



सत्यमेव जयते

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

Present: Shri.V.Vijaya Kumar, B.Sc., LL.M, Presiding Officer.
(Thursday the 7th day of October 2021)

APPEAL No. 34/2020

Appellant : M/s. Periyar Steel Private Ltd.
IDA, Erumathala
Aluva – 683 112

By Adv. P A Saleem

Respondent : The Assistant PF Commissioner
EPFO, Sub - Regional Office, Kaloor
Kochi – 682 017

By Adv. Sajeev Kumar K Gopal

This case coming up for final hearing on 25/06/2021
and this Tribunal-cum-Labour Court on 07/10/2021 passed
the following:

ORDER

Present appeal is filed from order No. KR/KCH/19047/
DAMAGES CELL /2015/181 dated. 24/02/2016 assessing
damages under Section 14B of EPF and MP Act (hereinafter
referred to as ‘the Act’) for belated remittance of contribution

from 07/2005 – 11/2008. Total damages assessed is Rs.57,322/- (Fifty seven thousand three hundred and twenty two 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 covered under the provisions of the Act. The appellant took a non-functioning factory and started production w.e.f. 11/2008. The appellant establishment was closed for long time. The appellant took the risk of taking over a non-functioning establishment and spending all his accumulated assets. The appellant establishment was run by another management till 2005. The management was facing huge losses and therefore terminated all the employees and closed down the factory. The appellant purchased the shares from the accumulated funds and after getting some exemptions from organisations like Kerala State Electricity Board started its operations in November 2008. Though the appellant found it extremely difficult to the run appellant establishment, he could run the factory, though, without any profit. A copy of the exemption order received from Kerala State Electricity Board is produced and marked as Annexure A2. The appellant

also received a certificate after restarting from the District Industry Centre, a copy of which is produced and marked as Annexure A3. The respondent has issued orders for interest and damages for the period from 07/2005 – 11/2008. The respondent was aware that the appellant establishment was not functioning during the relevant point of time. The respondent authority issued a notice before issuing the impugned orders, however failed to consider the submissions made by the appellant. During the relevant point of time, the appellant were not owning the establishment and the unit was closed. In **Wasp Pumps Private Ltd. Vs Assistant Provident Fund Commissioner**, 2012 LLR 1031 the Hon'ble High Court of Bombay held that levy of damages for delayed deposit of Provident Fund, upon a sick unit, without reasons is not sustainable. In **Regional Provident Fund Commissioner Vs Sree Vishalam Chit Funds Ltd.**, 2011 LLR 222 (SN) the Hon'ble High Court of Madras held that in the absence of intentional delay the respondent cannot levy damages. The Hon'ble High Court of Kerala in **Ernakulam District Co-operative Bank Vs Regional Provident Fund Commissioner**,

2000 (1) LLJ 662 held that damages for default in payment of contribution is payable only to the extent of loss incurred by the beneficiaries. **M/s. K Streetlite Electric Corp. Vs Regional Provident Fund Commissioner**, 2001 (1) LLJ 1703 the Hon'ble Supreme Court of India reduced the damages to 25% taking into account the financial constraints of the appellant establishment.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act w.e.f. 28/02/1999. There was delay in remittance of contribution for period from 07/2005 – 11/2008 and therefore respondent initiated action under Sec 14B of the Act for levying damages. The respondent issued a notice for personnel hearing on 13/02/2014. A detailed damages statement showing month wise delay in remittance of contribution was also enclosed along with the notice. A representative of the appellant attended the hearing and admitted the delay in remittance of contribution. The respondent therefore issued impugned order assessing damages and interests. It is a settled legal position that the

appellant is liable to pay damages for belated remittance of contribution, even if there is a change of management. The claim of the appellant that there was no intentional delay is denied by the respondent. The appellant defaulted in remittance of even the employee's share of contribution which is deducted from the salary of the employees' each month. The non-remittance of employees' share of contribution deducted from the salary of employees' is an offence of breach of trust. The Hon'ble Supreme Court in **Chairman SEBI Vs Sriram Mutual Fund**, held that mensrea is not an essential ingredient for contravention of provisions of Civil Act. Penalty is attracted as soon as contravention of statutory obligation as contemplated by the Act and the regulation is established and therefore the intension of parties committing such violations becomes wholly irrelevant. The appellant was offered an opportunity for personnel hearing on 13/02/2014 and a representative of the appellant attended the hearing. The appellant did not raise any contention regarding the taking over of a closed unit or the financial difficulty of the appellant establishment. The issues which were not raised before the

respondent authority cannot be raised for the first time in this appeal. The Hon'ble High Court of Rajasthan in **Ess Dee Carpert Enterprises Vs Union of India**, 1985 LIC 1116 held that the question of facts not raised before the RPFC in the enquiry cannot be raised in the subsequent proceedings. The Annexure A2 letter given by the Kerala State Electricity Board did not allow any exemption but it is only an instalment facility to pay accumulated arrears payable by the appellant to the Board at an interest rate of 18%. The appellant establishment is not a sick industry in terms of Sick Industrial Company (Special Provisions Act). Appellant has not produced any proof to establish that the appellant establishment is a sick unit. The contention of the appellant that the respondent organisation has not sustained any loss or damages due to delayed remittance is not correct. The respondent organisation is under legal obligation to pay to the members of the fund interest at a cumulative rate, declared by the Government from time to time, irrespective of the fact whether the employer has remitted the contribution in time or not. The Hon'ble Supreme Court of India in **M/s. Organo Chemical Industries Vs UOI**,

1979AIR (SC)1803 held that *“The viability of the project depends on the employer duly deducting the workers contribution from their wages, adding his own little and promptly depositing the mickle into the chest constituted by the Act. The mechanics of the system will suffer paralysis if the employer fails to perform this function”*. The Hon’ble High Court of Kerala in **Ernakulam District Co-operative Bank Vs RPF**, 2000(1) LLJ 1662 held that though there is sufficient reasons for the appellant to make belated payment, that is not a ground for granting exemption from paying penalty or damages.

4. There is no dispute regarding the fact that there was delay in remittance of provident fund contribution for the period 07/2005 – 11/2008. According to the learned Counsel to the appellant, the appellant establishment was running under loss and was closed during the period from 07/2005 to 11/2008. The appellant establishment was under a different management during the relevant point of time. According to him, the appellant took over the management of the establishment only from 11/2008. The appellant failed to

produce any records to substantiate their claim of change of management. According to the learned Counsel for the appellant, previous Management was not in a position to run the factory because of the financial constraints and therefore closed and the services and the employees were also terminated. The learned Counsel for the respondent on the other hand, pointed out that the appellant did not raise the contention regarding change in management before respondent authority and no evidence is produced in this appeal also to substantiate their claim. The learned Counsel for the respondent also refused the claim of the appellant that the unit was closed during relevant point of time. According to him the unit was functioning and the employees were very much in service and their contribution was also paid during relevant point of time. The question regarding delayed remittance comes only after remittance of contribution. The documents now produced by the appellant in this appeal such as the order of KSEB dated 31/07/2008 (Annexure A2), Certificate dated 03/12/2008 issued by District Industry Centre (Annexure A3) will not anyway prove the financial

constraints of appellant establishment. The learned Counsel for the respondent also pointed out that the appellant is liable to pay the damages even if the claim of the appellant that they have taken over the management of the company only from 11/2008 is correct, as the PF Act is applied to the establishment and not its owners. The learned Counsel for the respondent also pointed out that the appellant cannot claim that there is no mensrea or intentional delay in remittance of contribution. According to him there is no case for the appellant that the wages of the employees were not paid in time. When the wages are paid, the employees' share of contribution is deducted from the salary of the employees and non-remittance of the employee share of contribution deducted from the salary of employee is an offence of breach of trust under Sec 405/406 of Indian Penal Code. In this case, it is not clear whether the wages of employees were paid in time as according to the appellant, they took over the management of the company only in 11/2008 and there is no evidence to support the claim that the wages were paid on time.

5. Taking into account the fact that the appellant has taken over a sick industrial unit and is working with financial constraints, interest of justice will be met if the appellant is directed to remit 70% of the damages under Sec 14B of the Act.

6. 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 Sec 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.

7. Hence the appeal is partially allowed and impugned order under Sec 14B is modified and appellant is directed to remit 70% of the damages. The appeal against Sec 7Q order is dismissed as not maintainable.

Sd/-

(V. Vijaya Kumar)
Presiding Officer