Sun Pressings (P) Ltd vs The Presiding Officer on 3 June, 2024

Author: S.S.Sundar

Bench: S.S. Sundar, S.Srimathy, R.Vijayakumar

W.P.(MD)N

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 15.12.2022

Pronounced on : 03.06.2024

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR
THE HONOURABLE MRS.JUSTICE S.SRIMATHY
AND
THE HONOURABLE MR. JUSTICE R.VIJAYAKUMAR

W.P.(MD)Nos.7339, 9688 of 2013, 2765 & 2782 of 2014

W.P.(MD)No.7339 of 2013:

Sun Pressings (P) Ltd.,
represented by its Managing Director
Mr.D.Dhanushkodi
No.F2 & 3, SIDCO Industrial Estate
K.Pudur, Madurai 625 007 .. P

vs.

1. The Presiding Officer
   Employees' Provident Fund Appellate Tribunal
   Core II, 4th Floor, Laxmi Nagar District Centre
   Laxmi Nagar, Delhi 110 092

2. The Assistant Provident Fund Commissioner
   Employees' Provident Fund Organization
   Regional Office
   No.1, Lady Doak College Road
   Chokkikulam, Madurai 625 002 .. Respondent

Writ Petition is filed under Article 226 of the Constitut

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https://www.mhc.tn.gov.in/judis

W.P.(MD)N

India, praying for issuance of a Writ of Certiorarified Mandamus, t
the impugned order of the first respondent in reference A.T.A.No.65
2010 dated 04.03.2013 and quash the order of levying of 50% of the
Damages claimed by the 2nd respondent and directing the 2nd respond
to take any coercive recovery measures for executing the impugned o
the 1st respondent.

For Petitioner :: Mr.G.Manivannan

For Respondents :: Mr.K.Murali Sankar for
Mr.M.E.Ilango
Amicus Curiae
Mr.R.Sankaranarayanan
Additional Solicitor G
for EPFO assisted by
Mr.R.Vishnu

W.P.(MD)No.9688 of 2013:

A2159 Vadugambady Primary Agriculture
Co-operative Credit Society
represented through its Secretary
Vadugambadi Post, Vedasandur Taluk
Dindigul District, Tamil Nadu .. Pe

-vs-

1. The Appellate Tribunal
Employees' Provident Fund Appellate Tribunal
Scope Minar, Core ll, 4th Floor
District Centre, Laxmi Nagar
New Delhi 110 092

2. The Assistant Provident Fund Commissioner
Employees Provident Fund Organization
Regional Office
Madurai 625 002 .. Re

Writ Petition is filed under Article 226 of the Constitu
India, praying for issuance of a Writ of Certiorari, calling for th
the file of the second respondent No.TN/RO/MDU/24201/RO/Circle M15/
PDC/LD/20120 dated 18.07.2012 and the order of the Appellate Tribun
passed in ATA No.751/(13)/2012 dated 14.03.2013 and quash the same.

For Petitioner :: Mr.V.O.S.Kalaiselvam

For Respondents :: Mr.K.Murali Sankar fo
Mr.M.E.Ilango
Amicus Curiae
Mr.R.Sankaranarayanan
Additional Solicitor
for EPFO assisted by
Mr.R.Vishnu

W.P.(MD)No.2765 of 2014:

The Assistant Provident Fund Commissioner
Office of the Regional Provident Fund Commissioner
Lady Doak College Road, Chokkikulam
Madurai District .. P

-vs-

1. The Presiding Officer
Employees' Provident Fund Appellate Tribunal
Scope Minor, Core ll, 4th Floor
Laxmi Nagar District Centre
Lakshmi Nagar, New Delhi

2. M/s Jai Renga Mills Pvt.Ltd.,
rep by its Authorised Signatory/Manager
Post Box No.47, Tenkasi Road
Rajapalayam, Virudhunagar District .. R

W.P.(MD)Nos

Writ Petition is filed under Article 226 of the Constitut
India, praying for issuance of a Writ of Certiorarified Mandamus, t
the records relating to the order passed by the 1st respondent in A
760(13)2012 dated 02.04.2013 and quash the same as illegal and
consequently direct the 2nd respondent to pay a sum of Rs.15,82,443
levied for the period April 2004 to December 2010 by an order in TN
MDU/SDC/TN/10314/2012 dated 17.08.2012 passed by the APFC,
Madurai, within a time frame as fixed by this Hon'ble Court.

For Petitioner :: Mr.K.Murali Sankar

For Respondents :: Mr.S.Karthik for R2
Mr.M.E.Ilango
Amicus Curiae
Mr.R.Sankaranarayanan
Additional Solicitor G

for EPFO assisted by
Mr.R.Vishnu

W.P.(MD)No.2782 of 2014:

The Assistant Provident Fund Commissioner
Office of the Regional Provident Fund Commissioner
Lady Doak College Road, Chokkikulam
Madurai District .. Peti

-vs-

1. The Presiding Officer
   Employees' Provident Fund Appellate Tribunal
   Scope Minor, Core ll, 4th Floor
   Laxmi Nagar District Centre
   Lakshmi Nagar, New Delhi
2. M/s Jai Renga Mills Pvt.Ltd.,
   rep by its Authorised Signatory/Manager
   Post Box No.47, Tenkasi Road
   Rajapalayam, Virudhunagar District .. Resp

Writ Petition is filed under Article 226 of the Constitut
India, praying for issuance of a Writ of Certiorarified Mandamus, t
the records relating to the order passed by the 1st respondent in A
761(13)2012 dated 02.04.2013 and quash the same as illegal and
consequently direct the 2nd respondent to pay a sum of Rs.3,62,807/
levied for the period April 2003 to October 2003 by an order in TN/
MDU/SDC/TN/10314/2012 dated 23.07.2012 passed by the APFC,
Madurai, within a time frame as fixed by this Hon'ble Court.

For Petitioner :: Mr.K.Murali Sankar

For Respondents :: Mr.S.Karthik for R2
Mr.M.E.Ilango
Amicus Curiae
Mr.R.Sankaranarayana
Additional Solicitor
for EPFO assisted by
Mr.R.Vishnu

COMMON JUDGMENT

S.S.SUNDAR, J.

In all these writ petitions, the orders passed by the Employees' Provident Fund Appellate Tribunal as against the orders levying penalty under Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as “the Act”) on account of belated payment of provident fund contributions are under challenge. While W.P.(MD)Nos.7339 and 9688 of 2013 have been preferred by the employer https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. concerned, W.P.(MD)Nos.2765 & 2782 of 2014 have been preferred by the Assistant Provident Fund Commissioner, Employees' Provident Fund Organisation, Madurai.

2.By the orders impugned in W.P.(MD)Nos.7339 & 9688 of 2013, the Appellate Tribunal, while examining the legality of the orders passed by the original authority levying damages under Section 14B of the Act for delayed payments of the provident fund contributions payable by the employer at the rates specified under Para 32A of the Employees' Provident Funds Scheme, 1952, reduced the quantum of damages to be paid by the employer to fifty percent of the amount, levied even after holding that the original authority has not rendered any finding to the effect that the employer had wilfully or deliberately withheld the contributions or that the employer had unlawfully diverted the funds collected from the employees' for its business use. Aggrieved thereby, the employer concerned have preferred the above writ petitions. However, by the orders impugned in W.P.No.2765 and 2782 of 2014, the Appellate Tribunal, in the Appeals preferred against similar orders of writ petitioners levying damages under Section 14B of the Act, as against two other employers, after recording https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. similar findings, held that the damages levied against the employers are not legally sustainable, but they should pay damages at the rate of five percent per annum with effect from the passing of impugned order by the original authority. The said orders have been questioned by the Assistant Provident Fund Commissioner, Madurai in W.P.(MD)Nos.2765 & 2782 of 2014.

3.When the writ petitions were listed before a learned single Judge of this Court, it was brought to the notice of the learned Judge the divergent views expressed by the Division Benches of this Court. A Division Bench in DWC Employees Co-operative Canteen Limited v. Presiding Officer, Employees' Provident Fund Appellate Tribunal in the order dated 19.04.2018 passed in W.A.(MD)No.1494 of 2011 has taken the view that in the absence of mens rea, there is no question of claiming damages from the employer. Similarly, in a subsequent decision in R.D.34 Ariyakudi Primary Agricultural Co-operative Bank v. Employees' Provident Fund Appellate Tribunal in the order dated 16.12.2019 in W.A.(MD)No.516 of 2012, it has been held that mens rea is an essential ingredient, and unless the Assistant Provident Fund Commissioner applies his mind to the fact as to whether the reason put forth by the employer is sufficient to waive https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. payment or not, the order of the authority determining the liability for penal damages under Section 14-B of the Act would stand vitiated. However, the learned single Judge took note of two other judgments of the Division Benches in Assistant Provident Fund Commissioner, Nagercoil v. D.R.Textiles and Garments represented by its Proprietor (vide order dated 26.09.2019 in W.A.(MD)No.840 of 2019) and in Assistant Provident Fund Commissioner, Nagercoil v. M.Girilal (vide order dated 07.11.2019 in W.A. (MD)No.1555 of 2018), holding that if damages have been imposed under Section 14-B of the Act, it will be only logical that “mens rea” or “actus reus” was prevailing at the relevant point of time and hence the order passed by the Assistant Provident Fund Commissioner levying penal damages is valid. In all the aforesaid cases, the Division Benches have

placed reliance on the dictum of the Hon'ble Supreme Court in McLeod Russel India Ltd., v. Regional Provident Fund Commissioner, (2014) 15 SCC 263, wherein, it is held as follows :

> "11.....the presence or absence of mens rea and/or actus reus would be a determinative factor in imposing damages under Section 14-B, as also the quantum thereof since it is not inflexible that 100 per cent of the arrears have to be imposed in all the cases. Alternatively stated, if damages https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. have been imposed under Section 14-B, it will be only logical that mens rea and/or actus reus was prevailing at the relevant time." Referring to another judgment of the Hon'ble Supreme Court in Assistant Provident Fund Commissioner v. RSL Textiles (India)(P)Ltd., (2017) 3 SCC 110, wherein "mens rea" was held to be a necessary ingredient before imposing damages under Section 14-B, the learned Judge thought it appropriate that the matters be placed before a larger Bench of this Court for an authoritative pronouncement on a few questions of importance. The purpose of placing these writ petitions before a larger Bench is narrated by the learned Judge, in the following lines:-
>
> "5. On a perusal of the conflicting decisions of the various Division Benches of this Court referred supra, it would appear that the divergence of judicial opinion expressed revolves on whom the burden of proof would lie, to wit, whether the authority under EPF Act or the employer would have to adduce evidence as to the presence or absence of mens rea and actus reus in imposing damages under Section 14-B of the EPF Act.
>
> 6. Another incidental question that would arise for consideration is that in case where the employer has been fastened with liability of penal damages under Section 14-B https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. of the EPF Act, what would be the principles to be followed for ascertaining the amount of damages payable in such case."
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> 4.When the matter was placed before Hon'ble the Chief Justice, this Bench was chosen to hear the reference and the matter was elaborately heard. From the order of the learned single Judge, this Court finds that the learned Judge has assumed that the Hon'ble Supreme Court has settled the position that damages can be levied under Section 14-B of the Act only when there exists mens rea. However, though the Hon'ble Supreme Court in ESI Corporation v. HMT Ltd., case, (2008) 3 SCC 35, McLeod Russel India Limited case, (2014) 15 SCC 262 and in RSL Textiles (India) (P) Limited case, (2017) 3 SCC 110 held that an element of mens rea or actus reus is essential, recently the Hon'ble Supreme Court in a few judgments, particularly, in the case of Horticulture Experiment Station, Gonikoppal, Coorg v. Regional Provident Fund Organization, (2022) 4 SCC 516, has held that levy of damages is a sine quo non and the employer is liable to pay damages irrespective of mens rea or actus reus. Following the judgments of the Hon'ble Supreme Court in SEBI v. Shriram Mutual Fund, (2006) 5 SCC https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013

> etc. 361 and in Union of India v. Dharamendra Textile Processors, (2008) 13 SCC 369, the Hon'ble Supreme Court observed that the judgments in ESI Corporation, (2008) 3 SCC 35, McLeod Russel India Limited, (2014) 15 SCC 262 and in RSL Textiles (India) (P) Limited, (2017) 3 SCC 110, may not be binding precedents, in view of the three-Judge Bench decision of the Hon'ble Supreme Court in Union of India v. Dharamendra Textile Processors, (2008) 13 SCC 369, wherein, the judgment of Hon'ble Supreme Court in Dilip N.Shroff v. CIT, (2007) 6 SCC 329, which was relied upon by the Hon'ble Supreme Court in other judgments, has been overruled.

Therefore, this Court has to necessarily consider whether “mens rea” is a determinative factor in imposing damages under Section 14-B of the Act as well other incidental issues. Since damages under Section 14-B of the Act is levied, in exercise of a quasi-judicial function, there is no question examining on whom the burden lies.

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 :

> https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc.
>
> (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 ?

6.Before we proceed further, it is imperative for us to understand the scope and the ambit of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. The statement of objects and reasons would show that the Act was enacted to provide for the institution of Compulsory Provident Fund, Family Pension Fund and Deposit-linked Insurance Fund for the benefit of the employees in factories and other establishments where twenty or more persons are employed. The statement of objects and reasons for the enactment is to create a Provident Fund with the contribution of employee to make some provision for the function of industrial workers or for their dependants in case of early death of workers. https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. There were subsequent amendments introducing other schemes or to secure prompt payment of contributions. Under the Act, provision is made for setting up an independent machinery for recovery of the outstanding amount of Provident Fund and other dues under the Act and for setting up of one or more single-member Tribunals for hearing of appeals filed against the orders of Provident Fund authorities in the matter of applicability of the provisions of the Act, assessment of

dues and levy of damages, etc. Under Section 6, every employer shall pay to the Fund ten per cent of the basic wages including dearness allowance and retaining allowance, if any, and the employees' contribution shall be equal to the contribution payable by the employer in respect of every individual employee. The power to recover damages for the belated payment of contributions by the employer was introduced later by amendment Act 40 of 1973. It is to be noted that under Section 7-Q, the employer is liable to pay simple interest at the rate of twelve per cent per annum or at a higher rate if it is specified in the Scheme on any amount due from an employer under the Act from the date on which the amount has become due till the date of actual payment. It is to be noted that Section 14-B of the Act to levy damages was introduced when Section 7-Q was not in the statute. The power to recover damages under Section https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. 14-B was brought in by Act 40 of 1973, which reads as follows:-

> "14-B. 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 (1 of https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. 1986), subject to such terms and conditions as may be specified in the Scheme." There is statutory guidelines for imposition of damages as contemplated in Para 32-A of the Employees' Provident Funds Scheme, 1952, which reads as follows:-
>
> "32-A. Recovery of damages for default in payment of any contribution.--(1) Where a 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 the 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 in the table below:-

TABLE Sl.No. Period of default Rate of damages (percentage of arrears per annum)

(a) Less than 2 months Five

(b) Two months and above but less than four Ten months https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. Sl.No. Period of default Rate of damages (percentage of arrears per annum)

(c) Four months and above but less than six Fifteen months

(d) Six months and above Twenty Five (2) The damages shall be calculated to the nearest rupees, 50 paise or more to be counted as the nearest higher rupee and fraction of a rupee less than 50 paise to be ignored." Some of the provisions, namely, Paras 29, 30, 32-B, 36, 38 & 76 of the Employees' Provident Funds Scheme, 1952 are relevant and hence they are extracted hereunder:-

"29. Contributions. (1) The contributions payable by the employer under the Scheme shall be at the rate of [ten per cent] of the [basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any)] payable to each employee to whom the Scheme applies:

Provided that the above rate of contribution shall be [twelve] per cent in respect of any establishment or class of establishments which the Central Government may specify in the Official Gazette from time to time under the first proviso to sub-section (1) of section 6 of the Act.

(2) The contribution payable by the employee under the Scheme, shall be equal to the contribution payable by the employer in respect of such employee:

https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. Provided that in respect of any employee to whom the Scheme applies, the contribution payable by him may, if he so desires, be an amount exceeding [ten per cent] or [twelve per cent], as the case may be, of his basic wages, dearness allowance and retaining allowance (if any) subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Act;

(3) The contributions shall be calculated on the basis of [basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any)] actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis.

(4) Each contribution shall be calculated to [the nearest rupee, 50 paise or more to be counted as the next higher rupee and fraction of a rupee less than 50 paise to be ignored.

30. Payment of contributions (1) The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member's contribution).

(2) In respect of employees employed by or through a contractor, the contractor shall recover the contribution https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. payable by such employee (in this Scheme referred to as the member's contribution) and shall pay to the principal employer the amount of member's contribution so deducted together with an equal amount of contribution (in this Scheme referred to as the employer's contribution) and also administrative charges.

(3) It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges.

Explanation: For the purposes of this paragraph the expression "administrative charges" means such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee, and in respect of which Provident Fund Contribution are payable as the Central Government may, in consultation with the Central Board and having regard to the resources of the Fund for meeting its normal administrative expenses, fix.

32-B. 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, https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. 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.

36. Duties of employers. (1) Every employer shall send to the Commissioner, within fifteen days of the commencement of this Scheme, a consolidated return in such form as the Commissioner may specify of the employees required or entitled to become members of the Fund showing the [basic

wage, retaining allowance (if any) and dearness allowance including the cash value of any food concession] paid to each of such employees:

> Provided that if there is no employee who is required or entitled to become a member of the Fund, the employer shall send a 'NiL' return.
>
> (2) Every employer shall send to the Commissioner within fifteen days of the close of each month a return-

https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc.

(a) in Form 5, of the employees qualifying to become members of the Fund for the first time during the preceding month together with the declarations in Form 2 furnished by such qualifying employees, and (b) [in such form as the Commissioner may specify], of the employees leaving service of the employer during the preceding month:

> Provided that if there is no employee qualifying to become a member of the Fund for the first time or there is no employee leaving service of the employer during the preceding month, the employer shall send a 'NIL' return.
>
> Provided further that a copy of the forms as mentioned in clauses (a) & (b) above shall be provided by the employer to concerned employees immediately after joining the service or at the time of leaving the service, as the case may be.
>
> (3) [Omitted] (4) Every employer shall maintain an inspection note book in such form as the Commissioner may specify, for an Inspector to record his observation on his visit to the establishment. (5) Every employer shall maintain such accounts in relation to the amounts contributed to the Fund by him and by his employees as the Central Board from time to time, direct, and it shall be the duty of every employer to assist the Central Board in making such payments from the Fund to his employees as are sanctioned by or under the authority of the https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. Central Board.
>
> (6) Notwithstanding anything hereinbefore contained in this paragraph, the Central Board may issue such directions to employers generally as it may consider necessary or proper for the purpose of implementing the Scheme, and it shall be the duty of every employer to carry out such directions. (7) Every employer shall send to the Commissioner such returns in electronic format also, in such form and manner as may be specified by the Commissioner.

38. Mode of payment of contributions. (1) The employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable, deduct the employee's contribution from his wages which together with his own contribution as well as an administrative charge of such percentage [of the pay (basic wages, dearness allowance, retaining allowance, if any,

and cash value of food concessions admissible thereon) for the time being payable to the employees other than excluded employee and in respect of which provident fund contribution payable, as the Central Government may fix. He shall within fifteen days of the close of every month pay the same to the fund [electronic through internet banking of the State Bank of India or any other Nationalized Bank] [or through PayGov platform or through scheduled banks in India including private sector banks authorized for collection on account of contributions and https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. administrative charge:

Provided that the Central Provident Fund Commissioner may for reasons to be recorded in writing, allow any employer or class of employer to deposit the contributions by any other mode other than internet banking. (2) The employer shall forward to the Commissioner, within twenty-five days of the close of the month, a monthly abstract in such form as the Commissioner may specify showing the aggregate amount of recoveries made from the wages of all the members and the aggregate amount contributed by the employer in respect of all such members for the month:

> Provided that an employer shall send a Nil return, if no such recoveries have been made from the employees :
>
> Provided further that in the case of any such employee who has become a member of the pension fund under the Employees' Pension Scheme, 1995, the aforesaid form shall also contain such particulars as are necessary to comply with the requirements of that Scheme. (3) The employer shall send to the Commissioner within one month of the close of the period of currency, a consolidated annual Contribution Statement in Form 6-A, showing the total amount of recoveries made during the period of currency from the wages of each member and the total amount contributed by the employer in respect of each such member for the said period. The employer shall maintain on his record duplicate https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. copies of the aforesaid monthly abstract and consolidated annual contribution statement for production at the time of inspection by the Inspector.

[Provided that the employer shall send to the Commissioner returns or details as required under sub- paragraph (2) and (3) above, in electronic format also, in such form and manner as may be specified by the Commissioner].

76. Punishment for failure to pay contribution, etc. If any person—

(a) deducts or attempts to deduct from the wages or other remuneration of a member the whole or any part of the employer's contribution, or

(b) fails or refuses to submit any return, statement or other document required by this Scheme or submits a false return, statement or other document, or makes a false declaration, or

(c) obstructs any Inspector or other official appointed under the Act or this Scheme in the discharge of his duties or fails to produce any record for inspection by such Inspector or other official, or

(d) is guilty of contravention of or non-compliance with any other requirement of this Scheme, he shall be punishable with imprisonment which may extend to [one year, or with fine which may extend to four thousand rupees], or with both." https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc.

7.The contributions payable by the employer is therefore ten per cent of the basic wages, dearness allowance including the cash value of food concession and retaining allowance payable to each employee to whom the Scheme applies. The employee is also required to pay a similar amount equal to the contribution payable by the employer and the employee, if he so desires, can pay more than ten per cent of his basic wages, dearness allowance etc. The manner of payment of contributions is elicited in Para 30 of the Scheme. The employer is required to pay both contributions in the first instance within 15 days of the end of every month to the fund and shall deduct the employee's contribution from the salary of employees. In terms of Para 32-A of EPF Scheme, the damages is required to be calculated at the rates specified in the Table. Para 32-B speaks about the terms and conditions for reduction or waiver of damages by the Central Board. While waiver of 100% of damages can be allowed in respect of sick industries, reduction of waiver upto 50% can be allowed in other cases, depending upon merits. The duties of employers is elicited in Para 36 of the Scheme. The mode of payment of contribution is elicited in Para 38 of the Scheme. Para 76 of the Scheme speaks about the punishment for failure to pay contribution or the refusal to submit any return as required. Section 7-Q of https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. the Act was introduced long after the introduction of Section 14-B of the Act and Section 7-Q makes the employer liable to pay interest at 12% per annum on any amount due from him under the Act from the date on which the amount has become due.

8.In Organo Chemical Industries and another v. Union of India and others, (1979) 4 SCC 573, while challenging the order levying damages, the validity of Section 14-B of the Act itself was questioned and the following arguments were advanced before the Hon'ble Supreme Court, namely, (i) that in view of the in-built arbitrariness in Section 14-B of the Act, the said provision is liable to be struck down as violative of Article 14;

(ii) that the enforcement agency is vested with an unbridled power to inflict any quantum of damages as he deems fit and this blanket authority is instinct with discriminatory possibility, and hence violative of Article 14 and; (iii) that no reasons be given or any appellate or revisional remedy is prescribed under the Statute and no judicial qualification is required for the Commissioner and therefore the power to impose penalty without guidelines, to be exercised by an authority, who has no judicial qualification, is unconstitutional. Justice V.R.Krishna Iyer (as he then was), https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. agreeing with the view expressed by Justice A.P.Sen (as he then was) in his separate judgment, rejected all the contentions for reasons and upheld the order passed under Section 14-B of the Act. However, Justice V.R.Krishna Iyer held that the power vested with the authority to impose damages for the wrong-doing is quasi-judicial in character and therefore, any order in exercise of power under Section 14-B should be after following

the principles of natural justice and the authority should record its reasons in support of the order he makes. Since fair play in administration is a finer juristic facet, and it is imperative of Section 14-B of the Act, it is further held that the authority should give reasons for his order imposing damages on an employer and that the reasons should be rational and cannot be capricious and any order that suffers from any irregularity can always be interfered with in a writ petition under Article 226 of the Constitution. Since the corrective remedy is available, the Hon'ble Supreme Court held that the absence of appellate or revisional remedy will not render the legislative provision illegal. Justice V.R.Krishna Iyer also observed that when power is conferred on high and responsible officers, they are expected to act with caution and impartiality while discharging their duties. It was also observed that the Commissioner cannot award anything more than or https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. unrelated to damages. The argument by the employer that damages should be by way of compensation was negatived by the Supreme Court, as the composite idea of damages includes more than pecuniary compensation. Section 14-B of the Act, therefore, was also understood and interpreted as a punitive measure to legitimize recovery of additional sums in the form of penalty so as to see that non-compliance will result in paying heavy price. Justice A.P.Sen, whose view was concurred by Justice V.R.Krishna Iyer, observed that the authority, while fixing the amount of damages, should take into consideration various factors, namely, the number of defaults, the period of delay, the frequency of defaults and the amounts involved. The imposition of damages at the flat rate of hundred per cent for all the defaults irrespective of their duration, is held to be capricious and arbitrary. It is to be noted that Section 7-Q of the Act making the employer liable to pay interest at the rate of 12% was introduced long after the judgment in Organo Chemical Industries' case, (1979) 4 SCC 573. Therefore, levy of penalty is no more compensatory and we should take Section 14-B as purely punitive.

9.In the light of the relevant provisions under the Act, this Court https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. has to see whether the existence of mens rea is essential before imposing penalty under Section 14-B of the Act. It is true that the Hon'ble Supreme Court in Employees State Insurance Corporation v. HMT Limited and another, (2008) 3 SCC 35 considered a similar provision under the Employees State Insurance Act, namely, Section 85-B. Relying upon the judgment of the Hon'ble Supreme Court in Dilip N.Shroff v. CIT, (2007) 6 SCC 329, (where an element of mens rea is held to be necessary before imposing penalty under Income Tax Act), it was held that the existence of mens rea or actus reus to contravene a statutory provision was held to be a necessary ingredient for levy of damages under ESI Act. But there is no independent discussion about the issue whether the liability or penalty under Section 14-B is a criminal liability or a civil obligation for non-compliance of a statutory provision. Similar view was expressed again by the Hon'ble Supreme Court in the case of McLeod Russel India Ltd., v. Regional Provident Fund Commissioner, Jalpaiguri and others, (2014) 15 SCC 263. After referring to the provisions of the EPF Act and the judgments of the Hon'ble Supreme Court in Organo Chemical Industries case, (1979) 4 SCC 573 and in Employees State Insurance Corporation v. HMT Limited case, (2008) 3 SCC 35, the Hon'ble Supreme Court held as follows:-

> https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. “In our opinion, Section 14-B is complete in itself so far as computation of damages is concerned. It is conceivable that the money due from an employer would have to be calculated under

Section 7-A and in the event the default or neglect of the employer is contumacious and contains the requisite mens rea and actus reus, yet another exercise of computation is to be undertaken under Section 14-B of the Act." Again there is no independent consideration or discussion with reference to the statute to arrive at the conclusion why mens rea or actus reus is required to exercise the power under Section 14-B of the Act to levy damages.

10.Again the Hon'ble Supreme Court in Assistant Provident Fund Commissioner, EPFO and another v. The Management of RSL Textiles India Private Limited, (2017) 3 SCC 110, followed the judgment of the Supreme Court in McLeod Russel India Ltd., v. Regional Provident Fund Commissioner, Jalpaiguri and others, (2014) 15 SCC 263. It is a short judgment with five paragraphs and paragraphs 3 & 4 alone are relevant, which read as follows:-

"3. This issue is now wholly covered against the appellants in the decision rendered by this Court in McLeod Russel India https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. Ltd., v. Regional Provident Fund Commissioner, Jalpaiguri and others, (2014) 15 SCC 263, wherein it has been held in paragraph 11 that ".....the presence or absence of mens rea and/or actus reus would be a determinative factor in imposing damages under Section 14-B, as also the quantum thereof since it is not inflexible that 100 per cent of the arrears have to be imposed in all the cases. Alternatively stated, if damages have been imposed under Section 14-B, it will be only logical that mens rea and/or actus reus was prevailing at the relevant time."

4. In the impugned Judgment, at paragraph 23, it has been specifically held by the High Court that "In this case, there is no finding rendered by the original authority or the appellate authority with regard to mens rea or actus reus, except saying financial crises cannot be a reason to escape."

11.Following the judgments of Hon'ble Supreme Court in Dilip N. Shroff v. CIT [Dilip N. Shroff v. CIT, (2007) 6 SCC 329] and Employees' State Insurance Corporation v. HMT Ltd and another, (2008) 3 SCC 35, a Division Bench of this Court in Regional Provident Fund Commissioner v.

Sree Visalam Chit Funds Ltd., Palathur, 2010 (4) L.L.N.706, held that unless it is established that such failure to pay the contribution was https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. attributable to mens rea on the part of employer, question of levying damages under Section 14-B of the Act does not arise.

12.However, the rule of strict liability or civil liability or obligation for blameworthy conduct in violation of a statutory obligation have been considered in several judgments of the Hon'ble Supreme Court. While examining the question whether in the case of a company which owns or runs a factory, it is only the Director of the company who can be notified as the occupier of the factory

within the meaning of proviso (ii) of Section 2(h) of the Factories Act or whether the company can nominate any other employee to be the occupier, in response to a query how a Director of the company, who may be wholly innocent, may be made liable for the contributions to be remitted under the Act. Hon'ble Supreme Court in the case of J.K.Industries Ltd. v Chief Inspector of Factories and Boilers, (1996) 6 SCC 665, held that the offence under the Factories Act are not a part of the general penal law, but arise from the breach of a duty provided in a special beneficial social defence legislation, which creates an absolute or strict liability without proof of mens rea. Hon'ble Supreme Court further added as follows:-

> https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. “42. The offences under the Act are not a part of general penal law but arise from the breach of a duty provided in a special beneficial social defence legislation, which creates an absolute or strict liability without proof of any mens rea. The offences are strict statutory offences for which establishment of mens rea is not an essential ingredient. The omission or commission of the statutory breach is itself the offence. Similar type of offences based on the principle of strict liability, which means liability without fault or mens rea, exist in many statutes relating to economic crimes as well as in laws concerning the industry, food adulteration, prevention of pollution, etc., in India and abroad. 'Absolute offences' are not criminal offences in any real sense but acts which are prohibited in the interest of welfare of the public and the prohibition is backed by sanction of penalty.”

13.A Constitution Bench of the Hon'ble Supreme Court in the case of Pyarali K.Tejani v. Mahadeo Ramchandra Dange and others, (1974) 1 SCC 167, considered the rule of strict liability with reference to Section 7 of the Prevention of Food Adulteration Act, wherein it has been held as follows:-

> “15. It was next urged before us that the dealer believed in good faith that there was no cyclamate in the substance sold https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. induced by the warranty and honestly did not know that saccharin was contraband, the Rules in this behalf having been changed frequently and recently. It is trite law that in food offences strict liability is the rule not merely under the Indian Act but all the world over. The principle has been explained in American Jurisprudence 2d. Vol. 35, p. 864) thus “Intent as element of offence:
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> The distribution of impure or adulterated food for consumption is an act perilous to human life and health, hence, a dangerous act, and cannot be made innocent and harmless by the want of knowledge or by the good faith of the seller; it is the act itself, not the intent, that determines the guilt, and the actual harm to the public is the same in one case as in the other. Thus, the seller of food is under the duty of ascertaining at his peril whether the article of food conforms to the standard fixed by statute or ordinance, unless such statutes or ordinances, expressly or by implication, make intent an element of the offence.” Nothing more than the actus reus is needed where

> regulation of private activity in vulnerable areas like public health is intended. In the words of Lord Wright in McLeod v. Buchanan [(1940) 2 All ER 179, 186 (HL)] "intention to commit a breach of statute need not be shown. The breach in fact is enough." Social defence reasonably https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. overpowers individual freedom to injure, in special situations of strict liability. Section 7 casts an absolute obligation regardless of scienter, bad faith and mens rea. If you have sold any article of food contrary to any of the sub-sections of Section 7, you are guilty. There is no more argument about it. The law denies the right of a dealer to rob the health of a supari consumer. We may merely refer to a similar plea overruled in the case Andhra Pradesh Grain & Seed Merchants' Association v. Union of India [(1970) 2 SCC 71 : (1971) 1 SCR 166] ."

14.In Gujarat Travancore Agency v. CIT, (1989) 3 SCC 52, the Hon'ble Supreme Court has observed as follows:-

> "4.....It is sufficient for us to refer to Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276-C which provides that if a person wilfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. to the provisions of Section 276-C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the legislature is that the penalty should serve as a deterrent. The creation of an offence by statute proceeds on the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)
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> (a) which requires that mens rea must be proved before penalty can be levied under that provision.

15.In Director of Enforcement v. M.C.T.M. Corporation Pvt.Ltd., https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. (1996) 2 SCC 471, the Hon'ble Supreme Court considered the issue

whether existence of “mens rea” is a necessary ingredient for establishing contravention of Section 10 punishable under Section 23 of FERA, 1947. Under Section 10, no person who has a right to receive foreign exchange or to receive from a person resident outside India a payment in rupees shall, except with the special permission of the Reserve Bank, do or refrain from doing anything to delay receipt or payment. As per Section 23 of FERA, a person who contravenes the provisions of Section 10 of FERA is liable to such penalty not exceeding three times the value of the foreign exchange as may be adjudged by the Director of Enforcement. Under Section 23-F any person who fails to pay penalty imposed by Director of Enforcement is liable to be prosecuted before a Court for an offence punishable with imprisonment for a term upto two years or with fine or with both. This Court held that proceedings under Section 23(1)(a) are “quasi-criminal” in nature and that “mens rea” is a necessary ingredient for the commission of an offence under Section 10. Hon'ble Supreme Court following the judgment of a Constitution Bench in Maqbaal Hussain v. State of Bombay, AIR 1953 SC 325 held that mens rea (as is understood in criminal law) is not an essential ingredient for holding a delinquent liable to pay penalty https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. under Section 23(1)(a) of FERA, 1947. Para Nos.7, 8 and 13 of the judgment are relevant and hence extracted :

> “7.“Mens rea” is a state of mind. Under the criminal law, mens rea is considered as the “guilty intention” and unless it is found that the ‘accused’ had the guilty intention to commit the ‘crime’ he cannot be held ‘guilty’ of committing the crime. An ‘offence’ under Criminal Procedure Code and the General Clauses Act, 1897 is defined as any act or omission “made punishable by any law for the time being in force”. The proceedings under Section 23(1)(a) of FERA, 1947 are ‘adjudicatory’ in nature and character and are not “criminal proceedings”. The officers of the Enforcement Directorate and other administrative authorities are expressly empowered by the Act to ‘adjudicate’ only. Indeed they have to act ‘judicially’ and follow the rules of natural justice to the extent applicable but, they are not ‘Judges’ of the “Criminal Courts” trying an ‘accused’ for commission of an offence, as understood in the general context. They perform quasi-judicial functions and do not act as ‘courts’ but only as ‘administrators’ and ‘adjudicators’. In the proceedings before them, they do not try ‘an accused’ for commission of “any crime” (not merely an offence) but determine the liability of the contravenor for the breach of his ‘obligations’ imposed under the Act. They impose ‘penalty’ for the breach of the https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. “civil obligations” laid down under the Act and not impose any ‘sentence’ for the commission of an offence. The expression ‘penalty’ is a word of wide significance. Sometimes, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not “compensatory” in character is also termed as a ‘penalty’. When penalty is imposed by an adjudicating officer, it is done so in “adjudicatory proceedings” and not by way of fine as a result of ‘prosecution’ of an ‘accused’ for commission of an ‘offence’ in a criminal court. Therefore, merely because ‘penalty’ clause exists in Section 23(1)(a), the nature of the proceedings under that section is not changed from ‘adjudicatory’ to ‘criminal’ prosecution. An order made by an adjudicating authority under the Act is not that of conviction but of determination of the breach of the civil obligation by the offender.

> 8.It is thus the breach of a "civil obligation" which attracts 'penalty' under Section 23(1)(a), FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10, FERA, 1947 that would immediately attract the levy of 'penalty' under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the 'prosecution' to establish that the 'accused' had the necessary "guilty intention" or in other words the https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. requisite "mens rea" to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947. It is the "delinquency"' of the "defaulter"' itself which establishes his 'blameworthy' conduct, attracting the provisions of Section 23(1)(a) of FERA, 1947 without any further proof of the existence of "mens rea". Even after an adjudication by the authorities and levy of penalty under Section 23(1)(a) of FERA, 1947, the defaulter can still be tried and punished for the commission of an offence under the penal law, where the act of the defaulter also amounts to an offence under the penal law and the bar under Article 20(2) of the Constitution of India in such a case would not be attracted.

The failure to pay the penalty by itself attracts 'prosecution' under Section 23-F and on conviction by the 'court' for the said offence imprisonment may follow.

13.We are in agreement with the aforesaid view and in our opinion, what applies to "tax delinquency" equally holds good for the 'blameworthy' conduct for contravention of the provisions of FERA, 1947. We, therefore, hold that mens rea (as is understood in criminal law) is not an essential ingredient https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. for holding a delinquent liable to pay penalty under Section 23(1)(a) of FERA, 1947 for contravention of the provisions of Section 10 of FERA, 1947 and that penalty is attracted under Section 23(1)(a) as soon as contravention of the statutory obligation contemplated by Section 10(1)(a) is established. The High Court apparently fell in error in treating the "blameworthy conduct" under the Act as equivalent to the commission of a "criminal offence", overlooking the position that the "blameworthy conduct" in the adjudicatory proceedings is established by proof only of the breach of a civil obligation under the Act, for which the defaulter is obliged to make amends by payment of the penalty imposed under Section 23(1)(a) of the Act irrespective of the fact whether he committed the breach with or without any guilty intention. Our answer to the first question formulated by us above is, therefore in the negative."

16.In Swedish Match AB v. SEBI, (2004) 11 SCC 641, a three- Judge Bench of the Hon'ble Supreme Court has concluded as follows:-

> "113. It is accepted that once a public offer is made the investors would be entitled to elect to transfer their shares at a higher price which may be offered by the acquirer

> with a view to acquire control over the target company. The investors would also be entitled to interest at such rate as the Board may https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. determine. The provisions of Section 15-H of the Act mandate that a penalty of rupees twenty-five crores may be imposed. The Board does not have any discretion in the matter and, thus, the adjudication proceeding is a mere formality. Imposition of penalty upon the appellant would, thus, be a forgone conclusion. Only in the criminal proceedings initiated against the appellants, existence of mens rea on the part of the appellants will come up for consideration."

17.In SEBI v. Cabot International Capital Corporation, (2005) 123 Comp Cases 841 (Bom), the Bombay High Court had an occasion to consider whether mens rea is an essential ingredient to be shown for imposing penalty for committing violation of the provisions of the SEBI Act and Regulations. While mens rea is considered to be essential or sine quo non for criminal offence, it is held that mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.

18.Again in Chairman, SEBI v. Shriram Mutual Fund and another, (2006) 5 SCC 361, the Hon'ble Supreme Court has reiterated the principle that the breach of a statutory obligation under the provisions of the SEBI Act and the Regulations made thereunder, would attract levy of https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. penalty irrespective of the fact whether the contraventions were made by the defaulter with any guilty intention or not. The Hon'ble Supreme Court, after referring to the judgments referred to earlier, has categorically ruled that mens rea is not an essential element for imposing penalty for breach of civil obligations. The relevant paragraphs in the said judgment are extracted below:-

> "29. The Tribunal set aside the order passed by the adjudicating officer on the ground that the penalty to be imposed for failure to perform a statutory obligation is a matter of discretion which has to be exercised judicially and on a consideration of all the relevant facts and circumstances. The Tribunal also held that the adjudicating officer has to be satisfied with the material placed before him that the violation deserves punishment. It was held that penalty is warranted by the quantum which has to be decided by taking into consideration the factors stated in Section 15-J of the SEBI Act. In our opinion, the Tribunal has miserably failed to appreciate that by setting aside the order of the adjudicating officer the Tribunal was setting a serious wrong precedent whereby every offender would take shelter of alleged hardships to violate the provisions of the Act. In our opinion, mens rea is not an essential ingredient for contravention of the provisions of a civil Act. In our view, the penalty is attracted as soon as contravention of the statutory https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In other words, the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not. This apart, unless the language of the statute indicates the

need to establish the element of mens rea, it is generally sufficient to prove that a default in complying with the statute has occurred. Under a close scrutiny of Sections 15-D(b) and 15-E of the Act, there is nothing which requires that mens rea must be proved before penalty can be imposed under these provisions. Hence, we are of the view that once the contravention is established, then the penalty has to follow and only the quantum of penalty is discretionary. Discretion has been exercised by the adjudicating officer as is evident from imposition of lesser penalty than what could have been imposed under the provisions. The intention of the parties is wholly irrelevant since there has been a clear violation of the statutory Regulations and provisions repetitively, covering a period of 6 quarters. Hence, we hold that the respondents have wilfully violated statutory provisions with impunity and hence the imposition of penalty was fully justified. The Tribunal, in this context, failed to appreciate that every mutual fund has to redeem the units as per terms and conditions of the scheme on https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. the request of the unit-holders and this cannot, in any manner, be considered as an extraordinary circumstance or something which was not known to the respondents. The facts and circumstances of the present case in no way indicate the existence of special circumstances so as to waive the penalty imposed by the adjudicating officer. A perusal of the order passed by the adjudicating officer would clearly go to show that factors such as small size of the funds, low volume of transactions, thinly traded securities, administrative and operational exigencies were duly considered and appreciated by the adjudicating officer while passing the order and that is why the adjudicating officer did not impose the maximum permissible penalty. The Tribunal failed to appreciate that the objective behind imposing certain limit on the business that can be conducted by mutual fund through the associate broker is to eliminate any undue advantage to the class of brokers by virtue of their close association with the asset management company, sponsors, etc. In other words, the object of imposing such limits is to ensure that there is no concentration of business only in such entities, so that there is an indirect pecuniary advantage to the person associated with the asset management company, sponsors, etc. Any undue concentration on the business of the mutual fund with its affiliated brokers by paying huge commissions to such brokers is neither desirable nor in the interest of the unit-holders. It is a matter of record that in the 12 https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. admitted instances of violation by the respondents, the percentage of the business through the associated brokers was as high as 91.68% and 52.2% in certain factors. This apart, the respondent's excessive exposure to the associate brokers is not only established from the record, but has also been admitted by the respondents.

30. It is settled law that when a penalty is imposed by an adjudicating officer, it is done so in adjudicatory proceedings and not by way of fine as a result of prosecution of an accused for commission of an offence in a criminal proceeding. In the instant case, the Tribunal has failed to appreciate that the respondents had given undue and unfair advantage to the associated brokers, which is detrimental to the interest of the

unit-holders. ...

35. In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not. We also further held that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. ascertain whether such a violation was intentional or not. On a careful perusal of Section 15-D(b) and Section 15-E of the Act, there is nothing which requires that mens rea must be proved before penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow.

36. In our view, the impugned judgment of the Securities Appellate Tribunal has set a serious wrong precedent and the powers of the SEBI to impose penalty under Chapter VI-A are severely curtailed against the plain language of the statute which mandatorily imposes penalties on the contravention of the Act/Regulations without any requirement of the contravention having been deliberated or contumacious. The impugned order sets the stage for various market players to violate statutory regulations with impunity and subsequently plead ignorance of law or lack of mens rea to escape the imposition of penalty. The imputing of mens rea into the provisions of Chapter VI-A is against the plain language of the statute and frustrates entire purpose and object of introducing Chapter VI-A to give teeth to the SEBI to secure strict compliance with the Act and the Regulations."

19.Noticing the conflicting views in Dilip N. Shroff v. CIT [Dilip N. Shroff v. CIT, (2007) 6 SCC 329] and SEBI v. Shriram Mutual Fund, https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. (2006) 5 SCC 361, the matter was referred to a larger Bench. While approving the judgment of Hon'ble Supreme Court in SEBI v. Shriram Mutual Fund, (2006) 5 SCC 361, a three-Judge Bench of the Hon'ble Supreme Court in the case of Union of India v. Dharamendra Textile Processors and others, (2008) 13 SCC 369, to the question whether Section 11-AC of the Central Excise Act, 1944 inserted by the Finance Act, 1996 with an intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient, answered mens rea is not an essential ingredient for imposing penalty which is a civil liability. Interestingly, the larger Bench held that Dilip N. Shroff v. CIT [Dilip N. Shroff v. CIT, (2007) 6 SCC 329] was not correctly decided. The larger Bench approved and followed the judgment in SEBI v. Shriram Mutual Fund, (2006) 5 SCC 361, the judgment of the Hon'ble Supreme Court in Director of Enforcement v. MCTM Corporation (P) Ltd., (1996) 2 SCC 471 and a few other judgments to hold that penalty under Section 11-AC of Central Excise Act, 1944, is mandatory irrespective of mens rea and there is no scope for any discretion in view of the strict liability under the provision.

https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc.

20.The Hon'ble Supreme Court had the occasion to consider almost all the above judgments in Horticulture Experiment Station, Coorg v. The Regional Provident Fund Organization, (2022) 4 SCC 516 and has held that levy of damages is a sine quo non and upheld the order of recovery of damages under Section 14-B of the Act. Paragraphs 15 to 19 of the said judgment is reproduced below:-

> "15. Taking note of the exposition of law on the subject, it is well-settled that mens rea or actus reus is not an essential element for imposing penalty or damages for breach of civil obligations and liabilities.
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> 16. The judgment on which the learned counsel for the appellant(s) has placed reliance i.e. ESI Corpn. [ESI Corpn. v. HMT Ltd., (2008) 3 SCC 35 : (2008) 1 SCC (L&S) 558] , the Division Bench in ignorance of the settled judicial binding precedent of which a detailed reference has been made, while examining the scope and ambit of Section 85-B of the Employees State Insurance Corporation Act, 1948 which is in pari materia with Section 14-B of the 1952 Act placing reliance on the judgment of Division Bench of this Court in Dilip N. Shroff [Dilip N. Shroff v. CIT, (2007) 6 SCC 329] held that for the breach of civil obligations/liabilities, existence of mens rea or actus reus to be a necessary ingredient for levy of damages and/or the quantum thereof.

https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc.

17. It may be noticed that Dilip N. Shroff [Dilip N. Shroff v. CIT, (2007) 6 SCC 329] on which reliance was placed has been overruled by this Court in Union of India v. Dharamendra Textile Processors (2008) 13 SCC 369. For the aforesaid reasons, the view expressed by this Court in ESI Corpn. [ESI Corpn. v. HMT Ltd., (2008) 3 SCC 35 :

> (2008) 1 SCC (L&S) 558] may not be of binding precedent on the subject and of no assistance to the appellant(s).

18. The learned counsel for the appellant(s) further placed reliance on the judgment of this Court in McLeod Russel (India) Ltd. [McLeod Russel (India) Ltd. v. Regl. Provident Fund Commr., (2014) 15 SCC 263 : (2015) 3 SCC (L&S) 593] , wherein the question emerged for consideration was as to whether the damages which had been charged under Section 14-B of the 1952 Act would be recoverable jointly or severally from the erstwhile as well as the current managements. At the same time, the judgment relied upon in Provident Fund Commr. [Provident Fund Commr. v. RSL Textiles (India) (P) Ltd., (2017) 3 SCC 110 : (2017) 1 SCC (L&S) 543] was decided placing reliance on the judgment of this Court in McLeod Russel (India) Ltd. [McLeod Russel (India) Ltd. v. Regl. Provident Fund Commr., (2014) 15 SCC 263 : (2015) 3 SCC (L&S) 593] , which may not be of any assistance to the appellant(s).

19. Taking note of the three-Judge Bench judgment of this https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. Court in Union of India v. Dharamendra Textile Processors [Union of India v. Dharamendra Textile Processors, (2008) 13 SCC 369] , which is indeed binding on us, we are of the considered view that any default or delay in the payment of EPF contribution by the employer under the Act is a sine qua non for imposition of levy of damages under Section 14-B of the 1952 Act and mens rea or actus reus is not an essential element for imposing penalty/damages for breach of civil obligations/liabilities."

21.In view of the judgment of the Hon'ble Supreme Court in Horticulture Experiment Station case, the earlier judgment of the Hon'ble Supreme Court in Employees' State Insurance Corporation v. HMT Ltd and another, (2008) 3 SCC 35, McLeod Russel India Ltd., v. Regional Provident Fund Commissioner, (2014) 15 SCC 263 and Assistant Provident Fund Commissioner v. RSL Textiles (India)(P)Ltd., (2017) 3 SCC 110, holding otherwise relying upon the principles enunciated in Dilip N.Shroff case, (2007) 6 SCC 329 may not be binding for the following reasons. The difference between criminal liability and civil liability for breach of statutory obligation has been dealt with in several judicial precedents referred to above. The judgment of Hon'ble Supreme Court in Dilip https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. N.Shroff case, (2007) 6 SCC 329 has been specifically overruled by the larger Bench of Hon'ble Supreme Court in Dharamendra Textile Processors case, (2008) 13 SCC 369. Therefore, the three judgments above referred to which are on the basis of judgment in Dilip N.Shroff case, (2007) 6 SCC 329 which was subsequently overruled, cannot be relied upon as a precedent.

22.It is also to be noted that in McLeod Russel India Ltd., v. Regional Provident Fund Commissioner, (2014) 15 SCC 263, the Hon'ble Supreme Court, while applying the rule that mens rea or actus reus is a necessary ingredient for levy of penalty, has specifically noted that the proceeding under Section 14B of the Act cannot be treated in par with criminal prosecution. Paragraph 13 of the judgment reads as follows:-

> "13. There is no gainsaying that criminal liability remains steadfastly fastened to the actual perpetrator and cannot be transferred by any compact between persons or even by statute. But this incontrovertible legal principle does not support or validate the contention of Mr Jayant Bhushan, learned Senior Advocate for the appellants, that damages levied in terms of Section 14-B of the EPF Act cannot be foisted onto his clients.
>
> https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. Sections 14, 14-A, 14-AA, 14-AB and 14-AC of the EPF Act are the provisions postulating prosecution; in contradistinction Section 14-B contemplates the power to "recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme".
>
> It is true that it is not a river but a mere rivulet that segregates and distinguishes the legal concepts of damages or compensatory damages or exemplary damages or deterrent damages or punitive damages or retributory damages. We shall abjure from

writing a dissertation on this compelling legal nodus; save to clarify that modern jurisprudence recognises that the imposition of punitive damages, quintessentially quasi-criminal in character, can be resorted to even in civil proceedings to deter wilful wrongdoing by making an admonished example of the wrongdoer. This is the essential purpose, it seems to us, of Section 14-B of the EPF Act, and an imposition within its confines does not assume criminal prosecution so as to stand proscribed insofar as transfer of establishment from one management/employer to its successor is concerned." Therefore, levy of damages under Section 14-B of the Act is not a criminal liability but a civil liability arising out of a statutory obligation. In view of the principles reiterated by several judgments distinguishing the difference https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. between criminal liability and the civil liability for violation of statutory obligation and the judgment in Horticulture Experiment Station, Gonikoppal, Coorg v. Regional Provident Fund Organization, (2022) 4 SCC 516, we are bound to hold that mens rea or actus reus is not an essential requirement or sine quo non for levying penalty under Section 14- B of the Act.

23.Let us now consider the following questions :

i. Whether levy of damages is compulsory in all cases ?

ii. In what cases levy of damages should be avoided ?

iii. What are the guiding principles to be followed while quantifying the damages under Section 14-B of the Act ?

24.Even in Organo Chemical Industries and another v. Union of India and others, (1979) 4 SCC 573, the Hon'ble Supreme Court observed that the imposition of penalty cannot be more than or unrelated to damages. Since Section 14-B of the Act has now become punitive, the order imposing penalty should meet the standard required in various judgments of Hon'ble Supreme Court. While exercising power under Section 14-B, the quasi- https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. judicial authority should impose damages for the default. The Hon'ble Supreme Court also reiterated in unambiguous terms that proceedings under Section 14-B should be after following the principles of natural justice. It is further held that the authority should record reasons in support of the order imposing penalty. The reasons also should be rational and cannot be capricious. It is also held that imposition of damages at the flat rate of hundred percent for all the defaults is capricious and arbitrary.

25.Now, let us examine some of the precedents where the scope of Section 14-B of the Act or similar provision under different enactments have been examined.

26.In Regional Provident Fund Commissioner v. S.D.College, Hoshiarpur, (1997) 11 SCC 241, the Hon'ble Supreme Court held that the Regional Provident Fund Commissioner is given discretion to waive penalty altogether.

27.A three-Judge Bench of the Hon'ble Supreme Court in Hindustan Steel Limited v. The State of Orissa, AIR 1970 SC 253 had an https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. occasion to consider the penal provision under the Orissa Sales Tax Act. The appellant before the Hon'ble Supreme Court is a Government of India undertaking. Between 1954 and 1959, the company was erecting factory buildings for the steel plant. The company was supplying building materials for consideration and adjusted the value of goods supplied at the rates specified in the tender. Between 1954 and 1959, the company failed to register as a dealer. Under Section 9(a) read with Section 25(1)(a) of the Orissa Sales Tax Act, penalty was imposed and the Hon'ble Supreme Court while concluding that no penalty can be imposed, has held as follows:-

> "7. Under the Act penalty may be imposed for failure to register as a dealer: Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasicriminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

28.A Division Bench of the Orissa High Court in Bhubaneswar City Distribution Division v. Union of India and another, (1998) 2 LLJ 1044, considered an application filed by the appellant challenging the order of Regional Provident Fund Commissioner levying damages under Section 14-B of the Act for delayed payment of dues. One of the grounds raised was that the delayed payment of statutory dues ipso facto does not invite levy of damages under Section 14-B of the Act and no specific reason is given for levy of damages and that damages have been levied arbitrarily https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. without following any principle. The Division Bench of Orissa High Court held as follows:-

> "Contention No.(iii)6: Section 14B of the Act clearly provides that where an employer makes default in the payment of any contribution required under the Act, the Commissioner may recover from the employer by way of penalty of such damages provided that before levying and recovering of such damages, the employer shall the given a reasonable opportunity offering heard. A bare reading of the provision would indicate that delayed payment of the statutory dues as it had occurred in the present

case, does not ipso-facto invite levy of damages. If the employer furnishes sufficient cause for the delay, the designated authority in a given case may not levy damages. In the impugned order, the Commissioner in paragraph-5 has observed " that the establishment had defaulted in payment of statutory dues without any valid reasons."

Shri Nayak, learned counsel for the petitioner submits that earlier different divisions were depositing the employees and employers' share with the Commissioner within the time stipulated but subsequently when the centralised payment scheme was introduced, the divisions could not deposit the share and as such, delay in deposit was unavoidable and was not intentional. This plea taken by the petitioner does not seem to have been considered by the Commissioner as is evident https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. from the impugned order.

Contention No. (iv):- The break-up of damages levied on the petitioner (vide enclosure to Annexure-5 series) would show that for the period of delay ranging from six days to 562 days (from March, 1986 to March, 1990), 25% of arrears per annum has been imposed as penal damages. It is evidently arbitrary. May it be stated that previously damages were being imposed at a rate basing on circulars issued by the Commissioner under which damages up-to 100% was impossible. Such imposition being arbitrary, as there was no clear guideline paragraph 32- A has been inserted vide C.S.R. No. 521 dated August 16, 1991 (with effect from September 1, 1991) clearly indicating that damages may be recovered from the employer at the rates given below:

"Period of default Rate of damages (percentage of arrears per annum)

(a) Less than two months Seventeen

(b) Two months and above but less than four months. Twenty-two

(c) Four months and above but less than six months Twenty-seven

(d) Six months and above Thirty-seven".

The aforesaid provision though is not strictly applicable to the case at hand, it indicates the mind of the Government that the https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. rate of damages should not be arbitrary. On the facts and circumstances of this case and keeping in view that the Act is a beneficial legislation for the employees in factories and establishments covered under the Act and to avoid further litigation between the parties, we are inclined to -hold that the petitioner is liable to pay damages at the rate of 17% per annum on the percentage of arrears."

29.In Cable Corporation of India Ltd., and another v. Union of India and another, 2006 SCC OnLine Bom 765, a writ petition was filed before the Bombay High Court challenging the order directing the

writ petitioner to deposit a sum of Rs.31,01,050/- towards interest under Section 7-Q and a sum of Rs.94,17,882/- towards damages under Section 14-B of the Act. Though the company admitted its liability to pay interest on the defaulted amount, made a request that damages/penalty may be condoned and waived in view of the financial losses suffered by it. Referring to the judgment of the Hon'ble Supreme Court in Hindustan Times Limited case, (1998) 2 SCC 242, it is held as follows:-

> "9. The power to impose damages under section 14-B is a judicial power. As has already been noticed, section 14-B does not mandate that an order for damages must follow in https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. the event of every default. Section 14-B confers a discretion upon the Provident Fund Commissioner to impose damages not exceeding the amount of arrears. Within the ceiling that is imposed by the statute the Provident Fund Commissioner has a discretion. The nature of the power being quasi judicial, the exercise of the discretion must be for sound and objective considerations. Regulation 32-A under which a graded scale for imposition of damages has been provided cannot be regarded as a rigid or inflexible prescription. The Regulations cannot fetter the exercise of the power which is conferred upon the Provident Fund Commissioner by the provisions of the enactment, but guide and channelize the exercise of discretion. Similarly, Regulation 32-B structures the exercise of the discretion to reduce or waive the imposition of damages. Neither Regulation 32-A nor Regulation 32-B can be regarded as inflexible.
>
> 10. In the present case, there has been unquestionably a default on the part of the petitioners. However, there is merit in the submission which has been urged on behalf of the petitioners that the order of the Regional Provident Fund Commissioner is lacking in essential particulars in so far as the quantification of damages is concerned. The order in fact contains no elaboration of the manner in which damages have been computed. On behalf of the Second respondent it has been submitted that damages have been imposed on a sliding https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. scale and that the memo of appeal submitted by the petitioners before the Appellate Tribunal would reflect a consciousness of this position. Consequently, Counsel appearing on behalf of the Second respondent submitted that the damages have been quantified in accordance with the schedule indicated in Regulation 32-A and the maximum rate at which damages have been levied is 37% per annum on the arrears, for a delay in excess of six months. Unfortunately, nothing that is stated at the Bar on behalf of the Second respondent would appear ex facie from a reading of the impugned order. The Supreme Court has held in its decision in Organo Chemical Industries that the power under section 14-B is quasi-judicial in nature and one of the safeguards against an arbitrary exercise of powers is the recording of reasons which would establish the basis or foundation of the determination. That unfortunately is not readily apparent from a perusal of the manner in which damages have been computed in the present case under section 14-B of the Act.

The order passed by the Regional Provident Fund Commissioner in the companion Writ Petition (Writ Petition 910 of 2004) on 10th December, 2003 in fact postulates that the statutory provisions do not permit the Regional Provident Fund Commissioner to waive, reduce or condone the levy of interest and penal damages under sections 7-Q and 14-B respectively of the Act. This statement of law, in so far as https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. section 7-Q is concerned is unexceptionable. But the Regional Provident Fund Commissioner has misapplied himself in holding that he had no power to reduce or condone the damages imposed under section 14-B. The power under section 14-B is coupled with a discretion and that discretion itself indicates that the power has to be exercised in an appropriate case."

30.A learned Judge of the Kerala High Court in Indian Telephone Industries Ltd v. Assistant Provident Fund Commissioner, 2006 SCC OnLine Ker 726, had an occasion to consider the writ petition filed by the petitioner company challenging the imposition of damages under Section 14-B. The facts of the case would show that the petitioner company was making profits till 1995, but started accumulating losses and hence the company made a reference to Board of Industrial and Financial Reconstruction (BIFR) under Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985. Due to financial crisis faced by company, there was delay in payment of contributions. An amount of Rs.3,85,485/- was imposed as damages for delayed payment of employees' provident fund contributions. After taking note of the provision of Section 7-Q for collecting interest for any delayed payment and the judgment of the Hon'ble https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. Supreme Court in Organo Chemical case, the learned Judge came to the conclusion that Section 14-B of the Act is purely punitive in nature and hence damages under Section 14-B of the Act should be strictly in accordance with the principles for imposing penalty which is quasi-criminal proceedings. The learned single Judge made the following observations:-

> "23. In this connection, I have to dispose of the contention of the counsel for the 1 st respondent that in view of the words "as may be specified in the Scheme" now occurring in Section 14-B and the new clause 32-A of the Employees Provident Funds Scheme, the 1 st respondent has no discretion in the matter except to apply the formula in clause 32-A for quantification of damages also. I think that this is a myopic view of the said provisions. If, while deciding the quantum of damages under Section 14-B the reasons for the delay has to be taken into account, then the damages cannot be as per any strait-jacketed formula. At the best, clause 32-A would only serve as a guideline. In fact, the words used in clause 32-A is that "may recover from the employer by way of penalty damages at the rates given below", which would also suggest that the same is intended as a guideline. Here, it may work the other way also. The clause takes into account only the period of delay, but does not take into account the number of delays, which also may be a factor in favour of imposition of higher https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. damages. Further, when Section 14-B envisages a maximum damages equal to the amount of arrears, the maximum envisaged by clause 32-A is only 37%. Therefore, Clause 37- A is purely in the nature of guidelines and not a structured formula of invariable application in all circumstances without reference to the reasons for delay.

24. I am of opinion that merely because there is belated payment of contributions, liability to pay damages does not automatically arise, but the same shall be decided by applying mind to the merits of each case and not by resorting to mere arithmetic calculation of damages. Even though liability to pay contributions is statutory, to hold that delay automatically attracts damages would be too rigid a way of construing the Section, especially since the imposition of damages is punitive in nature. There must be application of mind taking into account the reasons for delay and whether the delay could have been avoided by ordinary diligence by the employer. For this, one cannot with any amount of certainty say what are the circumstances which would mitigate the damages and which would not. The same would differ from case to case, which requires exercise of judicial discretion by the authority imposing damages by application of mind to the circumstances pleaded and proved by the defaulting employer." While remitting the matter, the following directions were issued:

https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. "32. For the foregoing reasons, I set aside the impugned orders and issue the following directions:

The 1st respondent shall reconsider the question of imposition of damages on the petitioner-Company for delay in payment of contributions for the period from September, 2003 to October, 2004 afresh in accordance with the observations and findings contained in this judgment, after affording an opportunity of being heard to the petitioner and taking into account, inter alia, the facts that the wages of the employees were not paid in time, contributions were paid when wages were actually paid and the petitioner-Company was registered as a sick industry by BIFR and not merely adopting the structured formula in clause 32-A of the Employees Provident Funds Scheme. If the petitioner is still aggrieved by the fresh orders to be passed by the 1 st respondent in the matter of imposition of damages under Section 14-B, it would be open to the petitioner to file an application under the second proviso to Section 14-B of the Act before the Board of Trustees, in which event, the 5th respondent shall place the same before the Board of Trustees who shall consider the same in accordance with law and the observations contained in this judgment. I make it clear that this would be without prejudice to the right of the petitioner to file appeal before the Appellate Tribunal, if the petitioner so wishes. The writ petition is disposed of as above." https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc.

31.In Employees' State Insurance Corporation v. HMT Ltd and another, (2008) 3 SCC 35, it has been held, in paragraph 21, as follows:-

"21. 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 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, unless the statute is held to be mandatory in character." In Prestolite (India) Ltd., v. Regional Director, 1994 Supp (3) SCC 690, the Hon'ble Supreme Cout has held as follows:-

"5.....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 mitigating 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 https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. 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 objections, the employee's case could not be discarded in limine. On the contrary, the objection ought to have been considered on merits. We, therefore, allow this appeal and set aside the impugned orders. The Regional Director is directed to dispose of the representation of the appellant by indicating reasons after taking into consideration the grounds for delayed payment. Since the matter is going to be reheard, the appellant is permitted to make personal representation at the hearing of the show-cause proceeding...."

32.In State of Himachal Pradesh v. Paras Ram and others, (2008) 3 SCC 655, the Hon'ble Supreme Court has considered the importance to give reasons while passing orders as a quasi-judicial authority, in the following lines:-

"6. Even in respect of administrative orders, Lord Denning, M.R. in Breen v. Amalgamated Engg. Union [(1971) 2 QB 175 : (1971) 2 WLR 742 : (1971) 1 All ER 1148 (CA)] observed :

(All ER p. 1154h) 'The giving of reasons is one of the fundamentals of good administration.' In Alexander https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. Machinery (Dudley) Ltd. v. Crabtree [1974 ICR 120] it was observed:'Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at.' Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the 'inscrutable face of the sphinx', it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reasons is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the

> decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking-out. The 'inscrutable face of a sphinx' is ordinarily incongruous with a judicial or quasi-judicial performance."

33.In the case of Assistant Provident Fund Commissioner v. Hi-

tech Vocational Training Centre, in the order dated 21.09.2015 passed in LPA No.629 of 2011, a Division Bench of the Delhi High Court interpreted Section 14-B of the Act in a similar context with reference to the relevant https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. regulations. It has been categorically held that Section 14-B read with Para 32A of the Employees' Provident Funds Scheme would show that the power to impose penalty is discretionary and that the damages indicated in the table in Para 32A fix only the upper limit and leave it to the discretion of the authority to determine in each case whether or not damages have to be levied and the quantum thereof. It is also held that the Commissioner has power to waive or reduce penalty as per Para 32A of the Scheme. It is also held as follows:-

> "11.....There is an element of a stick in the Section, but the same must be yielded with care and caution. The stick would be to penalize the employer so that he learns by example and does not willfully default in future or adopt a casual attitude. Persistent and repeat defaulters should be dealt with sternly and visited with the maximum penalty. First time defaulters deserve sympathy. These are some of the indicative factors, not exhaustive, which must be kept in mind while exercising the discretion.
>
> 13.It is trite that where a default by a party confers a right upon another, it would be open to the said other party to waive the breach. This would be when the relationship is interpersonal and stems from either a contract or a law. But where the power to levy https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. damages are on account of a default in making the contribution to a fund which is for the benefit of the employees, the Commissioner would be nobody to waive the default. Further, as we have noted hereinabove what triggers Section 14B is the default in the payment of the contribution to the fund, and the default would be not making the contribution to the fund by the 15th day of the ensuing wage month.

The statute nowhere contemplates that the default must be in existence on the day when proceedings under Section 14B are initiated. Thus, if there is a default in making contribution to the fund, notwithstanding belated contribution being made to the fund, since the default has already taken place the Commissioner would be within his power to initiate proceedings under Section 14B...."

34.A Division Bench of this Court in Regional Provident Fund Commissioner v. Sree Visalam Chit Funds Ltd., Palathur, 2010 (4) L.L.N. 706, following the judgment in Employee's State Insurance Corporation v. HMT Ltd., (2008) 3 SCC 35, held as follows:-

> "30. In our considered opinion, as we have already concluded, unless it is established that such failure to pay the https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. contribution was attributable to the mens rea or actus reus on the part of the employer, question of levying damages under S.14B of the Act does not arise. It has been repeatedly held by the Hon'ble Supreme Court that simply because the statutory provision enables an authority to impose penalty, it does not mean that such penalty should be imposed in a mechanical manner without looking into the attending circumstances and the facts as to whether there was any mens rea or actus reus on the part of the employer."

35.This Court has already extracted the relevant portion of the judgment of the Hon'ble Supreme Court in Hindustan Times Limited v. Union of India and others, (1998) 2 SCC 242, where the Hon'ble Supreme Court has summarised certain principles as to how the authority under Section14-B of the Act has to apply his mind and to pass a reasoned order after following the principles of natural justice. In every precedent where Section 14-B is considered, this Court and the Hon'ble Supreme Court have directed the authorities to apply their mind as to why the employer has defaulted and to consider all mitigating circumstances.

36.In Radhanath Cooperative Press v. Regional Provident Fund https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. Commissioner, (1998) III LLJ 1160 Orissa, a Division Bench of the Orissa High Court held that the default in payment of contributions may not be seriously viewed when the employer is a cooperative society and the cooperative society was continuously in financial difficulty. There are several precedents emphasising that the provident fund authority should consider all the submissions made by the employer when there is an attempt to make out a case that the default was not intentional or deliberate and that the reasons should be assigned why the explanation offered by the employer cannot be accepted. The authorities are expected to pass reasoned orders and not an order in a mechanical fashion. Since the authority in exercise of power under Section 14-B is not bound to impose penalty on every default, he is required to consider all relevant facts to decide whether the employer has committed willful default, even though it is obligatory upon every employer to pay in the first instance both the employer and employee contributions. Unless there is an element of willful negligence or the employer is found guilty of diverting funds for investment in other business, there cannot be a levy of penalty at the highest percentage as given in the table under Para 32A of the Scheme.

https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc.

37.Again in the case of Hindustan Times Limited v. Union of India and others, (1998) 2 SCC 242, the Hon'ble Supreme Court has held as follows:-

> "29. From the aforesaid decisions, the following principles can be summarised:
>
> The authority under Section 14-B has to apply his mind to the facts of the case and the reply to the show-cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the

> Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on plea of power-cut, financial problems relating to other indebtedness or the delay in realisation of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages under Section 14-B. The fact that proceedings are initiated or demand for damages is made after several years cannot by itself be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings under Section 14-B would be taken; mere delay in initiating action under Section 14-B cannot amount to prejudice inasmuch as the delay on the part of the Department, https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. would have only allowed the employer to use the monies for his own purposes or for his business especially when there is no additional provision for charging interest. However, the employer can claim prejudice if there is proof that between the period of default and the date of initiation of action under Section 14-B, he has changed his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an "irretrievable" nature; he might also claim prejudice upon proof of loss of all the relevant records and/or non-availability of the personnel who were, several years back in charge of these payments and provided he further establishes that there is no other way he can reconstruct the record or produce evidence; or there are other similar grounds which could lead to "irretrievable" prejudice; further, in such cases of "irretrievable" prejudice, the defaulter must take the necessary pleas in defence in the reply to the show- cause notice and must satisfy the authority concerned with acceptable material; if those pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that effect."

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, https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. 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 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. https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc.

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 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 https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. 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 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 https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. 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.

https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. 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.

40.Before deciding the individual cases, we would like to record our appreciation for the valuable assistance rendered by Mr.M.E.Elango, learned Advocate, who was appointed as Amicus Curiae to assist this Court. W.P.(MD) No.7339 of 2013 :

41.W.P.(MD) No.7339 of 2013 has been filed by the employer, challenging the order of the Appellate Tribunal/1 st respondent, reducing the penalty levied by the 2nd respondent by 50%.

42.A sum of Rs.2,33,247/- has been levied as penalty by calculating the amount at the rates specified under Para 32-A of the EPF Scheme, 1952. The order of the 2nd respondent proceeds on the basis that the writ petitioner has admitted the delay. The 2nd respondent, by impugned

https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. order dated 24.09.2010, has observed that the organization has lost heavily by not getting the amount on due dates by way of unearned interest while statutorily bound to pay interest to the poor workers from the due date itself. It is not the case of the petitioner that he is not liable to pay interest for the delay in payment and it is not the proceeding demanding interest for the delayed payment that is challenged. There is total non-application of mind while levying penalty as against the writ petitioner.

43.Though the petitioner has produced before this Court some materials and has given the mitigating circumstances, this Court is not inclined to deal with the same, as it would be appropriate to remit the matter to the 2nd respondent for considering the issue afresh in the light of the guidelines given by this Court in this order. The 1st respondent/Appellate Tribunal, though observed that there is no finding by the 2nd respondent that the petitioner had willfully and deliberately withheld the provident fund contributions or that the petitioner had unlawfully diverted the funds collected from the employees for his business use, reduced the quantum only by 50% of the actual amount of damages levied by the 2nd respondent. Though the order of the 2nd respondent cannot be sustained for non- https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. application of mind, the Appellate Tribunal has reduced the amount by 50% without assigning proper reasons.

44.In such circumstances, this Court is of the view that the matter has to be remitted to the 2nd respondent for considering the matter afresh. The petitioner is directed to submit his detailed objections and explanation for the delay in payment of dues. It is open to the petitioner to produce all the materials which have been filed before this Court in the typed set of papers, to show that the petitioner was incurring heavy loss due to continuous power cut for a long time and other mitigating circumstances.

45.The impugned order passed by the 1st respondent in A.T.A.No. 651 (13) 2010, dated 04.03.2013, and the order of the 2 nd respondent in No.TN/RO/MDU/57204/RO/circle 4/PDC/LD/2010, dated 24.09.2010, are set aside and the matter is remitted to the 2nd respondent for passing orders afresh in the light of the guidelines issued by this Court in this order. The 2nd respondent shall pass fresh orders after considering the explanation offered by the petitioner within a period of 12 weeks from the date of receipt of the representation/explanation to be submitted by the petitioner within a period of two weeks from the date of receipt of a copy of https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. this order. Accordingly, W.P.(MD) No.7339 of 2013 is allowed. W.P.(MD) No.9688 of 2013 :

> 46.W.P.(MD) No.9688 of 2013 has been filed by the employer, challenging the order of the Appellate Tribunal/1 st respondent, reducing the penalty levied by the 2nd respondent by 50%, as well as the order of the 2nd respondent, levying penalty.
>
> 47.The petitioner is a Cooperative Society. In response to the show cause notice, the petitioner has given a reply indicating the loss incurred by the Society over the years due to which the net worth of the Society got eroded over a period of years. Several other reasons were also given by the petitioner. However, the 2nd respondent has passed orders mechanically imposing penalty. The 1st respondent, the Appellate

> Tribunal, though recorded a finding that there is no enquiry nor finding of fact by the 2nd respondent before levying the maximum amount by way of damages, has not considered the reasons or mitigating circumstances. Even before this Court, it is not contended by the 2nd respondent that the explanation or the mitigating circumstances pointed out by the writ petitioner are not proved.

This Court is of the view that the 2nd respondent ought not to have levied https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. damages. There is no willful negligence or careless indifference in payment of provident fund dues. However, the 1st respondent, after rendering a finding in favour of the writ petitioner that the petitioner had not willfully and deliberately withheld the provident fund contributions, has reduced the damages only by 50% of the actual amount of damages levied by the 2nd respondent. Though the appeal before the 1st respondent was allowed, relief was partial and this Court finds that the petitioner is entitled to seek waiver. Even though this Court can remit the matter once again to the 2nd respondent for passing appropriate orders in the light of the directions of this Court, having regard to the peculiar facts and circumstances and the petitioner being a Cooperative Society in financial trouble, this Court is inclined to allow this writ petition, holding that the petitioner is not a chronic defaulter nor it had shown any willful negligence or indifference in paying the provident fund dues. For the reasons stated by the petitioner in the explanation offered to the show cause notice, this Court finds that the liability in terms of Para 32-A of the Employees' Provident Funds Scheme, 1952, cannot be saddled on the petitioner.

48.Therefore, W.P.(MD) No.9688 of 2013 is allowed and the https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. order of the 1st respondent/Appellate Tribunal in ATA No.751/(13)/2012, dated 14.03.2013, and the order of the 2nd respondent in No.TN/RO/MDU/24201/ RO/Circle M15/PDC/LD/20120, dated 18.07.2012, are hereby quashed.

W.P.(MD) Nos.2765 and 2782 of 2014 :

> 49.W.P.(MD) Nos.2765 and 2782 of 2014 have been filed by the Assistant Provident Fund Commissioner, challenging the order passed by the 1st respondent, namely the Appellate Tribunal, modifying the order of the petitioner by reducing the quantum by way of damages at 5% p.a. with effect from the passing of the impugned order.
>
> 50.Though several grounds are raised by the writ petitioner, the Appellate Tribunal has given proper reasons in tune with the principles we have reiterated earlier in this writ petition, placing reliance on the judgment of the Hon'ble Supreme Court in Prestolite (India) Ltd., v. Regional Director, 1994 Supp (3) SCC 690. The 1st respondent has categorically given a finding that delayed payment of contribution in every case does not invite levy of damages and that the writ petitioner, who is vested with the https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. discretion under Section 14-B, has not considered and followed the principles reiterated by Courts. Even though the Appellate Tribunal has also relied upon various judgments including the judgment of the Hon'ble Supreme Court in ESI Corporation v. HMT

Ltd., case, (2008) 3 SCC 35, this Court finds that the impugned order cannot be interfered with, as the Appellate Tribunal has given reasons approved by this Court in this judgment.

51.Therefore, this Court finds no merit in these two writ petitions.

Accordingly, W.P.(MD) Nos.2765 and 2782 of 2014 are dismissed. There shall be no order as to cost in all the writ petitions.

[SSSRJ] [SSYJ
03.06.2

ss/mkn
Index : Yes / No
Neutral Citation : Yes / No

https://www.mhc.tn.gov.in/judis
W.P.(MD)Nos.73

To

1.The Presiding Officer

Employees' Provident Fund Appellate Tribunal Core II, 4th Floor, Laxmi Nagar District Centre Laxmi Nagar, Delhi 110 092.

2.The Assistant Provident Fund Commissioner Employees' Provident Fund Organization Regional Office No.1, Lady Doak College Road Chokkikulam, Madurai 625 002.

https://www.mhc.tn.gov.in/judis W.P.(MD)Nos.7339 of 2013 etc. S.S. SUNDAR, J.

S.SRIMATHY,J.

and R.VIJAYAKUMAR, J.

ss/mkn Judgment in W.P.(MD) Nos.7339 of 2013 etc. 03.06.2024 https://www.mhc.tn.gov.in/judis