



सत्यमेव जयते

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

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

(Monday the 5th day of April, 2021)

Appeal No.66 & 67/2019

Appellant : The Kerala Agro Industries Corporation Ltd
" Kissan Jyothi " Fort
Trivandrum -695 023

By M/s. Menon & Pai

Respondent : The Assistant PF Commissioner
EPFO, Regional Office
Pattom, Trivandrum -695 004.

By Adv. Nita N.S

This appeal came up for hearing on 02/03/2021 and this Industrial Tribunal cum Labour Court issued the following order on 05/04/2021.

ORDER

Appeal No. 66/2019 is filed from order No. KR / TVM / 2985 / Damage Cell / 2018-19 / 6518 dt. 04/10/2018 assessing damages U/s 14B of EPF & MP Act,1952 (hereinafter referred as 'the Act'.) for belated remittance of contribution for the period from 09/2006 to 09/2009. The total damages assessed is Rs.14,781/-.

2. **Appeal No. 67/2019** is filed from order No. KR / TVM / 2985/ Damages Cell / 2018-19 / 6519 dt. 04/10/2018 assessing damages U/s 14B of EPF & MP Act, 1952 (hereinafter referred as 'the Act'.) for belated remittance of contribution for the period from 03/2012 to 03/2017. The total damages assessed is Rs. 1,94,133/-.

3. Since common issues are raised, both these appeals are heard together and disposed off by a common order.

4. The appellant is a Company registered under Company's Act with equity participation from Government of India as well as Government of Kerala. The main objectives of the Company are mechanization of agriculture, manufacture and distribution of agricultural machinery improved implements and tools enabling persons engaged in agriculture and allied pursuits to own the means of modernizing their operations. The appellant was facing cash flow constraints for the last seven years which affected the operations very badly. Lack of fresh fund infusion and the decline in cash generation from operations lead to severe financial crisis which in turn forced curtailment of operations. In view of the above, there was some slight delay in payment of contributions to the respondent. While so, the

appellant received a notice alleging delay in remittance of contribution. The appellant appeared before the respondent and explained the financial constraints. It was also pointed out that the delay was neither deliberate nor willful and it was on occasions solely due to the financial crisis faced by the appellant at the relevant point of time. Without considering the pleadings the respondent issued the impugned orders. The accumulated loss of the appellant company during 31/03/2013 was 1390.60 lakhs and for the year ending 31/03/2014 the accumulated loss was 1285.19 lakhs, for year ending 31/03/2015 the accumulated loss was 1234.89 lakhs, for year ending 31/03/2016 the loss was Rs.1169.67 lakhs, for the year ending 31.03.2017 the loss was Rs.1147.04 lakhs and for the year ending 31/03/2018 the loss was Rs.1116.19 lakhs. The abstract of annual report for the relevant years are produced and marked as Annexure A2 series. The respondent failed to exercise the discretion available to him while assessing damages U/s 14B of the Act. In ***RPFC Vs SD college Hoshiarpur***, 1997(2) LLJ 55 the Hon'ble Supreme Court held that though the Commissioner has no power to waive penalty altogether, he has the discretion to reduce the percentage of damages. In ***RPFC Vs HML Ltd***, 2013(3) KLT 790 the Division Bench of the Hon'ble

High Court of Kerala held that the officer has to exercise the discretion while looking into the mitigating circumstances which includes financial difficulties. ***In Mcleod Russel India Ltd Vs RPFC***, AIR 2015 SC 2573 the Hon'ble Supreme Court held that presence of mensrea or actus reus would be a determinative factor in imposing damages U/s 14B as also the quantum thereof. The above principle was again reinstated by the Hon'ble Court in ***APFC Vs Management of RSL Textile India Pvt. Ltd***, 2017 (3) SSC 110. Mensrea can only be determined in the light of facts and circumstances of each case. In this case the appellant delayed remittance of contribution only because of the financial constraints of the appellant establishment.

5. The respondent filed counter denying the above allegations. The appellant was offered opportunity for hearing on 04/07/2018, 06/07/2018, 13/08/2018 and 14/09/2018. The appellant never raised any dispute regarding the delay in remittance of provident fund contribution. The appellant or his representative never raised any ground of financial difficulties before the respondent authority U/s 14B of the Act. The appellant never produced any documents before the respondent authority to substantiate their claim of financial difficulties. When there

is delay in remittance of provident fund contribution the appellant is liable to pay damages U/s 14B of the Act read with Para 32A of EPF Scheme. Hence a notice was issued to the appellant to show cause why damages shall not be levied against the appellant for belated remittance of contribution. A detailed statement showing the delay in monthwise remittance was also forwarded to the appellant. The appellant was given adequate opportunity to explain the delay with supporting documents. The appellant failed to utilize the opportunity afforded to him to explain the delay and also produce the documents to substantiate their claim. The appellant admitted the delay and hence the impugned orders were issued. Consequent to the introduction of Para 32A of EPF Scheme, the assessing authority is bound to follow the rates specified therein. The Hon'ble Supreme Court considered whether financial difficulties can be pleaded as a ground for reducing or waiving damages in ***Organo Chemical Industries Vs Union of India***, 1979 (20 LLJ 416 SC). The Hon'ble Supreme Court 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 financial position of the establishments over

different points of time. Besides 50% of the contribution 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 to any consideration for relief. In ***Chairman, SEBI Vs Sriram Mutual Fund and Another***, Civil Appeal No. 9523-9524/2003, the Hon'ble Supreme Court held that mensrea is not an essential ingredient for contravention of the provisions of a civil Act. Penalty is attracted as soon as contravention of the statutory obligation as contemplated by the Act and the regulation is established and hence the intention of parties committing such violation is wholly irrelevant.

6. It is an admitted fact that there was delay in remittance of provident fund contribution by the appellant. Even the delay statement send by the respondent is not disputed by the appellant during the course of Sec 14B proceedings. It is seen that the appellant never raised any ground of financial difficulties before the respondent authority. The representative of the appellant who appeared before the respondent authority also failed to raise the

ground of mensrea before the authority U/s 14B of the Act. All these grounds are raised for the first time in this appeal. The appellant also produced certain financial statement to argue that the reason for belated remittance of contribution was financial constraints of the appellant establishment. According to the learned Counsel for the appellant, the respondent had the discretion to reduce or waive damages U/s 14B of the Act. He also relied on the decision of the Hon'ble Supreme Court in **RPFC Vs SD College** (supra) and also **RPFC Vs Harrison Malayalam Ltd**, (Supra). The learned Counsel for the appellant also relied on the decision of Madras High Court in M/s **Bojaraj Textile Mills Ltd Vs EPF Appellate Tribunal**, 2020 LLR 194 to argue that mensrea is a relevant consideration while issuing an order U/s 14B of the Act. According to the learned Counsel for the appellant relying on the decision of the Kerala High Court in **Sree Kamakshy Agency Pvt. Ltd Vs Employees PF Tribunal**, WPC No. 10181/2010, **Elston Tea estate Vs RPFC**, WPC No. 21504/2010 and **Standard Furnishing Vs EPF Appellate Tribunal 2020**, (3) KLJ 528 levy of damages is not automatic and that all the circumstances which lead to delay in remitting the provident fund contribution have to be factored in by the respondent

authority before issuing the impugned order. The learned Counsel for the appellant also relied on the decision of the Hon'ble Supreme Court in **McLeod Russel India Vs RPFC**, AIR 2015 SC 2573 and **Assistant PF Commissioner Vs Management of RSL Textile India Pvt. Ltd**, 2017 (3) SCC 11 and **South India Federation of Fishermen Societies Vs RPFC**, 2021 LLR205 to argue that mensrea is a relevant consideration while deciding the quantum of damages. As already pointed out none of the above contentions were taken before the respondent authority while issuing the impugned orders and therefore was not considered by the authority. The learned Counsel for the respondent pointed out that the appellant has no claim that the wages of the employees were not paid in time. When wages were paid to the employees, the employees' share of contribution is deducted from the salary of the employees. The appellant failed to remit in time even the employees' contribution which amounts to 50% of total contribution. Non remittance of employees' share of contribution deducted from the salary of the employee is an offence U/s 405 & 406 of Indian Penal Code. Having committed an offense of breach of trust, as pointed out by the Hon'ble Supreme Court in **Organo Chemical's** case (supra), the appellant cannot plead that there was no

element of mensrea in belated remittance of contribution. The learned Counsel for the appellant argued that financial constraints of the appellant is a ground that is required to be considered while deciding the quantum of damages. The appellant produced the extracts of annual reports to show that the appellant establishment was under financial constraint during the relevant point of time. To that extend the appellant is entitled for some relief as far as damages are concerned.

7. Considering all the facts, circumstances and pleadings, I am inclined to hold that interest of justice will be met if the appellant is directed to remit 60 % of the damages assessed as per the impugned order.

Hence the appeals are partially allowed the impugned orders are modified and the appellant is directed to remit 60% of damages assessed U/s 14B of the Act.

Sd/-

(V. Vijaya Kumar)
Presiding Officer