



सत्यमेव जयते

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

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

(Tuesday, the 28th day of December 2021)

APPEAL No. 769/2019

Appellant : M/s. Kochi Municipal Corporation
Office of the Kochi Municipal Corporation,
Park Avenue
Ernakulam – 682 011

By Adv. C.B.Mukundan &
Adv. M.P.Mathew

Respondent : The Regional PF Commissioner
EPFO, Regional Office
Kaloor, Kochi – 682 017.

By Adv. Sajeev Kumar K Gopal

This case coming up for final hearing on 28.09.2021 and this Tribunal-cum-Labour Court on 28.12.2021 passed the following:

ORDER

Present Appeal is filed from order No. KR/KCH/27450/ Penal damages/2019/6669 dated 14.08.2019 assessing damages under Section 14B of EPF Act and MP Act (hereinafter referred to as 'the Act') for belated remittance of contribution for the period

from 01.04.2014 – 31.03.2019 (months from 12/2012 to 02/2019). The total damages assessed is Rs.6,78,632/- (Rupees six lakh seventy eight thousand six hundred and thirty two). The interest demanded under Sec 7Q of the Act for the same period is also being challenged in this appeal.

2. The appellant, Kochi Municipal Corporation is a local self Government institution constituted under the provisions of Kerala Municipality Act 1994. The appellant institution is engaged in performing the functions and discharging the obligations enjoined under the Constitution of India and under the various provisions of the Kerala Municipality Act. In May 2011, the respondent brought the contingent workers of the appellant institution under the coverage of EPF and MP Act with retrospective effect from 08.01.2011. Since the appellant institution being part of Government had to complete several formalities before starting compliance, it took considerable time to complete the formalities. The appellant establishment faced financial constraints during the relevant period and there was delay in disbursement of salaries to these employees. From the above facts it is clear that there is no intentional/deliberate delay

in remitting Provident Fund contribution. Since there was delay in remitting the contribution, the respondent initiated an enquiry under Sec 7A of the Act which was closed only on 22.10.2012. Thereafter the appellant cleared the entire amount. The respondent issued a notice dated 28.05.2019 proposing to levy damages and interests alleging delay in payment of contribution for the period from 12/2012 to 02/2019. The true copy of the notice is produced and marked as Annexure A3. During the course of enquiry, the appellant explained the reasons for delay and filed a written statement, a copy of which is produced and marked as Annexure A4. Without considering the representation and submissions, the respondent issued the impugned orders which are marked as Annexure A1 and A2. The calculation of damages and interest is not done as per the circular dated 29.05.1990 issued by the head quarters of the respondent organisation. It is clear that 7Q is included in the damages and cannot be charged separately. The above circular was upheld by the Hon'ble High Court of Delhi in ***Systems and Stamping and others Vs Employees Provident Fund Appellate Tribunal***, 2008 LLR 485. The respondent authority failed to exercise its discretion available under Sec 14B of the Act. The existence of

mensrea to contravene a statutory provision is also held to be a necessary ingredient for levy of damages or quantum thereof. The appellant establishment was undergoing heavy financial crisis during the period for which the respondent has claimed interest and damages. There was no wilful defiance or law or contumacious conduct on the part of the appellant.

3. The respondent filed counter denying the above allegations. The appellant, Kochi Municipal Corporation is covered under the provisions of the Act. No appeal is maintainable from a demand issued under Sec 7Q of the Act. All the Corporations and Municipalities in this country were covered under the provisions of the Act w.e.f. 08.01.2011. There was delay in remittance of contribution by the appellant. The respondent therefore initiated action for assessing damages and interest by issuing summons dated 28.05.2019. The appellant was also given an opportunity for personnel hearing on 25.06.2019. A detailed delay statement furnishing the month wise details of delay was also furnished to the appellant establishment. An Advocate appeared on behalf of the appellant and also filed a written statement dated 24.07.2019. According

to the learned Counsel, the delay in remittance of contribution was due to the fact that the appellant institution being a Government institution have to complete several formalities before commencing compliance under the provisions of the Act. It was also pointed out that there was some delay in obtaining the attendance details of contingent workers from various zones. It was also pointed out that the employees being illiterate had certain disputes regarding payment of wages which delayed the disbursement of salary and eventually resulted in delay in remittance of the contributions. The appellant also pleaded financial constraints for belayed remittance. The appellant failed to produce any documents to substantiate the claims made by them in the written statement. The appellant however did not raise any objection regarding the delay statement forwarded to them. The Act was made applicable to the Municipalities and Corporations w.e.f. 08.01.2011, the date from which the Government of India exercising its powers under the Act notified Municipal Councils and Municipal Corporations constituted under sub Clauses B & C of Clause 1 of Article 243 Q of the Constitution of India. Notification was indented to cover all the employees of the establishments as per the definition of Sec 2(f) of

the Act excluding the employees who were getting the benefits of Provident Fund and Pension according to the rules of State Government or Municipal law. The delay in remittance of contribution varied from 100 – 1400 days as evident from Annexure A statement. The delay in remittance on an average is more than 3 years and therefore the appellant cannot escape the liability of paying interests and damages. The appellant failed to produce any documents to substantiate their claim of financial difficulty. Even if it is proved, the appellant cannot escape the liability to pay damages in view of the decision of the Hon'ble Supreme Court in ***Hindustan Times Ltd. Vs Union of India***, AIR 1998 SC 688 wherein the Hon'ble Supreme Court held that bad financial condition is no defence for delay in deposit of contribution. The circular dated 29.05.1990 and the decision of the Hon'ble High Court of Delhi in ***Systems and Stamping Vs EPF Appellate Tribunal (Supra)*** is of no help to the appellant. The above circular has no relevance after amendment of Para 32 of EPF Scheme and the above decision is also not relevant after amendment of the Scheme. The Hon'ble Supreme Court of India in ***Chairman, SEBI Vs Sri Ram Mutual Fund***, 2006 (5) SCC 361, held that mensrea is not an essential ingredient for

contravention of provisions of a Civil Act. The Hon'ble Supreme Court of India in ***Organo Chemicals Vs Union of India***, 1979 (2) LLJ 416 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. Besides 50% of the contributions deposited late represented the employees' share which had been deducted from the employees' wages and was a trust money with the employer for deposit in the statutory fund. The delay in deposit of this part of the contribution amounted to breach of trust and does not entitle the employer for any consideration for relief".

4. The appellant is Kochi Municipal Corporation. Municipalities and Corporations are brought under the purview of the Act vide notification dated 08.01.2011. Hence all the contingent and temporary staff working in Municipalities and Corporations are required to be covered under the provisions of the Act and Schemes w.e.f. that date. The respondent authority vide coverage memo dated 11.05.2011 intimated the appellant

regarding the notification and directed the appellant to extend the social security benefits to all contingent, temporary and contract employees of the appellant establishment. The appellant establishment did not start compliance. The respondent authority therefore initiated action under Sec 7A of the Act, assessed the dues and recovered the same. Since there was delay in remittance of contribution, the respondent authority initiated action for assessment of damages and interests for belated remittance of contribution. The respondent issued notice along with a detailed delay statement which is produced and marked as Annexure A3 in this appeal. An Advocate appeared on behalf of the appellant and submitted that the delay in remittance of contribution was due to administrative reasons and financial constraints of the appellant establishment. The respondent considered the representation of the appellant and thereafter issued the impugned orders.

5. In this appeal, the learned Counsel for the appellant retreated the same grounds that were raised before the respondent authority. The first ground raised by the learned Counsel for the appellant is that there was some administrative

delay in starting compliance. The appellant being a Government Institution may take some time to implement the notification. However from Annexure A3 delay statement, it is seen that the delay was almost 5 years in starting compliance. Even if we take the date of issue of code number to the appellant establishment, the liability under the Act was communicated to the appellant establishment in May 2011 itself. The delay of 5 years in starting compliance cannot be explained away stating that there was administrative delay in starting compliance.

6. Another ground pleaded by the learned Counsel for the appellant is that of financial constraints of the appellant establishment. The appellant failed to produce any documents to substantiate the claim of financial difficulty before the respondent authority as well as in this appeal. 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.

7. The learned Counsel for the appellant also pointed out that the assessment of damages as per the impugned order is in violation of the circular issued by the Head office of the respondent organisations. According to him in the above circular, it is clearly mentioned that the damages under Sec 14B also include interest under Sec 7Q of the Act. Any circular or instruction issued in contravention of the provisions of the Act will have no validity in the eyes of law. Sec 14B and 7Q are two independent sections with two entirely different purposes. Hence

it is not correct to say that the interest is also included in 14B damages. Further the circular has no relevance after the amendment of the Scheme provision. And for the same reasons the decision of the Hon'ble High Court of Delhi is not relevant to the facts and circumstances of this case.

8. The learned Counsel for the appellant also pointed out that there was no mensrea in belated remittance of contribution. The respondent authority in the impugned order has taken pains to explain why there is mensrea when there is a clear violation of the provisions of the Act. According to the learned Counsel for the respondent, the appellant recovered the employee's share of contribution atleast from May 2011 and retained the same with it for almost 5 years. Non-remittance of employees' share of contribution deducted from the salary of the employee is an offence of breach of trust under Sec 405/406 of Indian Penal Code. Hence the appellant cannot claim that there was no intentional delay in remittance of contribution atleast to the extent of employees' share which amounts to 50% of the total contribution. The Hon'ble Supreme Court of India considered the applicability of mensrea in a proceeding under Sec 14B of the Act

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.

9. The appellant is a Municipal Corporation. The claim of the learned Counsel for the appellant that there was administrative delay before starting compliance under the provisions of the Act cannot be completely ignored. However the delay of 5 years cannot be substantiated on a ground of administrative delay. However considering the fact that the appellant is a Government Institution, the appellant is entitled to some accommodation as far as damages under Sec 14B is concerned.

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 assessed under Sec 14 B 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 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 Sec 7Q order is dismissed as not maintainable.

Sd/-
(V.Vijaya Kumar)
Presiding Officer