BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, ERNAKULAM

Present: Shri.V.Vijaya Kumar, B.Sc., LLM, Presiding Officer.

(Monday the, 28th day of February 2022)

APPEAL No. 122/2019

Appellants : 1. M/s. A.V.George Group Employees Provident Fund
Ancheril Bank Building
Baker Junction
Kottayam – 686 001

2. M/s. A.V.George & Company Pvt. Ltd.
P.B.No.1, Ancheril Bank Building
Baker Junction
Kottayam – 686 001

By Adv. Sony Sebastian

Respondent : The Assistant PF Commissioner
EPFO, Regional Office,
Thirunakkara
Kottayam – 686 001.

By Adv. Joy Thattil Ittoop

This case coming up for final hearing on 02.12.2021 and this Tribunal-cum-Labour Court on 28.02.2022 passed the following:

ORDER

Present Appeal is filed from order No. KR/KTM/1054/ APFC/Penal Damages/14B/Enf 1(3)18-19/3465 dated 06.02.2019 assessing damages under Section 14B of EPF and MP Act (hereinafter referred to as 'the Act') for belated transfer of past accumulation for the period from 22.10.2017 – 23.05.2018. The total damages assessed is Rs.1,98,236/- (Rupees One lakh ninety eight thousand two hundred and thirty six only)

2. The appellant filed an IA No. 215/21 to amend the appeal and implead M/s. A.V.George & Company Pvt. Ltd. as a party to the proceedings. As per order dated 11.10.2021, the amendment application was allowed and the appellant establishment was directed to carry out the amendment.

3. M/s. A.V.George Group Employees' Provident Fund was maintaining the provident fund of the employees of A.V.George Group of Companies with the approval of the respondent organisation. The appellant surrendered the exemption to the respondent organisation w.e.f. 30.11.2017. As per Para 28(1) (ii) of the EPF Scheme, the time frame stipulated for transferring liquid cash in the bank is 10 days of the application of the Scheme or

cancellation of exemption and in the case of securities the time frame stipulated is 30 days. The cash in bank amounting to Rs.68,00,000/- was paid to the respondent organisation on 22.12.2017. There was an inadvertent delay of 12 days. The securities with the appellant consisted of Private securities, Semi Government securities and Government securities. The selling of the securities was entrusted to M/s. Karvy Stock Broking Ltd. An amount of Rs. 2.2 crores, 1.3 crores, 36 lakh and 6 lakh were remitted on 29.12.2017, 02.01.2018, 30.01.2018 and 27.02.2018 respectively. Steps for selling the security were initiated by the appellant on 30.11.2017, as is evidenced from the letter No.AVGEPF/138/2017-18, a copy of which is produced and marked as Annexure-1. Out of the approved amount of Rs.4,65,12,941/- to be transferred to the respondent organization, the balance amount to be transferred was only Rs. 5,12,941/-. There was an investment made by the appellant in 1975 for the purpose of this Scheme with State Bank of India through Syndicate Bank for an amount of Rs. 11,65,440/-. The appellant vide letter dated 29.01.2018 requested Syndicate Bank to close the deposit. Syndicate Bank vide letter dated 04.05.2018 required a confirmation of remittance by the appellant to EPF organisation.

True copy of the letter dated 29.01.2018 from the appellant to Chief Manager, Syndicate Bank is produced and marked as Annexure 2. In the meanwhile the respondent organisation vide letter dated 10.04.2018 directed the appellant to remit the balance amount of Rs.5,12,941/-. To avoid further legal action, the appellant availed a loan from A.V.George & Company and remitted the amount on 19.04.2018. A true copy of the letter dated 10.04.2018 received from the respondent organisations is produced and marked as Annexure 3. The true copy of the letter dated 19.04.2018 from the appellant to the respondent organisations enclosing the DD for Rs. 5,12,941/- is produced and marked as Annexure 4. The respondent organisations issued another letter dated 18.05.2018 for transferring the surplus amount of Rs. 3,45,677/-. The amount was borrowed from A.V.George & Company Ltd and paid to the respondent organization on 23.05.2018. A true copy of the letter dated 23.05.2018 enclosing the DD is produced and marked as Annexure 5. The appellant remitted the entire amount to the respondent organisation by even availing loans and by transferring the deposits and securities. The special deposit with the State Bank of India has not yet been realised, though the entire amount has been remitted and the loans on account of the same is still outstanding. The true copy of the statement of accounts for the period 15.12.2017 – 27.02.2018 is produced and marked as Annexure 6. It would clearly show that there was no intentional delay in paying the amounts but only some minor delay on account of administrative reasons and intervening holidays. There was no intentional delay in transferring the funds and in any case there has not been any contumacious or dishonest conduct on the part of the appellant in remitting the amount to the respondent organization. It is a settled legal position that liability to pay damages is not automatic and such damages will not ordinarily be imposed unless the party obliged to pay the amount due acted either deliberately or in defiance of law. The respondent ought to have found that in respect of transfers to the fund the time limit prescribed under Para 28 (1)(ii) of EPF Scheme was 10 days in case of liquid cash in the bank and 30 days in case of security. Therefore the respondent authority ought to have calculated the delay only from 31st day and not from 11th day onwards in the case of securities. The respondent erred in relying on manual of accounting procedure for arriving at the quantum of damages.

The manual of accounting procedure is applicable only for internal accounting purposes.

3. The respondent filed counter denying the above allegations. The impugned order has been passed against M/s. A.V. George & Company (Appellant 2) covered under code No. KR/KTM/ 1054 and not A.V.George Group Employees' Provident Fund (Appellant 1). A.V. George and company covered under the provisions of the Act, constituted the appellant trust for privately maintaining the provident fund for its employees after obtaining exemption under Sec 17 of the Act read with Para 27 of EPF Scheme 1952. Upon surrender of exemption w.e.f 30.11.2017, the EPF Scheme becomes applicable to the appellant from 01.07.2017. The appellant establishment as per Para 28 of EPF Scheme was legally bound to transfer all amounts held in cash within 10 days to the respondent organisation and the amounts held in securities within 30 days from 01.12.2017. Since there was delay in transfer, the respondent initiated action for levy in damages under Sec 14B of the Act. To facilitate the smooth transfer of funds, the respondent authority vide order dated 14.11.2017 directed the Enforcement Officers to guide the appellant to remit all the amounts as well as give all necessary technical advice as per the

prescribed procedure. A copy of the daily order sheet dated 14.11.2017 is produced and marked as Annexure R1. As per Para 8.2.2019 of Manual of Accounting Procedure (MAP1) amounts held in cash shall be transferred to the EPF in 10 days from the date of application of the Scheme and as per Para 8.2.20 securities/deposits etc are to be transferred after due transfer endorsement within 30 days from the date of application of the Scheme. Transfer of amounts held in securities means transfer of securities in the form of Government securities and Government guaranteed securities to Central Board of Trustees EPF with necessary changes in the name of the holder in the securities. A true copy of the relevant page of manual of accounting procedure 1 is produced and marked as Annexure R2. Pursuant to Annexure R2, the respondent vide its letter dated 29.11.2017 informed appellant that all amounts held in Government securities are to be transferred as such and that the securities not guaranteed by Government are to be remitted by cash. A true copy of the letter dated 29.11.2017 is produced and marked as Annexure R3. The appellant vide its letter dated 29.11.2017 informed that under Para 28 (2) of the Scheme, all past accumulations, however invested, would be transferred to EPF in cash. And that the appellant establishment has the option of either transferring the securities or transfer the equivalent amount in cash. True copy of the letter dated 30.11.2017 by the appellant is produced and marked as Annexure R4. The appellant through their letter dated 22.12.2017 forwarded the Demand draft for transferring the liquid cash in banks. The true copy of the letter dated 22.12.2017 is produced and marked as Annexure R5. Annexure R5 would clearly evidence the delayed transfer of provident fund amount held in cash. The appellant chose to convert all provident fund amounts held in Government and Semi Government securities into cash instead of transferring the securities to the respondent organisations as mandated under Para 28 (2) of EPF Scheme. The appellant transferred the provident fund amounts held in securities, in cash to the respondent organisations after the sale of securities. True copy of the letters dated 29.12.2017, 02.01.2018, 30.01.2018, 27.02.2018, 19.04.2018 and 23.05.2018 are produced and marked as Annexures R6 – R11 respectively. The appellant did not adhere to sub clause (ii) of Para 28 (1) of the Scheme, in transferring the past accumulation from the existing provident fund to employees provident fund and opted the provision under

Para 28 (2) of the Scheme. The appellant transferred the past accumulation to the respondent organisations in cash and the same should have been completed within 10 days from the date of application of the Scheme. The appellant admits that reason for delayed transfer of amounts held in cash and security to the respondent organisations was inadvertence which amounts to wilful and deliberate default. Since there was delay in transfer of past accumulation, the respondent authority initiated action for assessment of damages for delayed transfer of past accumulation. Since the delay in transfer of cash was beyond 10 days from the date of application of the Schemes, damages are leviable for the period from 22.12.2017 to 23.05.2018 by virtue of Sec 14B read with Para 32A of the Scheme. Since there was delay, the appellant was liable to remit interest under Sec 7Q of the Act. A true copy of the letter dated 01.08.2018 issued by the respondent to the appellant is produced and marked as Annexure R12. The appellant issued a reply dated 17.08.2018 disputing the quantum of interest imposed. A true copy of the reply dated 17.08.2018 issued by the appellant is produced and marked as Annexure R13. The delay in remittance and the quantification of damages is done correctly as the appellant failed to transfer the securities and the amount was transferred in cash. The appellant challenged the levy of interest in WP(C) No. 37263/2018 before the Hon'ble High Court of Kerala.

4. The appellant No 2 A.V.George & Company Pvt. Ltd is an establishment covered and exempted under Sec 17 (1) of the Act read with Para 27 of EPF Scheme. The provident fund in respect of the appellant establishment was maintained by the first appellant, M/s. A.V.George Group Employees provident fund. The appellant decided to surrender exemption and comply with the provisions of the Act and Schemes with the respondent organisation w.e.f. 01.12.2017 and therefore surrendered their exemption on 13.11.2017. Once an exemption is surrendered, the appellant is required to prepare a past accumulation statement and transfer the amount in liquid cash within 10 days and transfer the securities within 30 days from the date of the EPF Scheme is made applicable to the appellant establishment. In the present case, there was delay in transfer and therefore the respondent authority initiated action under Sec 14B of the Act read with Para 32A of EPF Scheme. After hearing the parties, the respondent issued the impugned order.

5. In the appeal, the learned Counsel for the respondent took a stand that the appellant is not the competent authority to challenge the impugned order as the impugned order was issued to the establishment and not the trust. Accordingly the appellant filed an impleading petition which was allowed and the establishment was impleaded as Appellant No. 2.

6. The learned Counsel for the appellant submitted that the calculation of delay by the respondent authority in transferring past accumulation is not correct. According to him, as per Para 28 (1)(ii) of EPF Scheme, the time frame for transferring liquid cash in the bank is 10 days and securities is 30 days. According to him, the bank in cash was transferred on 22.12.2017. There was a delay of 12 days in transfer of cash. According to the learned Counsel, the appellant was holding Government, Semi Government and Private Securities. The appellant initiated action for selling the securities immediately and the amounts were transferred in cash. The action taken by the appellant was also communicated to the respondent authority. He also pointed out that the appellant had to take loans from parent company to complete the transfer as there was delay in getting the special deposit accounts closed. He also pointed out that the surplus

amount lying with the trust account was also transferred to the respondent authority. According to the learned Counsel for the appellant, Para 28 (1)(ii) prescribes 10 days time for fund transfer held in cash and 30 days time in case of securities. According to him it is not correct on the part of the respondent to rely on Manual of Accounting Procedure1 to levy damages in transfer of securities from the 11^{th} day after the EPF Scheme was made applicable to the appellant establishment.

7. According to the learned Counsel for the respondent, the appellant establishment had the option to transfer the past accumulation in cash or to transfer the Government or Government guaranteed securities to the name of Central Board of Trustees. As per Para 28 (1)(ii), the liquid cash available in bank shall be transferred within 10 days and the securities shall be transferred within 30 days of application of EPF Scheme to the appellant establishment. According to the learned Counsel for the respondent, the appellant chose to transfer the whole amount in cash and therefore the appellant is required to transfer the amount within 10 days failing which the appellant is liable to remit damages for belated remittance of contribution.

8. It is seen that the respondent authority has communicated the options available to the appellant under Para 28 of EPF Scheme for transfer of past accumulation to the respondent organisations on cancellation of exemption. The appellant chose to transfer the past accumulation in the form of cash instead of transferring the securities in the name of Central Board of Trustees. Selling of securities involves a time consuming process and it is not clear why the appellant chose to sell the securities and transfer the amount in cash. Transfer of Government securities and Government guaranteed securities will not attract damages as the securities earned interest whether it is in the name of a Private Trust or in the name of Central Board of Trustees. However securities which are not guaranteed by the Government cannot be transferred and they are required to be sold and the amount involved is to be transferred to the respondent organization. According to the learned Counsel for the respondent, the liability to pay interest to the employees on a cumulative basis starts from the day the EPF Scheme is made applicable to the employees and therefore the appellant establishment cannot escape the liability to pay damages as stipulated under Para 32A of EPF Scheme. According to the

learned Counsel for the appellant, since the respondent authority was aware that other than 68 lakh which was held in cash, the rest of the amount is held in security and therefore they are liable to pay damages only after 30 days of cancellation of exemption. As rightly pointed out by the learned Counsel for the respondent, the time limit of 30 days from the date of cancellation is available only for transfer of security and the time limit for transferring cash from the existing trust to the respondent authority is only 10 days even as per Para 28 of EPF Scheme.

9. The learned Counsel for the appellant pointed out that the appellant establishment has taken all earnest effort to see that the amount involved are transferred to the respondent organisation within the stipulated time. It was also pointed out that the appellant establishment had to avail loans to clear the amounts to avoid further delay in transfer. According to him there was no intentional delay in transfer of funds from the trust account to the account of the respondent organization. He also pointed out that there was no mensrea in delayed transfer of the past accumulation. The learned Counsel relied on the decision of the Hon'ble Supreme Court in ***APFC Vs RSL Textiles Private Limited*** to argue that mensrea is a relevant consideration while

deciding the quantum of damages under Sec 14B of the Act. The appellant also relied on the decision of ***RPFC Vs Harrison Malayalam Limited***, WA No. 241/2012 and the ***Standard Furniture Vs Registrar, EPF Appellate Tribunal and Others*** WA No. 996/2015 to argue that the circumstances that lead to delay in remitting provident fund contributions have to be factored in by the authorities concerned before issuing the order under Sec 14B of the Act. The Hon'ble Supreme Court of India in SLP No.21174/2015 filed from WA No 996/2016 in ***Harrison Malayalam case (Supra)*** kept the question of law involved in the case open. The Hon'ble Supreme Court of India in ***Horticulture Experiment Station, Gonikoppal, Coorg Vs Regional Provident Fund Organisation***, Civil Appeal No. 2136/2012 examined the issue of mensrea in Sec 14B proceedings. After considering its earlier decisions in ***Mcleod Russell India Ltd. Vs Regional Provident Fund Commissioner,*** 2014(15) SCC 263 and ***Assistant Provident Fund Commissioner Vs Management of RSL Textiles India Pvt. Ltd.***, 2017(3) SCC 110 the Hon'ble Supreme Court held that

> *"Para 17. Taking note of the three Judge Bench Judgement of this court in* ***Union Of India and others Vs***

Dharmendra Textile Processors and Others (Supra) *which is indeed binding on us, we are of the considered view that any default or delay in payment of EPF contribution by the employer under the Act is a sine qua non for imposition of levy of damages under Sec 14B of the Act 1952 and mensrea or actusreus is not an essential element for imposing penalty/damages for breach of civil obligations/liabilities"*

The above judgement of the Hon'ble Supreme Court finally settled the question whether the intention of parties in delayed remittance of provident fund contribution is relevant while deciding the quantum of damages under Sec 14B of the Act.

10. The circumstances leading to the assessment of damages in this particular case is relevant while deciding the quantum of damages. It is seen that after cancellation of exemption the appellant establishment has taken all earnest effort to see that the past accumulation lying in the trust is transferred to the respondent organization at the earliest. There was some delay in transferring the cash to the respondent organization. However the delay in selling and transferring the cash to the

respondent organisation caused maximum delay in transfer of funds. It is not clear as to why the appellant chose this course of action when there was an option to the appellant to transfer the Government securities and securities guaranteed by the Government, which will not attract any damages even if there is any delay. Taking into account the circumstances of the present case, it is felt that the appellant establishment is entitled for some relief in damages under Sec 14B of the Act.

11. Considering the facts, circumstances, pleadings and evidences in this appeal, I am inclined to hold that interest of justice will be met if appellant is directed to remit 70% of the damages.

Hence the appeal is partially allowed, the impugned order is modified and the appellant is directed to remit 70% of the damages assessed under Section 14B of the Act.

Sd/-
(V.Vijaya Kumar)
Presiding Officer