



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

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

(Tuesday the 26th day of October, 2021)

APPEAL No.348/2018

Appellant : M/s. Ambassador Security &
Detective Services
Chirathalthu Building
Nagampadam,
Near Medical Centre,
Kottayam - 686 001.

By Adv. Pallichal S.K Pramod

Respondent : The Assistant PF Commissioner
EPFO, Thirunakkara,
Kottayam - 686 001

By Adv. Joy Thattil Ittoop

This case coming up for final hearing on
23/04/2021 and this Tribunal-cum-Labour Court on
26/10/2021 passed the following:

ORDER

Present appeal is filed from order No. KR / KTM / 19140 / APFC / Penal Damage/14B/ 2018-19 / 2434 dt. 14/11/2018 assessing damages U/s 14B of EPF & MP Act, 1952 (hereinafter referred to as 'the Act'.) for belated remittance of contribution for the period from 03/2012 to 02/2017. The total damages assessed is Rs. 8,11,807/-. Interest demanded U/s 7Q for the same period also is being challenged in this appeal.

2. Appellant is a security agency providing security staff to employers on contract basis. The appellant is covered under the provisions of the Act. The appellant received a summons dt. 13/11/2017 calling upon to show cause why damages U/s 14B of the Act shall not be levied for the alleged delay in remittance of contribution for the period from 03/2012 to 02/2017. The appellant filed a written statement dt.16/12/2017 raising serious contentions.

A copy of the same is produced and marked as Exbt A2. The appellant also filed an argument note before the respondent on 08/09/2018. A copy of the same is marked as Exbt.A3. In the Exbt. A2 the appellant contented that the nature of service provided by the appellant is to provide security personnel to various institutions and the salary is disbursed only after receiving the amount from the principal employers. The delay was negligible and there was no reason to levy maximum damages. The respondent authority ought to have considered Exbts. A2 & A3 in letter and spirit. The respondent ought to have seen that the delay in remittance was due to the delay in getting the payments from the principal employers. Contribution become due only when it is actually drawn and the contributions are remitted as and when the payments are made by the principal employers. The respondent authority did not consider that the salary of the employees during certain months were not

paid in time due to financial difficulties. The respondent ought to have noticed that the appellant is not a chronic defaulter. Since the appellant explained the reasons for the delay, the respondent ought to have waived the damages or reduced the same. There was no intentional delay in remitting the contribution. The respondent failed to follow the guidelines for determinations of damages. There is no application of mind by the respondent while issuing impugned orders. The respondent ought to have followed the decision of the Hon'ble High Court of Kerala in **Harrisons Malayalam Ltd Vs RPFC, 2012(2) KLT SN 74.**

3. The respondent filed counter denying the above allegations. The appellant delayed remittance of contribution for the wage period 03/2012 to 02/2017. Hence Annexure A1 notice was issued to the appellant to show cause why damages shall not be levied for belated remittance of contribution. The appellant filed annexure A2 & A3

objections. The appellant provides security personnel to various institutions. The claim of the appellant that the delay in remittance of provident fund contribution was due to delay in receiving payments from principal employers is not tenable since the appellant is the principal employer in respect of the personnel supplied on the contract basis. As per Para 30 of EPF Scheme, the employer in the first instance shall pay both the contributions payable by himself and also on behalf of the members employed by him directly or by or through a contractor. The financial stringency pleaded by the appellant is not substantiated by him. The Hon'ble Supreme Court of India in **Hindustan Times case**, AIR 1998 SC 688 held that default on the part of the employer based on the plea of financial difficulties cannot be a justifiable ground for the employer to escape the liability U/s 14 B of the Act. In **Calicut Spinning and Weaving Mills Vs RPFC**, 1982 LAB IC 1422 the Hon'ble

High Court of Kerala held that Para 38 of EPF Scheme obliged the employer to make payment within 15 days of close of every month and Para 30 of the Scheme cast an obligation on the employer to pay both contribution payable by himself and on behalf of the members employed by him in the first instance. The Hon'ble Supreme Court in **Chairman, SEBI Vs Sri Ram Mutual Fund**, held that mensrea is not an essential ingredient for contravention of the provisions of civil Act. In this case the appellant violated Para 30 & 38 of EPF Scheme and has therefore committed a deliberate and willful delay warranting levy of damage U/s 14B of the Act .

4. The appellant challenged the Annexure A5 order imposing interest U/s 7Q of the Act before the Hon'ble High Court of Kerala in W.P.(C) No. 9649 of 2019. The Hon'ble High Court vide its judgment dt.17/06/2019

dismissed the writ petition holding that the levy of interest U/s 7Q of the Act cannot be challenged.

5. Admittedly there was delay in remittance of contribution during the period 03/2012 to 02/2017. The respondent therefore issued notice directing the appellant to explain the delay. A detailed delay statement was also enclosed along with the Exbt. A1 notice. The statements clearly shows the contribution paid, the due date of payment, the actual date of payment and the delay in remittance of contribution. The appellant was also given an opportunity for personal hearing on 21/12/2017. None attended the hearing on 21/12/2017 and the enquiry was adjourned to 20/08/2018. None attended the hearing on 20/08/2018 also. But on the request of the appellant the hearing was adjourned to 10/9/2018. The appellant requested for an adjournment and the matter was adjourned to 15/10/2018 and on 15/10/2018 also none attended the

hearing. However the appellant filed an argument note dt. 08/09/2018 which is marked as Annexure A3 in this proceedings. The appellant also claimed that he filed an objection in response to the Exbt.A1 notice which is marked as Exbt.A2 in this proceedings. In Exbt. A2 and A3 written statement and argument note the basic contention of the appellant are:

(i) The delay in remittance of provident fund contribution was due to the delay in receiving payment from the principal employers.

(ii) The last date of remittance and date of remittance shall be excluded and the grace period of 5 days shall also be considered while levying damages.

(iii) Being a penalty the respondent authority shall explore whether the appellant acted deliberately in delaying the payment.

(iv) Track record of the appellant shall be considered while levying damages. By imposing damages under 14B and interest U/s 7Q the appellant is being penalized twice.

(v) The respondent authority shall take into account the circular dt.29/05/1990 while assessing damages. The dictum laid down by Hon'ble High Court of Kerala in **Harrisons Malayalam case** (Supra) is to be applied in the present case also.

The respondent authority considered all the above objections and found that none of the grounds taken by the appellant can be taken as a mitigating circumstance for reducing or waiving damages and therefore issued the impugned orders.

6. The basic contention of the appellant for delayed remittance of contribution is that there was delay in remittance of contribution since there was delay in receiving payments from the principal employers. In directly the appellant was pleading that there was financial constrains

which delayed the remittance of contribution. The learned Counsel for the appellant also pleaded that there was even delay in payment of wages during certain months. However none of the above averments are substantiated by evidence. No documents is produced by the appellant before the respondent authority or in this appeal to substantiate his claim that there was delay in payment of wages due to delay in receipt of payments from the principal employers. It is settled law that the financial constrains pleaded by the appellant shall be proved through documentary evidence before the respondent authority. 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 U/s 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 U/s 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 authorities with all cogent evidence for satisfaction to arrive at a conclusion that it has to be taken as mitigating factor for lessening the liability.

7. Another ground pleaded by the appellant is with regard to the circular dt.29/05/1990. The above said circular is no more valid after amendment of Para 32A of EPF Scheme. Further any circular in contradiction to the statutory provision will have no validity. The grace period of 5 days is applicable if the contribution is paid within 20th of the next month. Any delay beyond 20th will attract damages from 15th. The learned Counsel for the respondent pointed

out that though the appellant pleaded that there was delay in payment of wages in few months the same was not supported by any evidence. When wages are paid to the employees in time the employees' share of contribution is deducted from the salary of the employees. Non-payment of employees' share of contribution deducted from the salary of the employees is a criminal offence U/s 405 & 406 of Indian Penal Code. Having committed an offence of breach of trust, the appellant cannot plead that there was no intentional delay or mensrea in delayed remittance of contribution atleast to the extent of 50% of the contribution. It is seen that the appellant was given more than adequate opportunity to appear before the respondent and prove the financial constrains which delayed payment of contribution. However the appellant did not avail the opportunity and filed only the written statement and argument note. No documents were produced to substantiate the claim. The

learned Counsel for the appellant argued that the delay in remittance of contribution is not substantial. However on perusal of Annexure A1 notice and the delay statement, it is seen that the delay in remittance varied from 6 days to 927 days. The average delay in remittance of contribution is more than a year. Such a delay cannot be explained away stating that there was delay in receipt of payments from the principal employer. Further the employees share of contribution deducted from the salary of the employees were utilized by the appellant in his business for such a long time, violating the provisions of the Act and Schemes.

10. Considering the facts, circumstances and pleadings in this appeal I am not inclined to interfere with the impugned order U/s 14B of the Act.

11. The learned Counsel for the respondent pointed out that the appellant challenged the claim for interest U/s 7Q before the Hon'ble High Court of Kerala in WP(C) No.

9649/2019. It is seen that the Hon'ble High Court of Kerala after considering the decision of the Hon'ble Supreme Court in **Arcot Textile Mills Ltd Vs RPFC**, 2013 (16) SCC 1 dismissed the claim of the appellant. The claim of the appellant challenging the 7Q order in this appeal cannot be accepted as there is no provision U/s 7(I) of the Act, to challenge an order issue U/s 7Q of the Act.

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer