



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

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

(Tuesday the, 23rd November 2021)

APPEAL No. 428/2019

Old No. ATA 432 (7) 2016

Appellant

Corporation of Cochin,
Corporation Office,
PB No. 1016
Kochi – 682 011

By : Adv. C.B.Mukundan

Respondent

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

By Adv. Sajeev Kumar K Gopal

This case coming up for final hearing on 31.08.2021 and this Tribunal-cum-Labour Court on 23.11.2021 passed the following:

ORDER

Present Appeal is filed from order No. KR/KCH/27450/DAMAGES CELL /RB : 3048/2015/114 dated 22.02.2016 assessing damages under Section 14B of EPF Act and MP Act 1952 (hereinafter referred to as the Act) for the period from

03/2011 – 01/2014. The total damages assessed is Rs. 33,70,230/- (Rupees thirty three lakh seventy thousand two hundred and thirty only). The interest demanded under Sec 7Q of the Act for the same period is also being challenged in this appeal.

2. The appellant, Corporation of Cochin is a Local Self Government institution constituted under provisions of Kerala Municipality Act 1994. The appellant institution is engaged in performing the function and discharging the obligation as contained under the Constitution of India and under various provisions of Kerala Municipality Act. In May 2011, respondent brought the contingent workers of the appellant institution under the coverage of the Act w.e.f 08.01.2011. The appellant could not start compliance immediately as approvals were required at various levels under the provisions of the Municipality Act. The appellant Corporation is having around 900 contingent staff and collecting the required information for coverage also took some time to start compliance. However the appellant started compliance from November 2011. The financial constraints of the appellant Corporation also contributed in delayed remittance of

contribution. Since there was delay, the respondent initiated an enquiry under Sec 7A of the Act. The order under Sec 7A was issued only on 22.10.2012. The appellant received a notice dated 14.01.2015 issued by the respondent proposing to levy damages and interest alleging delay in payment of contribution for the period from 03/2011 – 01/2014. A copy of the notice is produced and marked as Annexure A3. During the course of enquiry, the appellant explained the factual position to the respondent authority. The appellant also filed a detailed written statement dated 23.04.2015. Ignoring the contentions of the appellant, the respondent issued the impugned orders assessing damages and interest. Copies of the said orders are produced and marked as Annexure A1 and Annexure A2. It is clear from the impugned order that the same is issued in a mechanical manner in complete disregard of the contentions raised before the respondent authority. The appellant brought to the notice of the respondent certain glaring discrepancy in payment particulars as furnished in Annexure A3 notice dated 14.01.2015. On going through the table of payment details given in the written statement, it can be seen that the dates relating to 9 payments were wrongly

furnished in the delay statement. The copies of the letters dated 02.03.2012, 19.03.2012, 18.04.2012 are produced and marked as Annexure A5 series. Copies of the demand draft dated 04.01.2013 (2 in Nos) 02.04.2013 (4 in Nos) are produced and marked as Annexure A6 series which will clearly prove the discrepancies in payment particulars. As per instructions issued by the respondent organisation, presentation of cheque to the bank is to be reckoned and not the date on which EPF organisation has given credit to the payments. It is settled legal position that damages being a penal provision cannot be levied in a mechanical manner. The judgements of the Hon'ble Supreme Court of India and Hon'ble High Court clearly states that unless there is wilful defiance of law and contumacious conduct on the part of the employer, no damages can be levied.

3. Present appeal is filed before EPF Appellate Tribunal, New Delhi as ATA 432(7)2016. The appeal was later transferred to its southern branch at Bangalore and later to this Tribunal. This Tribunal issued notice to both the parties and both of them entered appearance on 24.12.2019. Thereafter the respondent was given many opportunities to file

counter. No counter is seen filed by the respondent authority. The learned Counsel for the respondent submitted on 09.07.2021 that counter had already been filed before EPF Appellate Tribunal, New Delhi. Since no counter is seen transferred along with the file, the learned Counsel for the respondent was directed to file a copy of the counter filed before EPF Appellate Tribunal, New Delhi. The respondent failed to do so. Hence I am constrained to decide the matter on the basis of the arguments by the appellant as well as the respondent.

4. The present appeal is filed by the appellant against orders issued under Sec 14B and Sec 7Q of the Act. According to the learned Counsel, the appellant establishment is covered retrospectively from March 2011 in May 2011. However the appellant Corporation being a statutory organisation had to take approvals and decisions and accordingly there was delay in remittance of Provident Fund contribution. All the Municipalities and Corporations were brought under the provisions of the Act by Government of India and all the Municipal Corporations are required to comply in respect of their contingent staff under the

provisions of the Act w.e.f 03/2011. However the appellant started compliance only from January 2013. The learned Counsel for the appellant raised four issues in this appeal. The first issue is with regard to administrative delay in implementing the provisions of the Act. Even if there is delay in taking decisions, two years delay in implementing the provision cannot be justified by stating that there were administrative issues in the initial stages of implementation. The second issue raised by the learned Counsel for the appellant is with regard to the financial constraints of the appellant Corporation. According to the learned Counsel for the respondent, no documents were produced before the respondent authority or in this appeal to substantiate the claim of financial difficulty during the relevant point of time. 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. The third issue raised by the learned Counsel for the appellant is with regard to the date of remittance reflected in the delay statement enclosed along with Annexure 3 notice and the actual date of payment furnished in the written statement. The impugned order under Sec 14B is completely silent on the issue of discrepancy raised by the appellant before the respondent authority. The learned Counsel for the respondent also could not clarify the discrepancy in the date of remittance and the date furnished in the notice. The fourth issue raised by the learned Counsel for the appellant is with regard to the

difference in amounts in the notice as well as in the impugned order. As per Annexure A3 notice, the total amount of damages proposed under Sec 14B is Rs. 33,44,496/- whereas in the impugned order under Sec 14B the damages is quantified as Rs. 33,70,230/- Similarly the proposed interest under Sec 7Q as per the notice is Rs. 17,97,941/- and as per the Annexure A2 order the 7Q demanded is Rs.17,91,598/-. The respondent did not offer any explanation for this variation in the amounts as per the notice and the impugned orders.

5. In the absence of a proper explanation either through written statement or at the time of argument, it is not possible to sustain the order under Sec 14B of the Act. The learned Counsel for the appellant also raised an issue regarding lack of mensrea in delayed 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.

6. An order issued under Sec 7Q of the Act is not appealable as there is no provision under Sec 7(I) of the Act to challenge a Sec 7Q order in appeal. 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 Sec7Q 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. However in view of the discrepancies explained about, the appellant may approach the respondent to correct mistakes if any in the calculation of interest under Sec 7Q of the Act.

7. Considering the facts, circumstances, pleadings and evidences in this appeal it is not possible to sustain the impugned order under Sec 14B of the Act. Hence the appeal is allowed, the impugned order under Sec 14B is set aside and the matter is remitted back to the respondent to re-decide the matter within a period of six months after providing an

opportunity to the appellant to be heard. If the appellant fails to appear or produce the records called for, the respondent may decide the matter according to law. The appeal against Sec 7Q order is dismissed as not maintainable. However the appellant may approach the respondent in the event of any difference in the date of remittance as claimed in the appeal.

Sd/-
(V.Vijaya Kumar)
Presiding Officer