EMPLOYEES PROVIDENT FUND APPELLATE TRIBUNAL
NEW DELHI
ATA No. 565(09)2009

M/s. Fancy Corporation Ltd. ..... Appellant

Vs

RPFC, Mumbai & Another .... Respondent

ORDER
Dated: 15th April, 2014

Present: Sh. S K Gupta, Advocate for the appellant
Sh. Rajesh Kr. Singh, Advocate for the respondent.

The present appeal is file to challenge the Order dated 29-06-2009 passed by the APFC, Mumbai under Section 14B of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 imposing damages on account of delayed remittance of PF dues filed the appellant.

2. The facts of the present case are that the appellant delayed the remittance and PF dues and consequently, the Commissioner initiating proceedings under section 14B of the Act. During the proceedings, the appellant filed written statement stating therein that the appellant is regularly remitted the PF contribution right from the day of its inception and was functioning well till early 1970 and thereafter due to unprecedented depression in the Textile Industry, the mill fell sick. The Development Commissioner, Industries, Government of Maharashtra found the appellant establishment a financially sick and issued Certificate of industrial Sickness dated06-07-1984. The appellant, due to financial sickness, was referred to BIFR and a Scheme for rehabilitation was sanctioned by the Board 30-05-1990. The Government of India and the Government of Maharashtra were recommended to accorded

concessions for its rehabilitation. The Government of Maharashtra was requested for grant of permission for commercial exploitation of its plot of land at Borivalli, Mumbai. United Bank of India for concessional rate of interest. PF department was also requested for waiver of damages for delayed remittance of PF dues. The appellant has also contended that there was no mens rea on its part for delaying the remittance. The Ld. Commissioner considered the submissions made by the appellant and held that financial difficulties, recessation in the export etc. are business hazards, accumulated losses, closure of establishment are no ground to absolve the employer from its responsibility to pay damages. The Ld. Commissioner also held that Section 14B is automatically applicable as soon as the default is committed by the establishment.

3. The grounds taken by the appellant were opposed by the PF department by contending that the damages leviable under Section 14B of the Act are both compensatory as well as penal but predominating penal. It was also contending that the default due to financial hardship is not a mitigating factor in determination of damages under section 14B of the Act.

4. Heard the Ld Counsels for the parties and perused the records. Section 14B of the Act which provides for levy of damages states as under:-

> *"14B. Power to recover damages.—[Where an employer makes default in the payment of any contribution to the Fund [the [pension] Fund of 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 authorized by the Central Government, by notification in the Official Gazette, in this behalf] may recover [from the employer such damages], not exceeding the amount of arrears, as it may think fit to impose."*

5. The power to impose damages under Section 14-B is a judicial power and confers an authority upon the Provident Fund Commissioner to impose damages in case of failure of remittance of dues by the employer. Para 32A of the EPF Scheme, 1952 provides a sliding scale for the imposition of damages based on the period of defaults. It is a well known principle of law that a subordinate legislation must conform to the provisions of the Legislative Act. Section 14B of the Act provides for an enabling provision. It does not envisage mandatory levy of damages. It does not also contemplate computation of quantum of damages in the manner prescribed under the Scheme.

6. Section 14B of the Act uses the words 'may recover'. Levy of damages there under is by way of penalty. The Legislature limited the jurisdiction of the authority to levy penalty, i.e., not exceeding the amount of arrears. Para 31A of the Scheme, therefore, in our opinion, must be construed keeping in view the language used in the Legislative Act and not de hors the same.

7. In Prestolite (India) Ltd. v. Regional Director, [1994 Supp.(3) SCC 690], the Hon'ble Supreme Court of India had held that under the Employee's State Insurance General Regulations guidelines have been indicated showing as to how damages for delayed payment are to be imposed and since such guidelines have been followed, no exception should be taken thereto made to the impugned adjudication, stating:

> *"Even if the regulations have prescribed general guidelines and the upper limits at which the imposition of damages can be made, it cannot be contended that in no case, the mitigation circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter and it is bound to act mechanically in applying the uppermost limit of the table. In the instant case, it appears to us that the order has been passed without indicating any reason whatsoever as to why grounds for delayed payment were not to be accepted. There is no indication as to why the imposition of*

damages at the rate specified in the order was required to be made. Simply because the appellant did not appear in person and produce materials to support the objection, the employee's case could not be discarded in limine. On the contrary, the objection ought to have been considered on merits."

8. It implies that the employer is answerable for damages for delayed remittance irrespective of the fact that the employer had suffered heavy losses, is based on wrong presumption of law and is not sustainable. Again, it is pointed out that the Hon'ble High Court of Orissa, in the case of Bhubaneshwar City Distribution Division Vs. UOI & Another (1998 II LLJ 1044) had held that delayed payment of contribution does not ipso facto invite levy of damages. If the employer furnished sufficient cause for the delay, the authority may not levy damages in a given case. In the instant case, no reasons have been assigned or any justification is given why the damages are levied at the highest rates prescribed in Para 32A of the EPF Scheme, 1952.

9. It is settled position that 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 14B of the Act. When a discretionary jurisdiction has been conferred on the statutory authority to levy penal damages, the same cannot be construed as imperative.

10. It is also relevant to note that where a Company approaches the BIFR for its revival, the RPFC should not have to insist for damages. In the case of RPFC, West Bengal & Anr Vs. Delta Jute and Industries reported in (1997) 10 SCC 384, the Hon'ble Supreme Court took into consideration the fact that the company therein which had just revived and that in such a scenario, charging of any interest/damage on account of the delayed PF payments would have

jeopardized the said process of revival. In the said circumstances, the Hon'ble Supreme Court did not direct for payment of any interest and damages as claimed by the RPFC and disposed of the appeal filed by the RPFC against the order passed by the Trial Court whereby the Company was asked not to pay any interest or damages under the Act for the delayed payment. In the instant case too, the facts of which are far better that the one referred above, the APFC should have refrained from imposing the heavy penalty and interest. However, in this case the appellant has agreed to remit the interest.

11. The Ld. Commissioner while imposing the damages have relied on the case of Vallabhdas Kanji Ltd. Vs. Intelligence Officer, and held that the element of mens rea is not required in case levy of penalty. The Hon'ble High Court of Kerala in this case examined the scope and import of Section 45A of the Kerala General Sales Tax Act, xxx. Section 45A of Kerala GST Act empowered the designated authority or officer to direct that such person, who had violated any provisions of the Kerala GST Act to pay, by way of penalty, an amount not exceeding twice the amount of Sales Tax or other amount evaded or sought to be evaded where it is practicable to quantify the evasion or an amount not exceeding ten thousand rupees in any other case.

12. Recently, the Hon'ble Supreme Court of India in the case of The Chairman, Sebi Vs. Shriram Mutual Fund & Anr has the occasion to consider the scope and extent of Chapter VI-A of the Securities and Exchange Board of India Act, 1992 and held as follows:-

> "7. Chapter VI-A of the SEBI Act provides for Penalties and Adjudication, which provisions were introduced in SEBI Act by the Amendment Act 9 of 1995. Section 15-A to Section 15 HB are in the form of mandatory provisions imposing penalty in default of the provisions of the SEBI Act and Regulations. The provisions of penalty for non-compliance of the mandate of the Act is with an object to have an effective deterrent to ensure better compliance of the provisions of the SEBI Act and Regulations, which is crucial for the appellant Board in

order to protect the interests of investors in securities and to promote the development of the securities market. Chapter VI-A of the SEBI Act deals with the penalties and the adjudication. Section 15-I of the SEBI ACT envisages appointment of Adjudicating Officer for holding an inquiry in the prescribed manner, after giving reasonable opportunity of being heard for the purpose of imposing any penalty.

8. Section 15-J provides various factors which are to be taken into consideration while adjudging the question of penalty under Section 15-I namely, the amount of disproportionate gain or unfair advantage whenever quantifiable, loss caused to an investor or group of investors and the repetitive nature of default. The legislature in its wisdom had not included mens rea or deliberate or wilful nature of default as a factor to be considered by the Adjudicating Officer in determining the quantum of liability to be imposed on the defaulter.

9. Sections 15A to 15H and 15HA employ the words "shall be liable" and, therefore, mandatorily provides for imposition of monetary penalties for respective breaches or non-compliance of provisions of the SEBI Act and the Regulations. Default or failure, as contemplated under the Act includes:

15A. Failure to furnish information, return
15B. Failure to enter into agreement with clients
15C. Failure to redress investors' grievances
15D. Default in case of mutual funds
15E. Failure to observe rules and regulations by an asset management company
15F. Default in case of stock brokers
15G. For insider trading
15H. Non-disclosure of acquisition of shares and takeovers
15HA. Fradulent and unfair trade practices
15HB. Penalty, if not separately provided

10. The Scheme of the SEBI Act of imposing penalty is very clear. Chapter VI nowhere deals with criminal offences. These defaults for failures are nothing, but failure or default of statutory civil obligations provided under the Act and the Regulations made thereunder. It is pertinent to note that Section 24 of the SEBI Act deals with the criminal offences

proceedings under Chapter VI A are neither criminal nor quasi-criminal. The penalty leviable under this Chapter or under the Section, is penalty in cases of default or failure of statutory obligation or in other words breach of civil obligation. In the provisions and scheme of penalty under Chapter VI A of the SEBI Act, there is no element of any criminal offence or punishment as contemplated under criminal proceedings. Therefore, there is no question of proof of intention or any mens rea by the appellants and it is not essential element for imposing penalty under SEBI Act and the Regulations."

13. In the context of the EPF Act, Section 14B enables the designated authorities/Officers to recover damages in case of delayed remittance of PF dues. Section 14B of the Act is an enabling provision. It does not envisage mandatory levy of damages. It does not also contemplate computation of quantum of damages. The Central Government has framed the Employees Provident Fund Scheme, 1952 to implement the provisions of the Act. Para 32A of the EPF Scheme, 1952 provides a sliding scale for the imposition of damages based on the period of defaults. The provisions of Para 32A of the EPF Scheme, 1952 is a subordinate legislation and it must conform to the provisions of the Legislative Act, i.e. EPF Act. Section 14B of the Act provides for an enabling provision. It does not envisage mandatory levy of damages. Whereas, in the cases of Vallabhdas Kanji Ltd. (supra) and Shriram Mutual Fund & An. (supra), the relevant Section 45A of Kerala General Sales Tax, Act and chapter VI-A of the SEBI Act mandates compulsory imposition of damages/penalty. In this context it is relevant to refer the case of Asst. Commercial Taxes Officer v. Bajaj Electricals Ltd., [(2009) 17 KTR 120 (SC)], wherein the Hon'ble Supreme Court of India has held as follows:-

9. *Existence of mens rea is an essential ingredient of an offence. However, it is a rule of construction. If there is a conflict between the common law and the statute law, one has to construe a statue in conformity with the common law. However, if it is plain from the statue that it intends to alter the course of the common law, then that plain meaning should be accepted. Existence of mens rea is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals. A penalty imposed for*

a tax delinquently is a civil obligation, remedial and coercive in its nature, and is different from the penalty for a crime.

14. The provisions of Section 45A of the Kerala general Sales Tax Act and Chapter VI A of the SEBI Act are mandatory provisions to levy penalty for violation of the provisions of the said Acts whereas in the case of EPF Act the legislature has specifically dispensed with the requirement of mens rea while imposing penalty. The Hon'ble Supreme Court of India in the case of In the case of Employees' State Insurance Corporation Vs. HMT Ltd. and Another,(2008) 3 SCC 35, the Hon'ble Supreme Court of India held as follows:-

> "15. Obligation on the part of the employer to deposit the contributions of both the 'employer' and the 'employee' is not in dispute. What is in dispute is as to whether the amount of damages specified in Regulation 31/c of the Regulation is imperative in character or not.
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> "16. It is a well known principle of law that a subordinate legislation must conform to the provisions of the Legislative Act. Section 85-B of the Act provides for an enabling provision. It does not envisage mandatory levy of damages. It does not also contemplate computation of quantum of damages in the manner prescribed under the regulations.
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> "21. A penal provision should be constructed 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, under the statute is held to be mandatory in character.

"24. We agree with the said view as also for the additional reason that the subordinate legislation cannot override the principal legislative provisions.

"25. The statute itself does not say that a penalty has to be levied only in the manner prescribed. It is also not a case where the authority is left with no discretion. The legislation does not provide that adjudication for the purpose of levy of penalty proceeding would be a mere formality or imposition of penalty as also computation of the quantum thereof became a foregone conclusion. Ordinarily, even such a provision would not be held to providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance of the principles of natural justice is necessary thereunder.

"26. Existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof."

15. Therefore, the case of Vallabhdas Kanji Ltd. (supra) cited by the Ld. Commissioner has no relevance. In the matter of levy of damages under Section 14B of the Act the existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof.

16. In the instant case, the Ld. Commissioner has failed to establish that there was a willful default on the part of the appellant, the appellant cannot be held liable for damages.

17. In view of the above discussion, the impugned Order is legally not sustainable and the hence is set aside. The appeal is allowed. Copy of the order be sent to the parties. The file be consigned to the record room.

(R.L. Koli)
Presiding Officer, EPFAT