

(2018) 11 DEL CK 0052

In the Delhi High Court

Case No : Civil Writ Petition No.12089 Of 2018 & Civil Miscellaneous 46825 Of 2018

Central Board Of Trustees, Epf Thr. Rpfcd

APPELLANT

Vs

M/S DENTSU MARCOM PVT. LTD

RESPONDENT

Date of Decision : 12-11-2018

Acts Referred:

Employees' Provident Funds & Miscellaneous Provisions Act, 1952 — Section 7Q, 14B, 20, 21

Citation : (2018) 11 DEL CK 0052

Hon'ble Judges : Sunil Gaur, J

Bench : Single Bench

Advocate : Inderjeet Sidhu, Rajiv Arora, S.P. Arora

Final Decision : Disposed Off

Judgement

1. Impugned order of 18th September, 2018 sets aside petitioner's order of 23rd January, 2015 in proceedings under Section 14-B & 7 Q of the

EPF & MP Act, 1952 (hereinafter referred to as "aforesaid Enactment") while holding that revised calculation sheet submitted by Enforcement

Officer does not take into consideration the deposit of `62,05,360/- voluntarily made by respondent and since the revised calculation sheet is incomplete

and does not depict true and correct liability of the employer-establishment, therefore, the levy of damages vide order of 23rd January, 2015 has been

set aside.

2. Impugned order also holds that the modified/revised order of 21st April, 2015 does not rectify any clerical or arithmetical mistake apparent on the

face of record and concludes that competent authority has not conducted the proceedings independently. The impugned order also notes that no

finding of mens rea/actus reus, which is determinative factor, has been returned by the competent authority. While holding so, reliance has been

placed by the appellate authority on Supreme Court's decision in Assistant Provident Fund Commissioner EPFO and Another v. Management of

RSL Textiles India Private Limited through its Director, (2017) 3 SC 110 and also upon a decision of High Court of Bombay in Union of India and

Others v. Super Processors, (1993) IT LLJ 203Bom.

3. The challenge to impugned order by petitioner's counsel is on the ground that the impugned order erroneously discards petitioner's

Communication of 21st April, 2015 as in the said Communication, deposit made by respondent has already been taken into consideration and

thereafter, the damages levyable are to the tune of `1,32,00,000 odd. It is submitted on behalf of petitioner that the revised calculation sheet has been

accepted by respondent and to submit so, attention of this Court is drawn to respondent's Communication of 10th March, 2015 (Annexure P-3

colly.). It is further submitted by petitioner's counsel that to the show-cause notice issued by the competent authority, no reply was given by

respondent and so, the aspect of mens rea could not be considered by the competent authority. Reliance is placed by petitioner's counsel upon

Supreme Court's decision in M/s. Hindustan Times Limited v. Union of India and Others, 1998 LAB.I.C.483 to submit that on the ground of

delay, the order of competent authority cannot be set aside and so, it is submitted that the impugned order deserves to be quashed.

4. Respondent's counsel refutes the aforesaid stand taken on behalf of petitioner and supports the impugned order. Reliance is placed upon

Sections 20 & 21 of the aforesaid Enactment to submit that the Circular of 28th November, 1990 prescribing limitation of three years for levying

damages was not brought to the notice of Supreme Court in the case of M/s. Hindustan Times Limited (supra) and that petitioner is bound by Circular

and thus, the impugned levy of damages is time barred. Reliance is also placed upon Supreme Court's decision in Management of RSL Textile

India (Supra) to submit that in the absence of finding regarding mens rea of the employer, action under Section 14-B of the aforesaid Enactment

cannot be sustained. It is submitted on behalf of respondent that respondent's Communication of 10th March, 2015 (Annexure P-3 colly.) does not

indicate that the revised calculation made by petitioner was accepted. Respondent's counsel submits that revised calculation sheet was not

supplied to respondent. Reliance is placed by respondent's counsel upon decision of High Court of Bombay in *Super Processors* (supra) to submit

that petitioner is bound to apply aforesaid Circular of 28th November, 1990 while determining liability of the employer.

5. Upon hearing and on perusal of impugned order, material on record and the decisions cited, I find that the Circular of 28th November, 1990 was not

brought to the notice of Supreme Court in the year 1998 when the decision in *M/s. Hindustan Times Limited* (supra) was rendered. Otherwise also,

aforesaid Circular is not of statutory character. In the instant case, the delay in levying damages is of about 18 years whereas the delay in the case of

M/s. Hindustan Times Limited (supra) was of 14 years. To my mind, on the delay aspect alone, the impugned order cannot be maintained as the issue

of mens rea is a determinative factor in the instant proceedings. Neither the competent authority nor the appellate authority has gone into this vital

aspect of mens rea. It is true that petitioner's Communication of 21st April, 2015 does not disclose that any typographical or any arithmetical error

was sought to be corrected. Even if the aforesaid Communication of 21st April, 2015 is excluded from consideration, still the validity of the revised

calculation sheet has to be determined by the competent authority.

6. In the considered opinion of this Court, while setting aside competent authority's order of 23rd January, 2015, appellate authority ought to have

remanded the matter back to the competent authority for decision afresh as respondent in its Communication of 10th March, 2015 (Annexure P-3

colly.) has not specifically disputed the revised calculation-sheet. Another infirmity, which is apparent on the face of record, is that to the show-cause

notice issued by petitioner, no reply was given by respondent. In view of Supreme Court's decision in *Management of RSL Textiles India Private*

Limited (supra), the issue of mens rea is required to be determined, which cannot be done in the writ proceedings. In light of the aforesaid, impugned

order directing refund of amount deposited by respondent cannot be maintained and is accordingly set aside. However, impugned order so far as it

sets aside competent authority's order of 23rd January, 2015 (Annexure P-2) is maintained with the rider that competent authority is required to

pass an order under Section 14B&7Q of the EPF & MP Act, 1952 while returning a finding on the mens rea aspect. Let the needful be done by the

competent authority within a period of sixteen weeks or so. It is made clear that the competent authority shall afford an opportunity to both the sides

and will not be influenced by any observation in the impugned order or in its earlier order of 23rd January, 2015, which has already been set aside.

7. In the facts and circumstances of this case, let an opportunity be granted to respondent to give a reply to the show-cause notice within a period of

four weeks from today and thereafter, expeditiously proceed further in accordance with the law.

8. With the aforesaid directions, this petition and the application are disposed of.

Copy of this order be given dasti to counsel for both the sides.