority. I have gone through the record as well as the written argument filed by the Appellant Establishment through its counsel. On perusal of the record, in the light of the rival arguments, the following point comes up for determination, in the case in hand:-

**"Whether the assessment of damages under Section 14B of the Act made by the Respondent Authority in the impugned order can be faulted in law or fact?"**

6. **POINT FOR DETERMINATION:-**

Before proceeding with the discussion, it is worth mentioning that the fact that default in payment of employees provident fund dues is not disputed between the parties, hence the finding of the Respondent Authority with regard to default in payment of employees provident fund dues within the stipulated time with Respondent Authority is affirmed as it is not challenged.

7. The defense taken by the Appellant Establishment with respect to the delay in deposit of employees provident fund dues was bad financial condition of the Appellant Establishment due to recession in trade which resulted into loans taken by the Appellant Establishment from various banks details mentioned in the Memo turning into NPA's, consequently the banks initiated auction of properties of establishment. Perusal of impugned order reveals that this defence was taken by the Appellant Establishment before the Respondent Authority. The Respondent Authority further observed in the impugned order that as the establishment has accepted the dues, nothing more remains to be decided and made the impugned assessment.

8. The learned counsel for the appellant has submitted that the delay in deposits were not intentional rather it was under compulsion, arising out from bad financial conditions of Appellant Establishment due to adverse market and recession. The Appellant Establishment has filed documents with the memo of appeal not controverted by Respondent Authority, hence this fact is atleast established that financial condition of the Appellant Establishment was in bad shape during the period in question due to adverse

market conditions and other related factors. The point here arises for consideration is whether the Respondent Authority committed error in law in not considering the bad financial condition of the Appellant Establishment. It is to be made clear that the impugned order does not disclose any finding of Respondent Authority on this point. Learned Counsel has referred to judgment of Hon'ble the Apex Court in the case of **Employees State Insurance Corporation Vs. H.M.T. Limited**(2008) 3 SCC 35 where in "Hon'ble the Apex Court while considering the pari materia provisions of Employees State Insurance Act has observed that existence of required ***mens rea or actus reus*** to contravene a statutory provision must be held to be a necessary ingredient for levy of damages and assessment of quantum of damages. According to the learned Counsel, necessary implication of this point is that the adjudicating Authority is not required to Act mechanically in assessing the damages to the upper most limit of the table.

*9.* Learned Counsel further referred to another judgment of **Kerala High Court in the case of M/s Harrisons Malayalam Ltd. Vs. Regional Provident Fund Commissioner**(2012) 1 KLJ 398, wherein it has been laid down that lesser damages can be imposed at the time of financial crisis as per Section 14-B of the Act as the Employer Company faced delay in giving payment of provident fund.

*10.* Learned Counsel has referred to another Judgment of Hon'ble the Apex Court in **Assistant Provident Fund Commissioner, EPFO Vs. Management of RSL Textiles India Pvt. Ltd**. AIR(2017) SCC 679 to buttress the argument that required **mens rea** in late deposit is a must in imposition of damages under Section 14-B of the Act and imposition of damages without recording finding on required **mens rea** is bad in law.

*11.* In another case **M/s Prestolite of India Ltd. Vs. The Regional Director And Another** AIR(1994) SCC 521 referred to by learned counsel for the Appellant, it has been laid down that adjudicating Authority can take mitigating circumstances into consideration while computing damages and should not act mechanically in applying the upper most limit of damages.

*12.* Learned Counsel for the respondent has submitted that firstly there was no material placed before the Respondent Authority regarding financial instability of the appellant establishment when the impugned order was passed by him. Secondly financial crunch or financial instability relating to other in-debtness is not a ground to avoid liability for default. He has referred to decision of Hon'ble the Apex Court in the case of **Hindustan Times Ltd. Vs. Union of India** (1998 ) 2 SCC 242 and **Sky Machinery Limited Vs. Regional Provident Fund Commissioner** (1998) LLR 925 Orissa. In this respect there is another judgment of Hon'ble the Apex Court in the case of **Director of Enforcement Vs. MCTM**

**Corporation**(1996)2 SCC 471 wherein the learned counsel for the Respondent has submitted that as held by Hon. Apex Court, **mensrea** is a state of mind which can be inferred from the circumstances. According to the learned counsel for the Respondent, simply because there was some financial instability with the Appellant Establishment, it cannot be said that the penal damages should have been waived. This is also in the argument of learned counsel for the Respondent that since the legislation is a judicial legislation, the amount of employees provident fund dues is invested by the establishment which earns interest on the investment and is given back to the Members. If the amount is not deposited in time, it will not yield interest. This will ultimately prejudice the interest of the poor members of the claim. He has referred to a Judgement of Hon. The Apex Court in the case **or Oregano Chemical Industries and Another Vs. Union of India and Others** (1979) 4 SCC 573 , in this case it has been laid down that Section 14B of the Act is not ultra-virus of Constitution because the amount levied in this provision is given back to the Members of the Scheme in the form of interest also. This was the provision before the 7Q was inserted in the Act. Now there is a separate provision under Section 7Q for interest on late deposits , hence at present Section 14B is only acting as a deterrent for the establishment against late deposit of employees provident fund dues. It is well known that judicial notice of this fact can be taken that no portion of the amount recovered under Section 14B of the Act as penal damages, is given back to the Members of the Scheme. Learned Counsel for the Respondent has referred to a recent judgement of Hon. The Apex

Court in the case of **HORTICULTURE EXPERIMENT STATION GONIKOPPAL, COORG VERSUS THE REGIONAL PROVIDENT FUND ORGANIZATION(2022) Live Law SC 202** wherein it has placed reliance on its three Judges Bench decision in the case **Union of India and Others Vs. Dharmendra Textiles Processors and Others** (2008)13 SCC 369 , it has been held by Hon. The Apex Court that as far as penalty inflicted under provisions of Section 271(1)(c ) of the Income Tac Act,1961 is a civil liability. **Mens rea** or **actus reus** is not an essential element for imposing civil penalty and has further held that mensrea has no role to play while deciding liability of defaulter establishment to pay damages under Section 14B of the Act.

*13.* Though learned counsel for the appellant has tried to distinguish this judgement of Horticulture Experiment Station(supra) and has referred to another judgment of Hon. The Apex Court in the case of **Union of India Vs. M/s Rajasthan Spinning and Weaving Mills ,** Civil Appeal No.3527/2009 and another Division Bench judgment but since the Horticulture Experiment Station(supra) is recent, this will prevail over the earlier judgment

*14.* Hence on the basis of the above discussion, the fact that when it is established that the employees provident fund dues have not been deposited in time , this default will attract damages under Section 14B of the Act irrespective of existence or non-existence of required **mens rea** or **actus reus**. Accordingly the Appellant Establishment cannot escape from this liability to pay damages under Section 14B of the Act on the ground that it did not have the required **mens rea** to avoid liability that the delay was due to certain compelling circumstances.

*15.* If we compare Section 271(1)(c ) of the Income Tax Act,1961 with Section 14B of the Act we find difference. In the previous sections the word "shall" has been used and amount of penalty has also been specified whereas in Section 14B of the Act word "may " have been used and amount of penal damages has been left to be fixed by the Assessing Authority. Section 14B is being reproduced as follows:-

> **Section 14(B)-**
> **Power to recover damages. - Where an employer makes default in the payment of any contribution to the Fund the 2 [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 3 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of 4 [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, 5 [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 6 [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme].] 7 [Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard.] 8 [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 (1 of**

**1986), subject to such terms and conditions as may be specified in the Scheme.**

16. Now the question arises that when the Assessing Authority has been given discretion either to levy damages or not and has been given discretion regarding fixing of amount of damage even if the liability to pay damages is not dependent on existence of required **mens rea**, because it is a civil liability as it has been held in Horticulture Experiment Station(supra), is the Assessing Authority under obligation to look into the mitigating and aggravating circumstances while fixing the amount of penal damages keeping in view the fact that Section 14B of the Act does not fix any minimum amount and only highest amount has been fixed, answer in my view is YES.

17. Now coming to the fact in the case in hand, the documents in the form of balance sheets for the year 2017-18, statement of income tax for the year 2018-19 and the statement regarding profit and loss filed as Annexure-1 as well as public notice regarding auction of sale of property of the Appellant Establishment Annexure-2 coupled with Anexure-3 which shows that bank has initiated proceedings for recovery of amount before Debt Recovery Tribunal in which the attached order was passed by the Debt Recovery Tribunal and properties of Appellant were put for auction and sale, all uncontroverted from the side of the Respondent goes to show that the Appellant Establishment was under financial crunch during the period in question. It also comes out that these documents were not

probably produced before the Respondent Authority, hence he had no option to consider these documents and record any finding on these documents.

*18.* In the case of Hindustan Times(supra) referred to by learned counsel for the Respondent Authority, the assessment under Section 14B was made after several years. The Appellant Establishment has taken the plea that due to strikes by workman its financial condition became instable, it has been held by the Hon'ble the Apex Court, there was no proof of this plea. Hon'ble the Apex Court further held that since there is no limitation for initiating action under Section 14B for recovery of damages. The Establishment cannot be permitted to take the plea that late initiation of proceedings resulted into prejudice to it and it destabilized the establishment financially because by not depositing the employees provident fund dues in time, the establishment used the money which was meant to be deposited with the Authority. Hon'ble the Apex court has nowhere stated that financial crunch will not be a ground at all to be considered as mitigating circumstances.

*19.* In the light of the established fact that Appellant in the case in hand has established financial instability/crunch due to various factors, it must have been considered as mitigating circumstances in the light of judgment of Hon. Kerala High Court in the case of M/s Harrisons Malayalam(supra) referred to from the side of the Appellant. Hence keeping this mitigating circumstances in view, the assessment of amount under Section 14B of the Act deserves to be reduced by 20% and the impugned order deserves to be modified accordingly. **Point for determination is decided accordingly**.

## ORDER

**Appeal is allowed in part. The finding of the Respondent Authority holding the Appellant Establishment liable for damages under Section 14B of the Act is confirmed. The amount of damages is reduced by 20%.**

**Parties to bear their own costs.**

**(P.K.SRIVASTAVA)**

**PRESIDING OFFICER**

**JUDGMENT SIGNED , DATED AND PRONOUNCED.**

**(P.K.SRIVASTAVA)**

**PRESIDING OFFICER**

**Date:18-8-2022**