सत्यमेव जयते

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

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

(Friday the, 8th day of April 2022)

APPEAL No. 28/2020

Appellant : M/s. Cliff Valley Properties Pvt. Ltd.
Blanket Hotels & Spa,
Pallivasal,
Munnar – 686 612.

By Adv. K.K.Premlal &
Adv. Vishnu Jyothis Lal

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

By Adv. Joy Thattil Ittoop

This case coming up for final hearing on 24.02.2022 and this Tribunal-cum-Labour Court on 08.04.2022 passed the following:

ORDER

Present Appeal is filed from order No. KR/KTM/1723448/ APFC/Penal Damages/14B/2019-20/11564 dated 27.01.2020 assessing damages under Section 14B of EPF and MP Act 1952 (hereinafter referred to as 'the Act') for belated remittance of

contribution for the period from 09/2017 to 06/2019 (remittance made during 01.09.2017 – 30.06.2019). The total damages assessed is Rs. 1,39,810/- (Rupees one lakh thirty nine thousand eight hundred and ten only)

2. The appellant establishment started operation during July 2017. Even though the registration process under EPF Scheme was initiated, because of the mismatch of Aadhar and Pan details, there was some delay in allotment of code number. Code number was allotted on 27.04.2018. Several employees could not furnish their Aadhar details correctly and hence there was further delay in registration of employees. The appellant started part remittance w.e.f. 30.07.2018. The registration of all the employees was completed subsequently. The appellant establishment was affected by two consecutive floods in the last two years. The delay caused is due to acute financial crisis. The appellant received a notice dated 12.12.2019 alleging delay in remittance of contribution for the period from 01.09.2017 to 30.06.2019. A true copy of the notice is produced and marked as Annexure 1. A representative of the appellant attended the hearing and filed a written statement dated 15.01.2020. A true copy of the reply

dated 15.01.2020 is produced and marked as Annexure 2. Ignoring the contentions of the appellant, the respondent issued the impugned order, a copy of which is produced and marked as Annexure 3. Penalty is imposed only in cases where there is contumacious conduct or wilful default on the part of the appellant. The Hon'ble High Court of Kerala in ***Quilon District Automobile Workers' Co-operative Society Ltd. Vs E.S.I. Corporation,*** 2017 (2) KLT 21, held that the authority under ESIC Act has got discretion while levying damages. There was no mensrea or actus reus on the part of the appellant to contravene the provisions of law. The respondent ought to have considered the change after introduction of Sec 7Q into the Act. The Hon'ble High Court of Kerala has brought out the changes in ***Regional Provident Fund Commissioner Vs Harisson Malayalam Ltd***., 2013 (3) KLT 790. In the above case, the Hon'ble High Court also held that the existence of mensrea to contravene a statutory provision must also be held to be a necessary ingredient. The Hon'ble Supreme Court in ***Employees' State Insurance Corporation Vs HMT Ltd and Another***, AIR 2008 SC 1322 and in ***Assistant Provident Fund Commissioner and Another Vs***

Management of RSL Textiles India Private Limited, 2017 (3) SCC 110, held that mensrea or actus reus is a relevant consideration while levying damages under Sec 14B of the Act.

3. The respondent filed counter denying above allegations. The appellant is covered under the provisions of the act w.e.f. 01.09.2017. The appellant is liable to remit contribution within 15 days of close of every month as per Para 38 of EPF Scheme 1952. Since there was delay in remittance of contribution, the respondent issued notice dated 12.12.2019 directing the appellant to show cause why damages shall not be levied for belated remittance of contribution. A representative of the appellant attended the hearing and filed a written statement. Though the appellant claimed financial difficulty, no supporting evidence was produced before the respondent authority. The appellant establishment took registration through online registration process on 27.04.2018 w.e.f. 01.09.2017. The inordinate delay in registering the appellant establishment itself establishes mensrea. The appellant establishment delayed remittance of contribution even after delayed registration of the appellant establishment. When an establishment is a habitual defaulter, they are liable to

remit damages at the maximum prescribed under law. The reliance made by the appellant on the decision of the Hon'ble High Court of Kerala on ***Quilon District Automobile Workers Co-operative Society Ltd Vs ESI Corporation*** (supra) is not sustainable because the appellant establishment even failed to remit the employees share of contribution deducted from the wages of the employees. The Hon'ble Supreme Court of India in ***Organo Chemical Industries Vs Union of India,*** 1979 90020 LLT 0416 SC held that "even if it is assumed that there was a loss as claimed, it does not justify the delay in deposit of provident fund money which is an unqualified statutory obligation and cannot be allowed to be linked with the financial position of the establishment over different points of time".

4. There was delay in remittance of contribution by the appellant establishment during the period 09/2017 – 06/2019. The respondent therefore initiated action for assessing damages vide notice dated 12.12.2019. A representative of the appellant attended the hearing and filed a written statement. According to the written statement, the delay in remittance of contribution was due to the delayed registration of the appellant establishment and

the consequential delayed registration of employees. After taking into account the submissions made by the appellant, the respondent issued the impugned order.

5. In the present appeal also, the learned Counsel for the appellant reiterated its stand before the respondent authority. According to the learned Counsel for the appellant, one of the reasons for delayed remittance of contribution was financial constraints of the appellant establishment during the relevant point of time. The learned Counsel for the respondent pointed out that the financial difficulty of the appellant establishment was not substantiated before the respondent authority. It is seen that the appellant failed to substantiate financial difficulty in this appeal also. In ***M/s. Kee Pharma Ltd Vs APFC***, 2017 LLR 871 the Hon'ble High Court of Delhi held that the employers will have to substantiate their claim of financial difficulties if they want to claim any relief in the levy of penal damages under Sec 14B of the Act. In ***Sree Kamakshi Agency Pvt Ltd Vs EPF Appellate Tribunal***, 2013 1 KHC 457 the Hon'ble High Court of Kerala held that the respondent authority shall consider the financial constraints as a ground while levying damages under Sec 14B, if

the appellant pleads and produces documents to substantiate the same. In ***Elstone Tea Estates Ltd Vs RPFC***, W.P.(C) 21504/2010 the Hon'ble High Court of Kerala held that financial constraints have to be demonstrated before the authority with all cogent evidence for satisfaction to arrive at a conclusion that it has to be taken as mitigating factor for lessening the liability. Having failed to substantiate the claim of financial difficulties, the appellant cannot come up in appeal and plead that delay in remittance was due to financial difficulty of the appellant establishment.

6. Another ground pleaded by the learned Counsel for the appellant is with regard to the delay in the registration of the appellant establishment. According to the learned Counsel for the respondent, the registration of the establishments is online and the respondent organisation has no direct role in the registration process. If the registration of the appellant establishment is delayed, the delay can be attributed only to the appellant establishment. According to the learned Counsel for the appellant, the delay in registering the appellant establishment was due to some mismatch in name in PAN and in Aadhar. A delay of more

than 7 months cannot be attributed to the mismatch of names. The learned Counsel for the appellant further submitted that the delay was due to the fact that it took some time for them to collect the Aadhar details of the employees to register them in EPFO portal. This argument of the learned Counsel for the appellant also cannot be accepted as a ground for delayed remittance of contribution. According to the learned Counsel for the respondent, the appellant was deducting the employees' share of contribution and was retaining with him during the relevant period. The appellant thereby committed an offence of breach of trust under Sec 405/406 of Indian Penal Code.

7. The learned Counsel for the appellant also argued 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.

8. EPF is a social security legislation enacted by the Parliament for the protection of the poor working force in the country. The working of the social security system under the Act

contemplates timely remittance of provident fund contribution by all the establishments. Delayed remittance of contribution will delay the investment of money and also the return to the poor employees. The Scheme therefore mandates that the covered establishments shall remit the contributions within 15 days of close of every month. If the grounds pleaded by the learned Counsel for the appellant is accepted, it will affect the health of the fund and thereby impact the welfare of the employees. Annexure 1 delay statement will clearly indicate that there was an average delay of more than 200 days in remitting the contribution. Such delay in remittance of contribution cannot be accepted.

9. Considering the facts, circumstances, pleadings and arguments in this appeal, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed

Sd/-
(V.Vijaya Kumar)
Presiding Officer