



सत्यमेव जयते

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

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

(Monday the 14th day of March, 2022)

**APPEAL Nos. 478/2019 (Old No. ATA 459(7)/2016),
83/2021 & 84/2021**

Appellant : M/s. Steel Industrials Kerala Ltd.,
General Engineering Works,
P.B No. 6 , Thuravoor,
Alleppey – 688 532.

By M/s. B.S. Krishnan Associates

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

By Adv. Sajeev Kumar K.Gopal

This case coming up for final hearing on
12/01/2022 and this Tribunal-cum-Labour Court on
14/03/2022 passed the following:

ORDER

Appeal No. 478/2019 is filed from order no. KR / KCH /
12100/Damages Cell/2015/15190 dt. 06/01/2016 assessing
damages U/s 14B of EPF & MP Act (hereinafter referred to as
'the Act) for belated remittance of contribution for the period
from 04/1996 to 10/2009. Total damages assessed is

Rs. 41,84,856/-. Interest demanded U/s 7Q of the Act for the same period is also being challenged in this appeal.

2. **Appeal No. 83/2021** is filed from order No. KR / KCH / 12100 / Damages Cell / SPL / 2015 / 1116 dt. 17/11/2015 assessing damages U/s 14B of EPF and MP Act (for belated remittance of contribution for the period from 02/2014 to 10/2014. The total damages assessed is Rs. 47,150/-

3. **Appeal No. 84/2021** is filed from order No. KR/ KCH/12100/ Damages Cell / 2015 / 15191 dt. 06/01/2016 assessing damages U/s 14B of EPF and MP Act for belated remittance of contribution for the period from 02/2005 to 11/2013. The total damages assessed is Rs. 9,39,514/-.

4. Since common issues are raised, all the appeals are heard together and disposed of by this common order.

5. The appellant is a government company registered under Companies Act. The appellants started in 1975 and is having various manufacturing units at Kannur, Kozhikode, Ottappalam, Cherthala, Trivandrum and Trichur. From the year 2000 the appellant company is running under heavy loss. The appellant establishment is covered under provisions of Act and was regular in compliance till the year 2000. The respondent

issued notices alleging delay in remittance of contribution. The appellant attended the hearing and informed the respondent authority that the net worth of the company has become negative during the year 2004 and as per the proceedings of Board for Industrial and Financial Reconstruction (BIFR) dt.31/08/2006 in case No. 602/2005 the company was declared as Sick Industrial Company as on 31/03/2004, in terms of Sec 3 (1) (O) of Sick Industrial Companies (Special Provisions) Act 1985. This development was informed to the Central Provident Fund Commissioner also during the pendency of the proceedings before BIFR. The manufacturing unit at Cherthala was delinked from the company with a view to implement a joint venture with Indian Railways. The delinking was carried out by a book adjustment of Rs. 1,428.36 lakhs, on account of which BIFR deregistered the company from the purview of SICA Act vide its order dt. 09/04/2012, as the net worth turned positive because of the above book adjustment. The appellant filed an appeal before AAIFR which was not initially entertained. But as per the direction of the Hon'ble High Court of Kerala in W.P.(C) No. 15982/2013 the matter was heard and remanded back to BIFR. In spite of the plea by the

appellant, the respondent issued the impugned order assessing damages at the maximum rates. The delay in remittance was not deliberate. The delay in remittance was due to reasons beyond the control of the appellant company. The respondent ought to have considered the fact that the appellant company was declared sick by BIFR and therefore the respondent authority ought to have waived the damages.

6. The respondent filed counter denying the above allegations. Appellant is a public sector undertaking owned by Government of Kerala having different units in various districts. The different units are covered separately under the provisions of the Act. The appellant establishment is a chronic defaulter. The appellant establishment has challenged six orders, three issued U/s 14B of the Act for various periods and three issued U/s 7Q of the Act. As per rule 10 of EPF Appellate Tribunal (Procedure) Rules 1997, an appeal shall be based upon a single cause of action. In the instant case, appellant preferred a single appeal seeking remedies on different levy orders for different periods. Therefore the appeal is not maintainable under rule 10 of EPF Appellate Tribunal (Procedure) Rules 1997.

7. The appellant has challenged the levy of interest U/s 7Q of the Act. There is no provisions U/s 7(I) to challenge an order issued U/s 7Q of the Act. Hence the appeal is not maintainable against 7Q orders. The appellant filed W.P.(C) No. 25651 of 2019 before the Hon'ble High Court of Kerala against the show cause notice dt. 16/09/2019. The show cause notice relates to the amount due U/s 14B for belated remittance of contribution from 04/1996 to 10/2014. The Hon'ble High Court of Kerala disposed off the writ petition vide judgment dt. 18/03/2020 staying the show cause notice until orders are passed by the Tribunal.

8. The appellant failed to produce any documents to substantiate their claim of financial difficulties. The contributions defaulted by the appellant includes even employees' share of contribution deducted from the salary of the employees. In **Joseph Vs RPFC**, 1962 (1) LLJ 745 (KER), the Hon'ble High Court of Kerala held that consideration of hardship had no place in construing clear provisions of the statute. In **Hindustan Times Vs Union of India** , 1998 (1) LLJ 682 the Hon'ble Supreme Court held that financial condition of the establishment is no defence even for delayed deposit. The

non-remittance of employees' share of contribution deducted from the salary of the employees is an offence of breach of trust. The Hon'ble High Court of Madras in **Public Prosecutor Vs P.S.S Somasundaram Chettiar**, 1961 (1) LLJ 282 held that the liability of the employer or the Manager of an establishment under the Act is a kind of trust and its unwarranted infringement is a breach of trust. The representative of the appellant who attended the hearing before the respondent authority never pointed out that the appellant establishment is declared sick by the BIFR. There was no mention regarding the pendency of appeal before AAIFR. The record of daily proceedings held on 07/08/2014 is produced and marked as Exbt R2. It is a settled law that an issue not raised before the enquiry authority cannot be raised before the appellant authority. The Hon'ble High Court of Rajasthan in **ESS DEE Carpet Enterprises Vs Union of India**, 1985 LIC 1116 held that issues not raised before the lower authority cannot be raised before the Hon'ble High Court.

9. With effect from 01/12/2016 Sick Industrial Companies' (Special Provisions) Act, 1985 has been repealed which consequently dissolved BIFR and AAIFR. With Bankruptcy

Code coming into effect, all proceedings before BIFR and AAIFR stood abated. In **Ralli Wolf Ltd Vs RPFC and Others**, 2001 LLJ 1423 (Bom), it is held that payment of EPF dues is equated with payment of wages to the employees, which they are entitled, whether the appellant establishment is sick or not. The recovery of provident fund dues does not fall within the scope of the protection envisaged U/s 22 (1) of SICA 1985. The Hon'ble High Court of Madras in **Gauri Spinning Mills Pvt Ltd Vs Assistant PF Commissioner and Another**, 2006 (5) CTC (1) held that the provident fund dues under the Act is not covered by Sec 22 of SICA.

10. The learned Counsel for the respondent raised a valid issue under Rule 10 of EPF Appellate Tribunal (Procedure) Rules 1997 that appeals cannot be filed from orders with different cause of action. In this appeal it is seen that six orders are being challenged. During the course of the proceedings the learned Counsel for the appellant sought permission to split the appeals. The learned Counsel for the respondent objected the same. However considering the interest of justice, the request of the learned Counsel for the appellant was allowed and the

appeal is split depending on the period under which the Section 14B proceedings were issued.

11. The learned Counsel for the respondent pointed out that no appeal from a 7Q order is maintainable U/s 7(I) of the Act. The learned Counsel for the respondent pointed out that no appeal is maintainable from an order issued U/s 7Q of the Act. On a perusal of Sec 7(I) of the Act, it is seen that no appeal is provided from an order issued U/s 7Q of the Act. In **Arcot Textile Mills Vs RPFC**, AIR 2014 SC 295 the Hon'ble Supreme Court held that no appeal is provided from an order issued U/s 7Q of the Act. The Hon'ble High Court of Kerala in **District Nirmithi Kendra Vs EPFO**, W.P.(C) 234/2012 also clarified that no appeal can be prefer against an order issued U/s 7Q of the Act. In **M/s ISD Engineering School Vs EPFO**, WP(C) No. 5640/2015(D) and also in **St. Mary's Convent School Vs APFC**, WP (C) No. 28924/2016 (M) held that the order issued U/s 7Q of the Act is not appealable.

12. There is no dispute regarding fact that there was delay in remittance of provident fund contribution by the appellant. The respondent therefore initiated action under U/s

14B of the Act for assessing damages. In the enquiry a representative of the appellant attended and he admitted the delay statement send along with the summons. No other dispute was raised before the respondent authority, as is clear from the Exbt. R2 daily order issued by the respondent. Therefore the respondent authority issued the impugned orders.

13. In this appeal the learned Counsel for the appellant pointed out that the appellant is a company declared 'sick' by the BIFR under SICA 1985. The learned Counsel for the respondent pointed out that SICA is no more in existence after introduction of Insolvency and Bankruptcy Code in 2016. All the proceedings pending before BIFR and AAIFR got abated unless the claim is filed before NCLT within 6 months of the notification of the Bankruptcy Code. Appellant has no case that they approached NCLT for any relief. The appellant failed to produce any other document to support their claim of financial difficulties. It is a settled legal position that when an establishment claims financial difficulties as a ground for delayed remittance of contribution, it is the responsibility of the appellant to establish the same before the respondent authority.

14. 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.

15. According to the learned Counsel for the appellant, the very fact that appellant was declared a sick unit by BIFR would establish the fact that the appellant establishment is in real financial difficulties, as the networth of the company has completely eroded. The learned Counsel for the respondent pointed out that the appellant failed to produce even the orders

of BIFR declaring the appellant a sick unit. According to the learned Counsel for the appellant the Central provident fund Commissioner was also a party before the BIFR and therefore the respondent cannot claim that they were not aware of the proceedings.

16. Considering the fact that the appellant is a undertaking under Government of Kerala and is declared sick by BIFR, though the proceedings are not relevant as rightly pointed out by the learned Counsel for the respondent, it is felt that the appellant establishment is entitled for some relief U/s 14B of the Act. According to the learned Counsel for the appellant there is no intentional delay on the part of the appellant in delayed remittance of contribution and there is no mensrea .

17. The Hon'ble Supreme Court of India examined the applicability of mensrea in a proceedings U/s 14B of the Act . In **Horticulture Experiment Station Gonikoppal, Coorg Vs Regional PF Organisation**, Civil Appeal No. 2136/2012, the Hon'ble Supreme Court after examining the earlier decisions of court in **McLeod Russel India Ltd Vs RPFC**, 2014 (15) SCC 263 and

Assistant PF Commissioner Vs The Management of RSL Textiles India (Pvt) Ltd, 2017 (3) SCC 110 held that

“ Para 17 : Taking note of three Judge Bench judgment of this Court in **Union of India Vs. Dharmendra Textile Processor 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 U/s 14B of the Act 1952 and mensrea or actusreus is not an essential ingredient for imposing penalty/damages for breach of civil obligations/liabilities”

18. The learned Counsel for the respondent pointed out that the appellant establishment failed to remit even the employees' share of contribution deducted from the salary of the employees, in time. Non-remittance of employees' share of contribution is an offense of breach of trust U/s 405 & 406 of Indian Penal Code. Hence the appellant cannot plead that there is no intentional delay atleast in respect of 50% of the total

contribution, being the employees' share of contribution deducted from the salary of the employees.

19. Considering all the above facts, circumstances pleadings and evidence in this appeal, I am inclined to hold that interest of justice will be met, if the appellant is direct to remit 70% of the damages assessed as per the impugned orders.

Hence the appeals from orders issued U/s 14B are partially allowed, the impugned orders are modified and the appellant is direct to remit 70% of the damages. The appeal against 7Q order is dismissed as not maintainable.

Sd/~

(V. Vijaya Kumar)
Presiding Officer