



सत्यमेव जयते

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

Present:Shri.V.Vijaya Kumar, B.Sc., LLM, Presiding Officer.
(Tuesday the 5th day of October, 2021)

APPEAL No.23/2020

Appellant

M/s. Priyadarshini Co-operative
Spinning Mills Ltd.,
No. INDHT(ST)3 Meenadom P.O
Kottayam – 686 516.

By M/s. B.S Krishnan Associates

Respondent

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

By Adv. Joy Thattil Itoop

This case coming up for final hearing on 23.06.2021 and this
Tribunal-cum-Labour Court on 05.10.2021 passed the
following:

ORDER

Present appeal is filed from order No.KR/KTM/20244/APFC/Penal Damage/14B/2019-2020/7075 dt. 05/11/2019, 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 11/2017 to 08/2018. The total damages assessed is Rs.3,26,278/-.

2. Appellant is an industrial Co-operative Society running spinning mill and is engaged in the manufacturing of different counts of cotton yarns. There was huge variation with regard to the cost price of cotton yarn manufactured by the appellant and market price of the same. The appellant mill has been sustaining huge losses from the very inception. The appellant is running its mill only to sustain the livelihood of the employees. The appellant is run only on grant and the financial support of the government. The appellant mill has been incurring huge losses. As on 31/03/2015 the loss incurred is Rs.7,79,47,820/-, as on 31/03/2016 the loss is Rs.6,95,54,433/-, as on 31/03/2017 the loss is Rs.7,36,46,173/-, as on 31/03/2018 the loss is Rs.5,33,55,376/- and as on 31/03/2019 the loss is Rs.7,93,83,240/-. The Balance Sheet and Profit and Loss

Account for the above period are produced and marked as Annexure 1 to Annexure 5. True copies of profit and loss account for the above financial years are marked as Annexure 6 to 10. The respondent issued notice alleging that there was delay in remittance of contribution for the period from 11/2017 to 08/2018. The true copies of the notice is produced and marked as Annexure 11. A representative of the appellant attending the hearing scheduled on 28/10/2019 and filed a written statement dt.28/10/2019, a copy of which is produced and marked as Annexure 12. It was pleaded before the respondent authority that the delay was only due to the financial constraints and the balance sheets for the period ending 31/03/2015 to 31/03/2019 was also produced before the authority. Without considering any of the contentions the respondent authority issued the impugned order. The impugned order is issued without considering the written statement as well as the documents annexed to the same. Though the question of mensrea was alleged in the notice the same was not raised at the time of hearing. The respondent authority failed to exercise the discretion available to him U/s 14B of the Act. If the respondent authority insist for the damages, the same will lead to the winding up of the appellant mill and the employees

will be thrown to the streets. The documents produced by the appellant before the respondent authority would clearly show that the appellant establishment was in real financial constrains and there was no mensrea in belated remittance of contribution. The funds released by the government were not sufficient to pay the salary including the statutory dues. Therefore the amounts available were used for paying salary excluding the statutory remittance on behalf of the employees. It is settled in a series of decisions that existence of mensrea is an essential ingredient for invoking power U/s 14B of the Act .

3. The respondent filed counter denying the above allegations. The appellant challenged the impugned order, on the vague allegations as to price variations, adverse market conditions etc. However the appellant has not pleaded the corrective action taken by them to get over those difficulties. The averment of government aid is also not supported by any evidence. The evidence now produced by the appellant as Annexure 1 to 10 to establish its loss from 2015 to 2019 are only selected pages from the statutory auditor's report. The summary of deficiencies pointed out by the auditor and the compliance is deliberately suppressed by the appellant. Hence the documents now produced cannot be relied on for the

purpose of justifying the financial constrains of the appellat establishment. The Hon'ble Supreme Court in **Hindustan Times Vs Regional PF Commissioner**, AIR 1998 SC 688 held that financial difficulties or other related indebtedness cannot be justifiable ground for the employer to escape provident fund liability. Annexure 1 to 10 were not produced by the appellant before the respondent authority. Only Annexure 12 representation was submitted without any supporting evidence. The statutory auditor's annual report have been suppressed by the appellant which would reveal the mismanagement on the part of the appellant. Self inflicted losses cannot be used to escape the natural consequences there from, including levy of penal damages U/s 14B. The Hon'ble Supreme Court of India in **Organo Chemical Industries Vs Union of India**, 1979 (9) 0020 LLT 0416 SC 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. The Hon'ble High Court of Kerala in **Calicut Modern Spinning and Weaving Mill Vs RPFC**, 1982 LAB IC 1422 also held that Para 38 of EPF Scheme

obliged the employer to make the payment within 15 days of the close of every month and Para 30 of this Scheme cast an obligation on the employer to pay both the contribution payable by himself and on behalf of the member employed by him, in the first instance. The failure of the appellant to establish the financial difficulty before the respondent authority results in drawing an adverse inference regarding the claim of financial difficulty.

4. The impugned order is issued assessing damages for belated remittance of contribution. According to the learned Counsel for the appellant, the appellant establishment was under heavy loss during the period from 2015 to 2019 and the financial constrains compelled the appellant to delay the remittance of contribution. As per the profit and loss account for the year ending 31/03/2015, the net loss for the year was Rs.7,79,47,820/- and the accumulated loss was Rs.58,21,68,416/- For the year ending 31/03/2016 the net loss for the year was Rs.6,95,54,433/- and the accumulated loss was Rs.65,17,22,849/- similarly for the year ending 31/03/2017 the net loss for the year was Rs.7,36,46,170/- and the accumulated loss was Rs.72,53,69,023/-. For the year ending 31/03/2019 the net loss of the company was

Rs.7,93,83,213/- Hence the claim of the learned Counsel for the appellant is well supported by the documentary evidence. However according to the learned Counsel for the respondent, the documents now produced by the appellant in this appeal cannot be relied on as the same was not produced before the respondent authority at the time of hearing and it was not properly analyzed by the respondent authority before issuing the impugned order. The learned Counsel for the appellant also argued that the documents now produced are selected pages of the auditor's report and the observations of the auditors were not produced along with the Balance Sheet and profit and loss account. According to him this is a deliberate suppression to avoid disclosing the mismanagement of the appellant establishment, which cannot be considered for reducing the damages. The learned Counsel for the appellant relied on various decisions of the Hon'ble Supreme Court as well as High Court to drive home his point that the delay in remittance was only due to the financial constrains and there was no mensrea in belated remittance of contribution. According to him the Hon'ble Supreme Court of India in **Hindustan Steel Ltd Vs State of Orissa**, 1969 (2) SCC 627 held that an order imposing penalty for failure to

carry out a statutory obligation is the result of a quasi criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. The above decision was rendered by the Hon'ble Supreme Court while considering the penalty provision in Orissa Sales Tax Act and the observations while interpreting the penalty provision in a fiscal statute is entirely different from that of social security legislation. The delay in remittance of contribution in time will delay the investment of the same and therefore will hit the investment as well as the yield to be disbursed to its members. The learned Counsel for the appellant also relied on the decision of the Hon'ble Supreme Court in **Mcleod Russel India Ltd Vs RPFC**, 2014 15 SCC 263 and **Assistant PF Commissioner Vs Management of RSL Textile India Ltd**, 2017 (3) SCC 110 to argue that the presence of mensrea is a relevant consideration while imposing damages U/s 14B of the Act. In **Mcleod Russel India Ltd (supra)** the Hon'ble Supreme Court observed that the presence or absence of mensrea and/or actus reus would be a determinative factor in imposing damages U/s 14B as

also the quantum thereof since it is not inflexible that 100 % of the arrears has to be imposed in all cases. Alternatively stated if damage have been imposed U/s 14B it will be only logical that mensrea and/ or actus reus was prevailing at the relevant time. The Hon'ble Supreme Court in the above case held that modern jurisprudence recognizes that the imposition of punitive damages, quint essentially quasi criminal in character, can be resorted to even in civil proceedings to deter willful wrong doing. The learned Counsel for the appellant also relied on the decision of Division Bench of Kerala High Court in **RPFC Vs Harrison Malayalam Ltd**, 2013 (3) KLT 790 and the **Standard Furniture Vs The Registrar EPF Appellate Tribunal and Others** Writ Appeal No.996/2015 to press home his arguments that the respondent authority shall considered the mitigating circumstances while deciding the quantum of damages and the financial constrains is one of the mitigating circumstances that is required to be considered by the respondent authority. It may be relevant to pointed out that the decision of Hon'ble High Court of Kerala in **Harrison Malayalam Case (Supra)**, though approved by the Hon'ble Supreme Court in SLP C No. 21174/2015, kept the question of law in that case open to be decided in an appropriate case.

Learned Counsel for the respondent also pointed out that the Balance Sheet and the profit and Loss account now produced by the appellant in this proceedings cannot be accepted as a proof of financial constrains unless the documents are properly proved in the adjudication before the respondent authority. In **Aluminium Corporation Vs their Workman & Others** Civil Appeal No. 238 & 88 of 1962 the Hon'ble Supreme Court held that the mere statements in Balance Sheet as regards current assets and current liabilities cannot be taken as sacrosanct. The correctness of the figures as shown in the Balance Sheet itself are to be established by proper evidence in the court by those responsible for preparing the Balance Sheet or by competent witness. Having said that, it is clear from the documents now produced by the appellant that the appellant establishment was running under loss from 2015 onwards. It is true that it will have an impact on the financial status of the appellant establishment. According to the learned Counsel for the respondent the documents now produced by the appellant would show that the salary of the employees' during the relevant point of time was paid on time. When the salary is paid the employees share of contribution is deducted from the salary of the employees. According to him even the

employee's share of contribution deducted from the salary of the employees is not remitted in time by the appellant establishment. According to the learned Counsel for the appellant, the amounts received from the government was used for paying salary and since the amount was not adequate to pay salary and also the provident fund contribution, only the net amount of salary was paid to the employees of the appellant establishment. This argument cannot be sustained. It is seen that huge amounts are being paid by the government as government loan for repairs and maintenance, working capital loan, government financial assistance, government contribution as loan, government loan (investment loan) etc to the appellant establishment. The amount required for paying salary is a small percentage of the amount received from the government and therefore the claim of the learned Counsel that the amount received from the government was only adequate to pay the net salary cannot be accepted. Further if the statement is correct, the appellant establishment has clearly committed an offence of breach of trust, as the provident fund money of the employees is indirectly used by the management for other activities of the appellant establishment. Therefore the claim of the

appellant that there was no mensrea in the belated remittance of the contribution cannot be accepted, since the appellant has committed an offence of breach of trust U/s 405 & 406 of Indian Penal Code by not remitting the employees' share of contribution deducted from the salary of employees which amounts of 50% of the total contribution.

5. As already pointed out the appellant was having real financial constrains during the relevant point of time. Being a spinning mill in the co-operative sector under the control of government of Kerala the appellant deserves some consideration in the levy of damages U/s 14B of the Act. Taking into account all the factual and legal issues discussed above, I am of the considered opinion that the damages U/s 14B can be restricted to 70% of the total damages assessed as per the impugned order.

Hence the appeal is partially allowed, the impugned order is modified and the appellant is directed to remit 70% of the damages.

Sd/-

(V. Vijaya Kumar)
Presiding Officer