



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

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

(Tuesday, the 30<sup>th</sup> day of November 2021)

**APPEAL No. 236/2018**

(Old No. A/KL – 24/2017)

Appellant

M/s. Koluthara Exports Ltd.  
P.B.No. 7, Keltron Road,  
Aroor  
Alappuzha – 688 534

By M/s. Thomas & Thomas

Respondent

The Assistant PF Commissioner  
EPFO, Sub Regional Office,  
Bhavishyanidhi Bavan, Kaloor  
Kochi – 682 017

This case coming up for final hearing on 13.09.2021 and this Tribunal-cum-Labour Court on 30.11.2021 passed the following:

**ORDER**

Present Appeal is filed from order No. KR/KCH/13704/DAMAGES SCN/2016-2017/16453 dated, 20.02.2017 assessing damages under Section 14B of EPF Act and MP Act (hereinafter referred to as 'the Act') for belated remittance of

contribution from 08/2013-11/2015. The total damages assessed is Rs. 1,46,420/- (Rupees one lakh forty six thousand four hundred and twenty only). The interest demanded under Sec 7Q of the Act for the same period is also being challenged in this appeal.

2. The appellant is a company registered under the Companies Act and engaged in the processing and exporting of sea food. On account of unprecedented financial crisis, the appellant was incurring losses and became sick from 01.04.1999 and is registered with BIFR as case No. 382/2000 and the BIFR has declared the appellant company as a sick unit and State Bank of India has been appointed as the operating agency. After consulting all the concern authorities including the respondents, State Bank of India has submitted a rehabilitation Scheme for the revival of the company. The accumulated loss of the company for the period upto 2015 – 2016 was Rs. 8.43 crores. In spite of heavy losses, petitioner was paying wages and statutory dues though there was delay. The delay in remittance of contribution occurred due to reasons beyond the control of the appellant which was neither wilful nor deliberate. To substantiate the financial constraints, the copies of balance sheet

for the years 2012 – 2013, 2013 – 2014, 2014 – 2015 and 2015 – 2016 are produced and marked as Annexure A1 series. The respondent issued notice dated 05.04.2016 alleging delay in remittance of contribution for the period from 08/2013 to 11/2015 directing the appellant to show cause why damages shall not be levied for belated remittance of contribution. A copy of the notice dated 05.04.2016 is produced and marked as Annexure A2. The respondent also gave an opportunity for personnel hearing and the appellant filed a detailed written statement dated 16.04.2016 informing the respondent that the delay in remittance was due to the financial constraints of the appellant. A copy of the written statement is filed and marked as Annexure A3. Ignoring all the contentions of the appellant the respondent issued the impugned order. The respondent authority failed to exercise its discretions provided under Sec 14B of the Act and Paragraph 32A of EPF Scheme. In ***RPFC Vs SD College, Hoshiapur*** 1997 2 LLJ 55 the Hon'ble Supreme Court held that though the Commissioner has no power to waive penalty all together, he has the discretion to reduce the percentage of damages. In ***Telephone Industries Ltd. Vs APFC***, W.P.(C) No.32515/2005, the Hon'ble High Court of Kerala held that the

authority exercising powers under Sec 14B has the discretion to reduce the damages. The Division Bench of the Hon'ble High Court of Kerala in ***Harrisions Malayalam Vs RPFC***, 2013 KLT 730 held that financial constraints are to be considered as a valid ground for the purpose of delayed remittance of contribution.

3. Present appeal is filed before EPF Appellate Tribunal, Bangalore as Appeal No. A/KL-24/2017. The Hon'ble EPF Appellate Tribunal admitted the appeal vide order dated 21.03.2017. The appeal was thereafter posted for written statement of the respondent. Subsequently the files were transferred to this Tribunal. From 16.09.2019 this Tribunal directed the respondent to file counter. Though the Counsel for the respondent submitted on 13.03.2020 that the counter is being filed, no counter is filed by the respondent even on 13.09.2021. Hence the matter was finally taken up for hearing.

4. Admittedly there was delay in remittance of Provident Fund contribution. From Annexure A2 notice issued by the respondent to the appellant, it is seen that the delay in remittance of contribution varied from 15 days to 676 days. The average delay is around 18 months. According to the learned Counsel for the appellant, the appellant establishment was

passing through severe financial constraints during the relevant point of time. It was also argued that the appellant establishment was referred to BIFR and the BIFR has declared the establishment as sick unit from 01.04.1999. No documents were produced to substantiate the claim of the appellant. However the learned Counsel for the appellant pointed out that the respondent organisations also attended the proceeding before BIFR and they were aware of the same. Since no written statement is filed by the respondent and the claim of the appellant in this regard is not denied by the respondent in this proceedings, the contention of the appellant that they were declared sick by BIFR is taken to be correct. However after the passing of the Insolvency and Bankruptcy Code 2016, the proceedings before BIFR will have no relevance unless and until the matter is taken before the appropriate authority under 2016 Code. The learned Counsel for the appellant submitted that the financial statements now produced in this appeal would clearly prove the financial constraints of the appellant establishment. The documents now produced are only two page extracts of the balance sheet for the period ending 31.03.2013, 31.03.2014, 31.03.2015 and 31.03.2016. The learned Counsel for the

appellant could not explain as to how these documents will substantiate the financial constraints as the appellant establishment was earning profit. During the year ending 31.03.2013, the revenue income of the appellant establishment was 2.36 crores, for the year ending 31.03.2015, the total revenue income was 4 crore and for the year ending 31.03.2016 the total revenue income was 4.70 crores. The learned Counsel for the respondent argued that the statements in balance sheet as regards current assets and current liability cannot be taken as sacrosanct. In ***Aluminium Corporation Vs Their Workman***, 1964 (4) SCR 429 the Hon'ble Supreme Court held that the correctness of the figures as shown in the balance sheet itself are to be established by proper evidence by those responsible for preparing the balance sheet or by other competent witnesses. The learned Counsel for the respondent also pointed out that appellant though claimed that there was delay in payment of wages to its employees, the same was not substantiated. Further the documents now produced also will show that the wages of the employees were paid in time. The appellant establishment failed to remit even the employees share of contribution deducted from the salary of the employees in time. Non-remittance of employee's

share of contribution deducted from the salary of the employee is an offence of breach of trust under Sec 405/406 of Indian Penal Code. Having committed an offence of breach of trust, the appellant cannot plead that there was no intentional delay in remittance of provident fund contribution. The learned Counsel for the appellant also pointed out that the respondent authority ought to have seen that there was no mensrea in belated remittance of contribution. 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.

5. Taking into account the fact that the claim of the appellant that they were declared sick by BIFR and since the claim is not disputed by the respondent, the appellant establishment is entitled for some relief with regard to assessment of damages under Sec 14B of the Act.

6. 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 80% of the damages.

7. On perusal of Sec 7(I) of the Act, it is seen that there is no provision under Sec 7(I) to challenge an order issued under



Sec 7Q of the Act. The Hon'ble Supreme Court of India in ***Arcot Textile Mills Vs RPFC***, AIR 2014 SC 295 held that no appeal is maintainable against 7Q order. The Hon'ble High Court of Kerala in ***District Nirmithi Kendra Vs EPFO***, W.P.(C) 234/2012 also held that Sec 7(I) do not provide for an appeal from an order issued under Sec 7Q of the Act. The Hon'ble High Court of Kerala in ***M/s. ISD Engineering School Vs EPFO***, W.P.(C) No.5640/2015(D) and also in ***St. Marys Convent School Vs APFC***, W.P.(C) No.28924/2016 (M) held that the order issued under Sec 7Q of the Act is not appealable.

8. 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 80% of the damages.

The appeal against 7Q order is dismissed as not maintainable.

Sd/-  
**(V.Vijaya Kumar)**  
 Presiding Officer