



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

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

(Tuesday the, 28th day of December 2021)

APPEAL No. 466/2019

Appellant : M/s. Mather Projects,
Kodiyatt Chambers,
Rajaji Road,
Ernakulam – 682 035

By Adv. C.B.Mukundan

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 23.09.2021 and this Tribunal-cum-Labour Court on 28.12.2021 passed the following:

ORDER

Present Appeal is filed from order No. KR/KCH/21262/ Penal Damages/2019/4555 dated 25.07.2019 assessing damages under Section 14B of EPF and MP Act (hereinafter referred to as ‘the Act’) for belated remittance of contribution from 01.04.2018 – 11.07.2019. The total damages assessed is Rs. 1,41,003/-

(Rupees one lakh forty one thousand and three 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 Private Limited company covered under the provisions of the Act. It is admitted that there was delay in remittance of contribution for the period from 04/2018 – 07/2019. The delay in remittance was due to acute financial crisis of the appellant establishment. The appellant was not even in a position to disburse the wages of the employees in time. The appellant establishment has landed under Corporate Insolvency Resolution Process (CIRP). While so the respondent issued summons dated 08.04.2019 proposing to levy damages and interests for belated remittance of contribution. A copy of the summons is produced and marked as Annexure A3. The appellant appeared before the respondent and filed a written statement, a copy of which is produced and marked as Annexure A4. The Balance Sheet for the year 2017-2018 is produced and marked as Annexure A5. CIRP has been initiated against the appellant establishment under the provisions of Insolvency and Bankruptcy Code, 2016 by an order of National Company Law Tribunal w.e.f. 30.11.2018. A copy of the relevant

order is produced and marked as Annexure A6. Without taking into account any of the submissions made by the appellant, the respondent issued the impugned order. The respondent authority failed to consider the circular dated 29.05.1990 issued by the Head Quarters of the respondent organisation stating that 14B damages also include interest chargeable under Sec 7Q of the Act. The above circular was also confirmed by the Hon'ble High Court of Delhi in ***Systems Stamping and Another Vs Employees Provident Fund Appellate Tribunal***, 2008 LLR 485. The respondent failed to exercise the discretion available to him under Sec 14B of the Act. The respondent authority failed to notice that there was no mensrea or intentional delay in remittance of contribution. The respondent authority also failed to notice that as per Sec 14 of Insolvency and Bankruptcy Code, 2016, a moratorium has been declared by National Company Tribunal vide order dated 13.11.2018 whereby the initiations of cases against the appellant is prohibited.

3. The respondent filed counter denying the above allegations. No appeal is maintainable against an order issued under Sec 7Q of the Act. The financial distress claimed by the appellant is not proved in the proceedings. The appellant is liable

to remit contribution within 15 days of close of the month and any delay will attract damages and interests. The respondent therefore issued summons dated 08.04.2019 to the appellant to show cause why damages as envisaged under Sec 14B of the Act should not be recovered from the appellant employer. The appellant vide letter dated 10.05.2019 replied that the company is under NCLT proceedings and under CIRP proceedings vide order No. CP(IB)3633/I&BP/MB/2018. The financial constraints pleaded by the appellant has no relevance in a proceeding under Sec 14B of the Act. The Hon'ble Supreme Court of India in ***Hindustan Times Ltd. Vs Union of India***, AIR 1998 SC 688 held that bad financial condition is no defence for delayed deposit. Sec 11 of the Act gives priority of payment of contribution over other debts, where any employer adjudicated insolvent or being a company an order of winding up is made. As per Sec 53 of the Insolvency and Bankruptcy Code 2016, which creates a waterfall mechanism, that during liquidation debts to secured financial creditors and workmen are to be paid fully before payments to unsecured financial creditors and operational creditors. Hence there is no bar in assessing and recovering the damages under Sec 14 B of the Act. The circular dated 29.05.1990 and the decision of the Hon'ble High Court of Delhi

has no relevance after amendments of Para 32A of EPF scheme. In **Chairman SEBI Vs Sri Ram Mutual Fund**, 2006 (5) SCC 361, the Hon'ble Supreme Court held that mensrea is not an essential ingredient for contravention of provisions of Civil Act.

4. There was delay in Provident Fund contribution by the appellant establishment. The respondent therefore initiated action for assessing damages under Sec 14 B and interest under Sec 7Q of the Act. Summons dated 08.04.2019 was issued to the appellant. The appellant vide letter dated 10.05.2019 informed that the appellant company is under NCLT proceedings under CIRP. The appellant did not dispute the delay statement forwarded along with the summons and the respondent therefore issued the impugned order.

5. In this appeal, the learned Counsel for the appellant raised a preliminary objection that the appellant establishment is under NCLT proceedings and as per Sec 14 of the Insolvency and Bankruptcy Code 2016, there is a moratorium for all legal proceedings against the appellant establishment. As per Sec 36 of the IB Code 2016, all sums due to any workman or employee from the Provident Fund and Pension Fund are specifically excluded. And further as per Sec 155 of the Code 2016 the estate

of bankrupt shall not include all sums due to any workman or employee from the Provident Fund, Pension Fund and Gratuity Fund. In ***Bhupinder Singh Vs Unitech Ltd.***, Civil Appeal No. 10856/2016, the Hon'ble Supreme Court of India held that "the order of moratorium should not foreclose the statutory entitlement of EPFO to enforce the claims for payment of EPF and other related statutory dues as per law against erstwhile management". NCLT and NCLAT in a series decisions has driven home the point the provident fund and other dues payable by the corporate debtor, not being the assets owned by him but belong to the workers are not included in the liquidation estate. In ***State Bank of India Vs Moses Baer Karamchari Union***, 2019 SCC Online NCLAT 447, the Hon'ble Supreme Court of India held the provident fund, pension fund and gratuity fund are not included in the liquidation estate of the Corporate Debtor. In view of the above specific exclusion, there is no bar in continuing with the proceedings for quantification of dues, damages and interests under the provisions of the Act.

6. The learned Counsel for the appellant also pleaded that there is no mensrea in belated remittance of contribution. The issue regarding mensrea in Sec 14B proceedings was concluded

by the Hon'ble Supreme Court of India in a recent decision. 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.

7. The learned Counsel for the appellant also pointed out that the respondent authority failed to follow the circular issued by the Head office of the respondent organisation dated 29.05.1990. He also pointed out that the above circular was confirmed by Hon'ble High Court of Delhi in ***Systems Stamping and Another Vs Employees Provident Fund Appellate Tribunal (Supra)***. According to the circular dated, 25.09.1990, the damages under Sec 14B includes interests under Sec 7Q also. The above instructions are in conflict with the provisions of the Act. Sec 14B and 7Q are two independent sections with different purposes. Hence any administrative instructions in contravention of the statutory provisions will have no validity. Even otherwise the above circular has no validity after amendment of Para 32A of EPF scheme.

8. The learned Counsel for the appellant relying on the Balance Sheet of the appellant establishment for the year ending 31.03.2019 and 31.03.2020 argued that the financial constraints

of the appellant establishment was not considered by the respondent authority while issuing the impugned orders. The learned Counsel for the respondent pointed out that none of these documents were produced before the respondent during the course of the enquiry under Sec 14B. From the Balance Sheet for the year ending 31.03.2019, it is seen that the current assets of the appellant establishment is Rs. 50.72 crores and the employees benefit expenses was Rs. 2.88 crores. The salary and wages paid to the employees was Rs. 73.20 lakh and the balance sheet also reflects an amount of Rs. 6.36 lakh being paid towards Provident Fund contribution. Similarly for the year 2020, the current assets of the appellant establishment is 54.31 crores and the salary and wages of the employees was Rs. 35.49 lakhs. An amount of Rs 4.36 lakhs is also seen paid towards Provident Fund contribution. From the above documents it is clear that the delay in remittance of Provident Fund contribution is not exclusively due to the financial constraints of the appellant establishment.

9. The documents produced by the appellant in these proceedings would show that the appellant establishment was under loss for the year ending 31.03.2019 and 31.03.2020. For

the year ending 31.03.2019, the loss was Rs. 8.25 crores and for the year ending 31.03.2020, the loss was Rs. 3.91 crores. Further it was also brought to the notice of this tribunal that the appellant establishment is facing proceedings under Insolvency and Bankruptcy Code, 2016. The learned Counsel for the respondent pointed out that it is a settled legal position that the current assets and current liability reflected in the Balance Sheet cannot be accepted unless the figures reflected therein are proved through some competent person before the respondent authority. However these documents would definitely show that the appellant establishment was under financial constraints during the relevant point of time.

10. Considering the facts, pleadings and arguments in this appeal, I am inclined to hold that interest of justice will be met if appellant is directed to remit 70% of the damages under Sec 14B of the Act.

11. 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.

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

Sd/-
(V.Vijaya Kumar)
Presiding Officer