



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

Present: Shri.V.Vijaya Kumar, B.Sc., LLM, Presiding Officer.
(Thursday, the 23rd day of December 2021)

APPEAL No. 92/2018 & 93/2018

Appellant	M/s. Anzar Cashew Company Chathinamkulam, Chandanthope.P.O., Kollam – 691 014.
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By M/s. Thomas & Thomas

Respondent	The Assistant PF Commissioner EPFO, Regional Office, Ponnamma Chambers – 1 Kollam – 691 001.
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By Adv.Pirappancode.V.S.Sudheer

This case coming up for final hearing on 29.09.2021 and this Tribunal-cum-Labour Court on 23.12.2021 passed the following:

ORDER

Appeal No. 92/2018 is filed from order No. KR/ KLM/ 16262/PD/2017-18/1234 dated 01.02.2018 assessing damages under Section 14B of EPF and MP Act (hereinafter referred to as the Act) for belated remittance of contribution for the period from

01/2001 – 07/2006. The total damages assessed is Rs. 10,00,003/- (Rupees Ten lakh and three only).

Appeal No. 93/2018 is filed from order No. KR/KLM/16262/PD 2017-18/1232 dated 01.02.2018 assessing damages under Section 14B of EPF Act and MP Act (hereinafter referred to as the Act) for belated remittance of contribution from 07/2006 – 04/2008. The total damages assessed is Rs. 11,89,076/- (Rupees eleven lakh, eighty nine thousand seventy six only)

Since common issues are raised, both the appeals are heard and disposed of a common order.

2. The appellant is a cashew company. The respondent authority assessed an amount of Rs 1,03,77,094/- under Sec 7A for default for the period 8/2000 – 05/2008 vide order No KR/KOLM16262/Enf.1(4)2011 citing non-enrolment of employees and evasion of wages. In the review filed under Sec 7B of the Act, the said amount was reduced to Rs.22,84,164/- vide order dated 29.09.2011. The appellant remitted the amount in two instalments. Rs.1284164/- was paid on 29.09.2011 for the period 01/2001 to 07/2006 and an amount of Rs. 10,00,000/- for the period 07/2006 to 04/2008 was paid as per the direction of the Hon'ble High Court. The delay in remitting the

contribution was on omitted wages and not on regular wages. The appellant was incurring losses due to reasons beyond its control and the factory is closed down w.e.f. January 2015. The respondent initiated proceedings under Sec 14B alleging delay in remittance of contribution. The appellant was also given an opportunity for personnel hearing. The appellant filed a detailed written statement regarding the background and also the financial constraints. Without considering any of the submissions, the respondent issued the impugned orders. The appellant establishment was suffering huge losses and there was delay in paying salary to employees and consequently there was delay in remittance of contribution. The respondent authority failed to exercise its discretion available under Sec 14B of the Act and Para 32A of EPF Scheme. The Hon'ble Supreme Court of India in **R.P.F.C. Vs S.D College, Hoshiarpur**, 1997 (2) LLJ 55, held that though the Commissioner has no power to waive penalty altogether, he has the discretion to reduce the percentage of damages. In **Indian Telephone Industries Ltd. Vs Assistant Provident Fund Commissioner**, W.P.(C) No. 32515/2005 the Hon'ble High Court of Kerala held that authority exercising powers under Sec 14B has the discretion to

reduce the damages. The Division Bench of Hon'ble High Court of Kerala in ***Harrisons Malayalam Vs R.P.F.C*** , 2013 (3) KLT 790, held that financial constraints are to be considered as a ground while assessing damages under Sec 14B of the Act.

4. The respondent filed counter denying the above allegations. EPF and MP Act is legislation for providing social security to employees working in notified industries and establishments engaging 20 or more employees. The Act provides for provident fund, pension and insurance to the employees covered under the Act. In spite of the fact that an order issued under Sec 7Q is not appealable, the appellant establishment is yet to remit the interest demanded under Sec 7Q for the same period.

5. The appellant failed to remit contribution in respect of all the employees and also evaded regular contribution. Therefore an enquiry under Sec 7A was conducted and an amount of Rs.1,03,77,094/- was assessed against the establishment vide order dated 26.09.2008. Subsequently the due was re-assessed for the period from 08/2000 – 05/2008, as per the review order dated 20.02.2011. The appellant remitted the amount on 20.09.2011. Since there was delay in remitting

contribution, notice was issued under Sec 14B to the appellant establishment along with a delay statement showing the amount due, the due date of payment, the actual date of payment and the period of delay committed by the appellant establishment. The appellant was also given an opportunity for personnel hearing. An authorised representative of the appellant attended the hearing and pointed out that there was no wilful or deliberate delay on the part of the establishment in delayed remittance of contribution and it was due to financial difficulty of the establishment. It was also stated that the appellant establishment is closed w.e.f. January 2015. The omitted wages referred to and agreed by the employer actually refers to non-payment of complete dues as required under the statute. The appellant regularly recovered 12% of wages actually earned by the employee towards the employees share and that amount is split into employer and employees share and remitted to the respondent organisation as stated in the order under Sec 7A dated 26.09.2008. It was also seen that the appellant failed to enrol temporary employees to Provident Fund membership. The non-payment on omitted wages can only be taken as a deliberate attempt by the appellant to escape the statutory liability thereby

cheating both poor cashew workers and respondent organisation thereby defeating the very noble intention of the legislation. Recurring losses and financial difficulty cannot be a ground for non-payment of statutory contribution in due time. The Division Bench of Punjab and Haryana High Court in ***Elsons Cotton Mills Vs RPFC***, 2001(1)SCT 1104 (P&H)(DB) rejected the plea of financial crisis as a ground for delayed remittance of contribution. In ***M/s. Sky Machinery Ltd. Vs RPFC***, 1998 LLR 925 the Hon'ble High Court of Orissa held that financial crisis will not be sufficient for waiving penal damages for delayed remittance of contribution.

6. The respondent authority noticed huge evasion by the appellant establishment in Provident Fund contribution and also non-enrolment of temporary employees. Accordingly an enquiry under Sec 7A of the Act was initiated and quantified the dues to Rs. 1,03,77,094/- vide order dated 26.09.2008. On 7B review application filed by the appellant, the amount was reduced for the period 08/2000 – 05/2008. The learned Counsel for the respondent pointed out that the appellant establishment used to recover 12% contribution from the employee's wages and that amount is split into employer and employee share and remitted

to the respondent organisation. This means that the appellant establishment was not remitting the employers contribution and thereby cheating their own employees and the respondent organisation. The appellant was also not extending provident fund benefits to the temporary employees engaged by them and they were also not remitting contribution on the holiday wages paid to the employees. This defaults lead to an enquiry under Sec 7A quantifying the dues and subsequently an order under Sec 7B of the Act. The learned Counsel for the appellant pleaded that the appellant establishment is entitled for relief because the evasion is identified subsequently and the assessment and review orders are issued thereafter. The appellant, in fact has committed the worst form of criminal action by splitting the contribution recovered from the employees into employer and employee contribution and thereafter pleading that the appellant is entitled for the benefit of his criminal action. The learned Counsel for the appellant also pleaded that the delay in remittance was due to the financial crisis of the appellant establishment. The appellant failed to produce any documents to substantiate the claim of financial difficulty as well as the delay in payment of wages. 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 relied on the decision of the Hon'ble High Court of Kerala in ***Indian Telephone Industries case (Supra)*** and ***Harrisons Malayalam case (Supra)*** to argue that financial constraints is a relevant

consideration while deciding the quantum of damages under Sec 14B of the Act. It is pointed out that the judgement of the Single Bench in **Indian Telephone Industries (Supra)** was modified by the Division Bench, directing the establishment to approach the Central Board of Trustees for any remission in damages. Further the Hon'ble Supreme Court of India modified the decision of the Division Bench of Hon'ble High Court of Kerala in SLP C No. 21174/2015 holding that the question of law involved in the case is kept open to be decided in an appropriate case. The learned Counsel for the appellant also pleaded that there was no mensrea in belated 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.

8. The learned Counsel for the appellant pleaded that the appellant establishment is closed from January 2015. No evidence is produced by the appellant to substantiate that claim as well. As already pointed out, the delay in remittance of contribution is due to the fact that the appellant committed one of the worst criminal action that can be committed by an employer, by dividing the employees share of contribution

deducted from the salary of the employees into employer and employees share and thereby cheating not only his own employees but also the respondent organisation. It is felt that the appellant do not deserve any sympathy as far as damages are concerned.

9. Considering the facts, pleadings and arguments in these appeals, I am not inclined to interfere with the impugned order.

Hence the appeals are dismissed

Sd/-
(V.Vijaya Kumar)
Presiding Officer