



सत्यमेव जयते

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

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

(Friday the, 3rd September 2021)

APPEAL No. 736/2019

Old No. 1030 (7) 2012

Appellant

M/s. Mercy Arts College
Vadakara
Kozhikode - 673101

By : Adv. Jacob E Simon

Respondent

The Assistant PF Commissioner
EPFO, Sub Regional Office,
P.B.No. 1806, Eranjipalam P.O.
Kozhikode – 673 006

By : Adv.Abraham P Meachinkara

This case coming up for final hearing on 13/04/2021
and this Tribunal-cum-Labour Court on 03/09/2021 passed
the following:

ORDER

Present appeal is filed from order No.KR/KK17431/ENF
3(2)2012– 2013/3076 dated 02/11/2012 assessing damages
under section 14B of EPF and MP Act (hereinafter referred as
the 'Act') for delayed remittance of contribution for the period

from 07/1999 – 05/2007. The Total damages assessed is Rs. 26,82,680/- (Rupees Twenty six Lakh Eighty two thousand six hundred and eighty only)

2. The appellant is a tutorial college helping students seeking private study at university level. Initially the appellant establishment was running well as there was not enough colleges and courses under Calicut University to accommodate students who passed their qualifying examinations. Appellant have no direct link or affiliation with any university and is not a recognised institution by the Government. The only source of income for the appellant was the fee collected from the students. As it is an unrecognised institution and the teachers used to leave employment very often. After the Pre degree course was delinked from the university, the appellant establishment started facing huge loss. Further two Government colleges also started in the area which further reduced the number of students joining the appellant establishment. Private recognised colleges also started technical and science courses in the nearby area. The number of students joining the appellant institution came down drastically and the income of the appellant was also reduced

considerably. The appellant suffered huge losses during the period from 1998 -2012. There was delay in payment of wages to the staff. The responded authority initiated action under section 7A of the Act and assessed the dues from 6/1999 to 3/2000. The appellant challenged the order before the Sub Court, Kozhikode by filing suit No. OS 207 of 2000. The Honourable Sub Court dismissed the suit. Hence an appeal was filed before the District Court and the same was also dismissed vide order dated 17/3/2005. The appellant filed writ petition (C) 13111 of 2006 before the Honourable High Court of Kerala. In the meanwhile the respondent authority assessed PF dues for the period 04/2000 – 05/2007. The appellant challenged the assessment before the EPF appellant Tribunal New Delhi in appeal No. ATA 577(7)2006. The Honourable High Court dismissed the writ petition vide order dated 13/08/2007, leaving it open to the tribunal to decide the applicability also. The EPF Appellant Tribunal vide its order dated 28/4/2010 dismissed the appeal. Though the said order was also challenged before the Hon'ble High Court of Kerala, the same was not pursued by the appellant. The appellant remitted the contribution and is regular in compliance after

06/2000 downwards. The respondent initiated action for assessing the damages and interests alleging delay in remittance of PF contribution. The respondent authority failed to notice that the appellant was disputing the coverage and the applicability disputes reached its finality only by the order of the EPF Appellant Tribunal dated 28/04/2010. Without considering the above fact, the respondent issued the impugned order assessing damages, a copy of which is marked as **Annexure A1**. The respondent also issued another order assessing interest under section 7Q of the Act. A copy of the order is produced and marked as **Annexure A2**. A true copy of the order of the District Court in AS 151 of 2001 dated 17/03/2005 is produced and marked as **Annexure A3**. A copy of judgement of the Honourable High Court in WPC No. 13111 of 2006 dated 13/08/2007 is produced and marked as **Annexure A6**. A copy of the order of the EPF Appellate Tribunal, New Delhi in ATA 577(7) of 2006 dated 28/04/2010 is produced and marked as **Annexure A9**. The amount of damages levied by the respondent is more than amount of arrears of PF dues. This is not permissible under Section 14B of the Act. The rate of interest levied is not as per the EPF

Scheme. Annexure A1 does not disclose the amount of arrears on which damages is imposed. Annexure A1 order is delayed. The respondent ought to have considered the fact the the appellant was fighting a legal battle regarding the applicability of the Act to the appellant establishment. The Respondent ought to have considered the financial position of the appellant establishment while deciding the quantum of damages.

3. The respondent filed encounter denying the above allegations. The appellant is an establishment covered under the provisions Act. The appellant is liable to pay contribution under various scheme within 15 days of close of the month. Any delay in remittance of contribution will attract the damages under section 14B of the Act read with para 32A of EPF Scheme. Hence, a show cause notice dated 17/08/2012 was issued to the appellant to explain the delay and show cause why damages shall not be levied for belated remittance of contribution. A detailed statement showing the due date of payment, the actual date of payment and the delay in remittance of contribution was forwarded to the appellant along with the notice. The appellant was also given an opportunity for personnel hearing on 06/09/2012. A representative of the appellant attended the

hearing and submitted his stand on the issue. It is seen that the PF dues was assessed under section 7A for the period from 07/1999 – 05/2007 on different dates and the dues were completely paid but again on different dates. There is no dispute regarding the amounts paid and dates of payment. The appellant did not raise any dispute regarding the delay statement. The appellant only pleaded financial difficulties for delayed remittance of contribution. Damages is a penalty for default/failure in performance in duty imposed under the Act. **In Bharath Plywood and Timber Products Ltd. V Employees PF Commissioner, 1977 (50) FJR, 74(Ker.)** the Honourable High Court of Kerala observed that if an employer makes default, in payment of any contribution to the fund, he shall be liable to pay the amount by way of penalty such damages, not exceeding the amount of arrears as may be specified in this Scheme. Though there is sufficient reason to make belated payments that is not a ground for granting exemption for paying penalty of damages. **In Associated Industries (Pvt.) Ltd. V Regional Provident Fund Commissioner, Kerala (1963 (II) LLJ 652)**, the Honourable High Court of Kerala held that the employees are under legal obligation to deposit their shares of contributions to the fund within the

time prescribed, the moment the Act and Schemes become applicable to them as no intimation or notice of any kind in that respect was necessary to be issued by the authorities concerned. The amount of damages levied as per impugned order is Rs. 26,82,680/- (Twenty six lakhs Eighty two thousand six hundred and eighty only) which is not more than the arrears. The employee's share of contribution in account No.1 is furnished as 10,61,940/- instead of Rs. 10,62,000/- Therefore there is a totalling error of Rs. 60/-. The difference of Rs. 5/- occurred while rounding of 50 paise to Rs.1/- in the monthly dues while preparing the statement of damages. All the payments made by the appellant are accounted while preparing the damages statement and the appellant never raised any dispute regarding the same.

4. The appellant establishment is an educational institution which is a notified activity under the provisions of the Act. The respondent therefore covered the appellant establishment with effect from July 1999. Appellant failed to comply from the date of coverage and therefore respondent initiated action to assess the dues under Section 7A of the Act. The assessment order issued by the respondent authority for the

period from 06/99 – 03/2000 was challenged by the appellant before the Sub Court of Kozhikode. The Sub Court of Kozhikode dismissed the original suit. The appellant preferred an appeal before the District Court and the District Court also vide its order dated 17/03/2005 dismissed the appeal. The appellant challenged the said order before the Honourable High Court of Kerala in Writ Petition No. WP(C) 13111 of 2006. In the meanwhile the respondent authority continued assessing dues upto 05/2007. The Honourable High Court of Kerala dismissed the Writ Petition 13111 of 2006 directing the EPF Appellate Tribunal to decide the applicability also since appeal No. ATA577(7) of 2006 challenging the subsequent assessment was pending before the tribunal. The tribunal initially dismissed the appeal on the ground of non-deposit of pre deposit. The Honourable High Court restored the appeal on payment of Rs.10 lakhs as pre-deposit vide its order in WP(C) 27596 of 2007. The EPF Appellate Tribunal after hearing the parties dismissed the appeal vide its order dated 28/4/2010 confirming the applicability of the provision of the Act to the appellant establishment.

5. The claim of the appellant in this appeal is that the delay in remittance of contribution is due to the legal battle

that they were fighting before various forums and the same shall not be considered for assessment of damages. The claim of the appellant is not legally sustainable. When the appellant decided to fight a legal order passed by a competent authority, he is fully aware of the legal consequences of the delay. In this particular case, it is seen that the appellant approached the Civil Court whose jurisdiction is specifically barred by the special statute. Hence the delay, if any, due to pendency of the cases before various forums will not directly help the appellant in waiving the damages.

6. Another ground pleaded by the learned Counsel for the appellant is that the respondent authority failed to exercise its discretion while levying damages under section 14B of the Act. According to him, the respondent authority ought to have considered the financial difficulty and constraints of the appellant establishment while assessing the damages under Section 14B of the Act. The learned Counsel for the appellant relied on the decision of the division bench of Honourable High Court of Kerala in **Regional PF commission Vs Harrison's Malayalam Ltd. 2013(3) KLT 790** to argue that the respondent authority ought not have followed the straight

jacket formula while assessing damages against an establishment which is facing financial constraints due to various reasons. The learned counsel also relied on the decisions of the Honourable High Court of Kerala in **Indian Telephone Industries Ltd. Vs Assistant Provident Fund Commissioner (2006 KHC 1655)** to argue that the respondent authority shall consider the mitigating circumstances while assessing damages under section 14 B of the Act. The decision of the Division Bench of the Honourable High Court of Kerala in **Harrison's Malayalam Ltd.** (supra) though accepted by the Honourable Supreme Court, the legal issues were left open by the Honourable Supreme Court to be decided in an appropriate case. The decision in **Indian Telephone Industries Ltd** (supra) is also modified by the Division Bench of Kerala High Court in the Writ Appeal. The learned Council for the appellant also raised the question of mensrea in this appeal. According to him, the decision of the Honourable Supreme Court in **Mcleod Russel India Ltd, Vs Regional Provident Fund Commissioner and others, 2014 (15) SCC 263** and **Assistant Provident Fund Commissioner RSI Textiles, AIR 2017 SC 676** regarding the issue of mensrea is not considered

by the respondent authority. Though the Honourable Supreme Court of India in **Mcleod Russel India Ltd.** held that if damages have been imposed under section 14B it will only be logical that mensrea and actusreus was prevailing at the relevant time, the Honourable Supreme Court dismissed the appeal upholding the assessment of damages. In this case, the issue regarding mensrea is not very relevant in view of the fact that the appellant was fighting a legal battle before various judicial forums. The learned counsel for the appellant also cited the decisions of **Harrisons Malayalam (supra) and Standard Furniture Vs Registrar, EPF Appellate Tribunal, 2020 (4) KLT 105** and **M/s Sreekaamaakshi Agency Pvt. Ltd. Vs Employees Provident Fund Appellate Tribunal and another, 2013 (1) KHC 457** to argue that financial constrains shall be a mitigating ground while deciding the quantum of damages under Section 14B of the Act. It is true that the appellant pleaded financial difficulties before the respondent authority and also in this appeal. However the appellant failed to produce any documents to substantiate the claim of financial difficulties of the appellant establishment.

7. It is settled legal position when the appellant claims financial difficulty as a reason for delayed remittance of contribution, it is upto appellant to substantiate the claim of financial difficulty. In **Steel Industrials' Kerala Ltd Vs Assistant Provident Fund Commissioner WP(C) No. 29645 of 2014** the Honourable High Court of Kerala held that "Para 7. Further it is to be noticed that the petitioner's contentions against imposition of Section 14B damages are available in Exbt. P2 and P4. Exbt. P2 and P4 are glaring in so far as there is absolutely no material available to find financial crisis. The mere statement of financial crisis cannot lead to mitigation of damages under Section 14B". The Honourable High Court of Kerala in **Sreekamakshi Agency Pvt. Ltd. Vs Employees Provident Fund Appellate Tribunal and another, 2013 (1) KHC 457** also held that if the employer produced supporting documents to prove financial constrains, the respondent authority shall consider the same in an appropriate manner whether the financial constrains can be taken as a mitigating circumstance to reduce or waive penal damages. The Honourable High Court of Kerala in **Elstone Tea Estate Ltd. Vs Regional Provident Fund Commissioner, WP(C) No. 21504/2010** also held that the claim of financial

difficulty as a mitigating circumstance should be proved before the respondent authority through documentary evidence to satisfy the authority to claim relief in damages under Section 14B of the Act.

8. It is true that the appellant establishment was fighting a legal battle before various judicial forums challenging the applicability of the Act. Legally the appellant cannot claim any relief on that ground, since he was aware of the consequences of the delay. However while assessing penalty, the appellant can be given some relief in damages considering the fact that appellant is only a tutorial college giving coaching to the students participating in the university examinations.

9. Considering the facts, pleadings and evidence in this appeal, I am inclined to hold that interest of justice will be met if the appellant is directed to remit 70 % of the damages.

Hence the appeal is partially allowed, the impugned order is modified and the appellant is directed to remit 70% of the damages assessed under Section 14B of the Act.

Sd/-

(V. Vijaya Kumar)
Presiding Officer