



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

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

(Tuesday the, 1st day of March 2022)

APPEAL No. 17/2020

Appellant : M/s. Aluminium Industries Limited
Switchgear Division, Kuttamperoor,
Mannar
Alappuzha – 689 623

By M/s. Menon & Pai

Respondent : The Regional PF Commissioner
EPFO, Regional Office,
Bhavishyanidhi Bhavan
Kaloor, Kochi – 682 017

By Adv.Sajeevkumar K Gopal

This case coming up for final hearing on 15.12.2021 and this Tribunal-cum-Labour Court on 01.03.2022 passed the following:

ORDER

Present Appeal is filed from order No. KR/KCH/2726/PENAL DAMAGES/2019/7920 dated 12.12.2019 assessing damages under Section 14B of EPF and MP Act (hereinafter

referred to as 'the Act') for belated remittance of contribution from 02/1998 – 02/2013. The total damages assessed is Rs.7,53,124/- (Rupees Seven lakh fifty three thousand one hundred and twenty four only)

2. Appellant is a company registered under Companies Act 1956. The company have 9 divisions including seven manufacturing divisions; two divisions at Kundara came to a grinding halt since 1998. At present company have only three manufacturing divisions. The appellant company was referred to BIFR (Board for Industrial and Financial Reconstruction) under the provisions of Sick Industrial Company Special Provisions Act 1985 (SICA) and registered a Case No. 93/1987 following the complete erosion in its networth in 1987. BIFR sanctioned a Rehabilitation Scheme in the year 1987 and appointed State Bank of Travancore as an operating agency. The Scheme failed and the matter was again considered by BIFR. In June 2002, BIFR ordered sale of running units on a merger-cum-revival/take over basis and outright sale of non-running units of the company. Aggrieved by the order of BIFR, the existing promoters filed appeal before Appellate Authority for Industrial and Financial Reconstruction (AAIFR) New Delhi. AAIFR set aside the order of

BIFR and directed the existing promoters for rehabilitation of all the units. Accordingly the promoter submitted a fresh Rehabilitation Scheme. The order of BIRF dated 12.02.2014 is produced and marked as Annexure A1. Due to continuous losses, the appellant had financial difficulty and there was delay in remittance of contribution for the period from 02/1998 to 02/2013. Therefore the respondent initiated action under Sec 14B of the Act. The respondent vide summons dated 06.08.2019 directed the appellant to appear before the respondent on 23.08.2019. It was pointed out to the respondent authority that BIFR vide its order dated 12.12.2014 has sanctioned a rehabilitation package and as per the Rehabilitation Scheme sanctioned by BIFR under clause 17H(a) with caption that the penalty for non-payment of provident fund dues upto 31.03.2013 that is the cut off date can be waived. In view of the above, the appellant requested the respondent authority to waive the damages. A true copy of the reply submitted by the appellant is produced and marked as Annexure A2. Without considering the submissions made by the appellant, the respondent issued the impugned order, a copy of which is produced and marked as Annexure A3. The respondent authority failed to exercise its

discretion available under Sec 14B of the Act read with Para 32A of the Scheme. In ***RPFC Vs S.D.College Hoshiarpur***, 1997 (2) LLJ 55, the Hon'ble Supreme Court held that though the Commissioner has no power to waive penalty altogether, he has the discretion to reduce the percentage of damages. In ***Indian Telephone Industries Ltd. Vs APFC***, 2006(3) KLJ 698, the Hon'ble High Court of Kerala held that unless there is a finding by the authority that the employer is guilty of contumacious conduct or acts deliberately, dishonestly and in utter disregard of statutory obligations, penal damages cannot be imposed. The delay in remittance of contribution was only due to the financial constraints of appellant establishment during the relevant point of time. Imposition of damages at the maximum rate is unwarranted and unjustified. The respondent authority ought to have considered the fact that the appellant establishment was regular in compliance prior to the financial difficulty started.

3. The respondent filed counter denying the above allegations. The appellant delayed remittance of contribution for the period from 01.04.1996 to 30.07.2019. The respondent therefore initiated action for levy of damages. Accordingly a summons dated 06.08.2019 was issued to the appellant. A

representative of the appellant attended the hearing and submitted that the BIRF in Case No. 93/1987 in its order dated 12.12.2014 approved the rehabilitation package of appellant establishment. It was also pointed out that under clause 17H (a) regarding concessions to be given by provident fund department, it is proposed to waive damages for non-payment of provident fund dues upto cut off date, ie 31.03.2013. In ***M/s Gowri Spinning Mills (P) Ltd. Vs APFC***, the Hon'ble High Court of Madras held that in order to render the second proviso applicable to an establishment, it is mandatory under the statute that the establishment should be a sick industry in terms of SICA, a Scheme should have been sanctioned by BIFR for rehabilitation and that the reduction or waiver of damages would be subject to the terms and conditions specified in the Scheme. The appellant is covered by the second proviso to Sec 14B of the Act and is therefore entitled to approach the Central Board of Trustees for waiver of damages levied under Sec 14B of the Act upto the cut off date of 31.03.2013. The impugned order is issued upto the period of 02/2013 to enable the appellant to approach the Central Board of Trustees for the waiver/reduction of penal damages. The appellant establishment approached this Tribunal

without exhausting the statutory remedy of approaching the Central Board of Trustees. The appellant never raised any dispute regarding the belated remittance of contribution and therefore the liabilities under Sec 14B remain undisputed. The decision of the Hon'ble High Court in ***RPFC Vs SD College (Supra)*** is in an entirely different set of facts. In the said case, the college authorities continued to deposit the amount of provident fund contribution with the university in spite of direction of the Hon'ble High Court. The decision of the Single Bench of the Hon'ble High Court of Kerala in ***Indian Telephone Industries Case (Supra)*** is modified by the Division Bench of Hon'ble High Court in WA No. 2182/2006.

4. The appellant establishment is a Sick Industrial Company in terms of Sec 3(1)(o) of SICA, 1985. The BIFR in Case No. 93/1987 approved a Scheme of Rehabilitation vide order dated 12.02.2014. In the approved Scheme, Clause 17, Relief and Concessions at H, it is proposed that the damages for the non-payment of provident fund dues upto the cut off date ie, 31.03.2013 can be waived. As per the proviso 2 of Sec 14B of the Act, "the Central Board may reduce or waive 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 Re-construction established under Sec 4 of the Sick Industrial Companies (Special Provisions Act 1985) subject to such terms and conditions as may be specified in the Scheme.

As per Para 32B of EPF Scheme,

Terms and conditions for reduction of waiver of damages

Central Board may reduce or waive the damages levied under sec 14 B of the Act in relation to an establishment specified in the second proviso in Sec 14B, subject to the following terms and conditions namely

- a) *In case of change of management*
- b) *In case where the Board for Industrial and Financial Reconstruction, for reasons to be recorded in its Scheme, in this behalf recommends waiver of damages upto 100% may be allowed.*
- c) *In other cases depending on merits, reduction of damages upto 50% may be allowed.*

5. From the above provisions, it is very clear that the appellant establishment satisfied the requirement of reduction or

waiver of damages by the Central Board of Trustees. Though the Insolvency and Bankruptcy Code 2016 abolished SICA, 1985, as per the existing provisions, the appellant ought to have approached the Central Board of Trustees for reduction or waiver of damages as recommended by BIFR. It is seen from the impugned order that the respondent authority has specifically mentioned in the impugned order that

Accordingly, it has been decided to issue separate levy order quantifying penal damages under Sec 14B of the Act for the period from 02/1998 to 03/2013 so as to enable the establishment to approach the Central Board of Trustees Employees Provident Fund Organisation for waiver/reduction of penal damages as per the recommendation of BIFR.

6. The learned Counsel for the appellant submitted during the course of hearing that the appellant did not approach the Central Board of Trustees for reduction or waiver of damages. It is not clear as to why the appellant fail to avail the statutory remedy available to them inspite of a specific observation by the

respondent authority that the impugned order is issued only to facilitate the appellant to approach the Central Board of Trustees.

7. The learned Counsel for the respondent pointed out that the appellant is not entitled for any waiver of damages for belated remittance of employees' share of contribution. According to the learned Counsel, the appellant has no case that the wages of the employees were not paid in time. Having paid the wages to its employees, the appellant recovered the employees' share of contribution from the salary of the employees. Non-remittance of employees' share of contribution deducted from the salary of the employees is an offence of breach of trust under Sec 405/406 of Indian Penal Code.

8. The learned Counsel for the appellant argued that there was no intentional delay in remittance of the contribution and the delay was only due to the financial constraints of the appellant establishment. 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.

9. 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 50% of the damages.

Hence the appeal is partially allowed, the impugned order under Section 14 B of the Act is modified and the appellant is directed to remit 50% of the damages.

Sd/-
(V.Vijaya Kumar)
Presiding Officer