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

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

(Friday the 27th day of May , 2022)

APPEAL No.66/2021

Appellant	M/s. TECIL Chemicals and Hydropower Ltd., Chingavanam, Kottayam – 686 531.
	By Adv. Mathew M. Uthuppachan
Respondent	The Assistant PF Commissioner EPFO, Thirunakkara, Kottayam -686 001
	By Adv. Joy Thattil Ittoop

This case coming up for final hearing on 25/05/2022 and this Tribunal-cum-Labour Court on 27/05/2022 passed the following:

O R D E R

Present appeal is filed from a composite order No. KR / KTM/ 2334/ APFC/ Penal Damages /14B/2021-22/ 1836 dt.14/07/2021.assessing damages U/s 14B of EPF & MP Act, 1952 (hereinafter referred to as 'the Act'.) and 7Q respectively for belated remittance of contribution for the period from

01/1999 to 12/2009 (remittance of EPF dues made during the period 01/04/1996 to 31/01/2010). The total damages assessed is Rs. 34,82,293/-.

2. The appellant is Public Ltd Company registered under Companies Act 1956 engaged in the manufacturing and sale of Calcium Carbide, Feror Silicone, Acctyline black and other allied chemicals. The appellant factory was lockdown from 05/07/1999 due to labour unrest. A true copy of the certificate dt. 18/09/1999 issued by the Regional Joint Labour Commissioner is produced and marked as Annexure A1. The factory is not functioning for the last 22 years, since1999. The appellant received a notice dt. 21/10/2019 proposing to levy damages and interest for delayed remittance of contribution for the period from 01/1999 to 12/2009. A true copy of the notice is produced and marked as Annexure A2. The notice is highly belated as the appellant has lost all the records to support his case. The appellant submitted a reply dt. 21/01/2020, a true copy of which is produced and marked as Annexure A3. The notice is barred by limitation. In the Annexure A3 reply the appellant pointed out that the accumulated losses of the appellant company was at Rs.15 crores and the company is not functioning

for the last 22 years. The appellant also requested the respondent to confirm whether any provident fund dues is outstanding from the appellant. The respondent sent a reply stating that the outstanding dues is Rs.200/- for the period 02/2015 to 06/2015 and Rs. 34/- for the period 12/2016. A copy of the reply is annexed along with Annexure A3. The date of remittance of contribution shown in the statement is not correct. Without considering the submissions, the respondent issued the impugned order, a copy of which is produced and marked as Annexure A4. The respondent authority issued the impugned order under the wrong impression that assessment of damages is automatic, once there is delay in payment of contribution. The respondent failed to take into account the mitigating circumstances pleaded by the appellant establishment. The Thahazildar, Kottayam demanded an amount of Rs. 83,71,789/- being the lease rent arrears and the appellant was compelled to remit the same under protest. Similarly there were huge arrears of Sales tax and Electricity Charges of Rs.14,75,88,345/- which was also settled in 2012, because of the revenue recovery action resorted by the Board. In fact, even the provident fund contribution for the period from 01/1999 to 09/2000 was paid in 36 instalments of Rs.1.40

lakhs per month. The appellant also approached BIFR under reference No. 358/2002 which sanctioned a revival Scheme and the cut-of-date was on 31/03/2015. A true copy of the order is produced and marked as Annexure A5. Even before the lockout, in 1999 the company start running on loss which is clear from the balance sheet and profit and loss account for the period 1995 to 2008 and 2010. The true copies of the balance sheet and are produced and marked as Annexure A6.

3. The respondent filed counter denying the above allegations. The appellant establishment delayed remittance of contribution for the period from 01/1999 to 12/2009. The respondent therefore initiated action U/s 14B of the Act for assessment of damages. A notice was issued to the appellant along with the delay statement. A representative of the appellant attended the hearing and submitted that the appellant establishment is closed for the last 22 years. Other than the Annexure 1 letter dt.18/09/1999 there is nothing on record to prove that the appellant establishment was under lockdown during the relevant point of time. The dues U/s 7A has been assessed for the period from 12/1998 to 09/2000. There after the dues were assessed for the period from 10/2000 to 01/2005,

02/2005 to 06/2005, 07/2005 to 02/2006 and 03/2006 to 12/2009. The appellant establishment has remitted the dues regularly but belatedly. Hence the contentions of the appellant that the appellant establishment was not functioning for the last 22 years is completely false. Further the appellant had also submitted all the monthly and annual returns as provided under the schemes. The Sec 14B provides for no limitation. In **Hindustan Times Ltd Vs Union of India,** 1998 SC 688 the Hon'ble Supreme Court held that since the amounts are due to the trust funds and the recovery is not by suit, the provisions of limitation Act 1963 are not attracted. In **Elsons Cotton Mills Ltd Vs RPFC,** 2001 (1) SCT 1101 (P&H) (DB) the Division Bench of the Hon'ble Punjab and Haryana High Court held that there is no limitation in 14B proceedings. The Hon'ble High Court also held that the non-payment of employers' contribution being a continuing offense, period of limitation begins to run every moment the offence continues. The appellant did not produce any document to support their claim that the data furnished in the delay statement is incorrect. The Hon'ble Supreme Court of India in **Hindustan Times Ltd Vs Union of India,** AIR 1998 SC 688 held that financial constraints of an establishment cannot be

a justifiable ground for them to escape the liability under the Act. In **Organo Chemical Industries Vs Union of India,** 1979 90020 lTT 416 Supreme Court 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 the financial position of the establishment over different points of time.

4. The appellant filed a rejoinder denying the claim in the written statement. The appellant factory has been under lockdown since 1999. The company engaged staff to maintain the factory and the expensive machinery and therefore contribution was paid for the workers engaged. The number of workers were very few. When no period of limitation is prescribed, the notice ought to have been given within a reasonable period. The Division Bench of the Hon'ble High Court of Kerala in **RPFC Vs Harriosns Malalayam Ltd,** 2013 (3) KLT 790 held that the Officers U/s 14B shall look into mitigating circumstances including financial difficulties projected by the employer while deciding the quantum of damages. After introduction of 7Q, the legal position for levying damages has

undergone substantial change. Sec 14B provides a discretion to the respondent authority as the words used are **"may recover by way of penalty".** The Hon'ble Supreme Court of India in **Assistant PF Commissioner Vs Management of RSL Textiles India Pvt. Ltd,** 2017 (3) SCC 110 held that mensrea is a relevant consideration while levying damages U/s 14B of the Act. The judgment in **Horticulture Experiment Station case,** is not applicable to the facts in present case. The said judgment is passed on the ground that **Union of India Vs Dharmendra Textiles and Others** is binding on the bench. The case pertains to tax matters and is not connected with EPF matters.

5. The appellant establishment delayed remittance of contribution for the period 01/1999 to 12/2009. The respondent therefore initiated action for assessment of damages. A representative of the appellant attended the hearing and filed a written statement stating that the proceedings under 14B is barred by limitation and further that the delay was not intentional as the appellant unit was closed from July 1999. After considering the submissions made by the appellant the respondent issued the impugned order.

6. In this appeal also the learned Counsel for the appellant reiterated its earlier stand before the respondent authority. According to the learned Counsel the proceedings are initiated after 22 years of the lockdown of the appellant establishment. According to the learned Counsel for the respondent the appellant remitted the contributions belatedly. The contribution for the period 01/1999 to 09/2000 were paid by the appellant during 2002-2005 only and therefore the respondent can initiate action for damages only after the receipt of the contribution . Further it was also pointed out by the learned Counsel for the respondent that there is no limitation as far as Sec 14B is concerned. The Hon'ble Supreme Court in **RPFC Vs KT Rolling Mills Pvt Ltd**, 1995 (10) LLJ 882, **Hindustan Times Vs Union of India,** 1998 (1) LLJ 682, and M/s. **K. Street Lite Electric Corporation Vs RPFC,** 2001 (1) LLJ 1703 held that there is no limitation provided U/s 14B of the Act and therefore introducing the concept of limitation in Sec 14B will be in violation of the legislative intention. The Hon'ble Supreme Court also pointed out that the delay in default related even to the contribution of the employees share which money, the respondent after deduction from the wages of the employees,

must have used for its own purpose at the cost of those for whose benefit it was meant. Any different stand would only encourage the employers to thwart to object of the Act. After examining the legal position the Hon'ble Supreme Court held that it is not a legislative intention to provide limitation for assessing damages as the establishment who delay remittance of contribution are enjoying the provident fund contribution of the employees also in their business.

7. The contention of the appellant that the appellant establishment is lockdown from 1999 is disputed by the learned Counsel for the respondent. According to him the appellant continued remitting contribution in respect of its employees even after the year 2000 which would clearly establish the fact that the appellant establishment is running atleast partially. Though the learned Counsel for the appellant contested the above pleading of the learned Counsel for the respondent, he failed to produce any document other than Annexure A1, Certificate dt. 18/09/1999 to show that the appellant establishment still continues to be lockout. The learned Counsel for the appellant further pointed out that the appellant was registered under BIFR in Case No. 358/2002.The appellant produced Annexure

A5 communication dt. 12/09/2002 from BIFR to substantiate its claim. According to learned Counsel, a revival Scheme was approved by BIFR with a cut-of-date of 31/03/2015. No such document other than Annexure A5 is produced by the appellant to prove that there was a sanctioned revival scheme approved by the BIFR.

8. The learned Counsel for the appellant also contended that delay in remittance was due to the financial constraint of the appellant establishment. The learned Counsel relied on the Balance Sheet for the period 1994-1995 to 2007-2008 to substantiate his claim of financial difficulties. The documents establish the fact that the appellant establishment was running under loss from 1997.

9. The learned Counsel for the appellant also argued that the delay in remittance of contribution was due to reasons beyond the control of the appellant and there was no mensrea in belated remittance of contribution. The learned Counsel for the respondent relied on the recent decision of Hon'ble Supreme Court of India in **Horticulture Experiment Station Gonikoppal Coorg Vs Regional PF Organization,** Civil Appeal No. 2136/2012 where in it was held that any default or delay in the payment of

EPF contribution by the employer is a sign qua non for imposition of levy of damages. He further pointed out that the Hon'ble Apex Court disagreed with the ratio laid down in **Mcleod Russel Vs RPFC,** 2014 (15) SCC 263 and **APFC Vs RSL Textiles**, 2017 (3) SCC 110 and held that presence of mensrea is not relevant for attracting liability U/s 14B. The learned Counsel for the appellant argued that the decision of the Hon'ble Supreme Court in **Horticulture Experiment Station case** (supra) is not applicable to the facts of the present case, as the same was based on the earlier decision in **Union of India Vs Dharmendra Textiles and others** which is based on the penalty levied in tax case. I am inclined to disagree with the contention of the learned Counsel for the appellant as the Hon'ble Supreme Court referred to its earlier decisions in Employees State Insurance Corporation Vs HMT Ltd, 2008 (3) SCC 35, **Mcleod Russel India Vs RPFC,** 2014 (15) SCC 263 and **Assistant PF Commissioner and Another Vs the Management of RSL Textiles India Pvt. Ltd**, 2017 (3) SCC 110 and pointed out that the Hon'ble Supreme Court is not in a position to agree with the ratio laid down in the above cases in view of the three Judge bench judgment of the court in **Union of India and Others Vs Dharmendra Textile Processors and**

Another, 2008 (13) SCC 369 and after discussing all the above judgment including its decision on **Chairman, SEBI Vs Sriram Mutual Funds and Other** , 2006 (5) SCC 361 the Hon'ble Supreme Court held that " 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 actus reus is not an essential element for imposing penalty/damages for breach of civil obligation, liabilities".

10. The learned Counsel for the respondent also pointed out that the wages of the employees during the relevant period was paid in time. When the wages are paid, the employees' share of contribution is deducted from the salary of the employees. Non-remittance of the employees' share of contribution deducted from the salary of the employees is an offense of breach of trust U/s 405 and 406 of Indian Penal Code.

11. The learned Counsel for the appellant relying on the documents produced argued that the appellant establishment is under lockdown from July 1999 onwards. He has also indicated that the appellant establishment approached BIFR, proving the financial constraints during the relevant point of time. The

financial statements produced by the appellant would show that the appellant establishment was running under loss from 1997 onwards. Taking into account all these factors the appellant establishment is entitled for some relief with regard to damages U/s 14 B of the Act .

12. Considering the facts, circumstances pleadings and evidence in this appeal, I am inclined to hold that interest of justice will be met, if the appellant is directed to remit 70% of the damages assessed U/s 14B of the Act.

Hence the appeals are partially allowed, the impugned orders U/s 14B are modified and the appellant is directed to remit 70% of the damages.

Sd/-

(V. Vijaya Kumar)
Presiding Officer