



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

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

(Friday the 29th day of January, 2021)

APPEAL No.333/2019
(Old No. ATA No.976 (7)2015)

Appellant

M/s. BPL Telecom Limited.,
Chandranagar
Palakkad – 678007.

By M/s. Menon & Pai

Respondent

The Regional PF Commissioner
EPFO, Sub Regional Office
Eranhipalam
Kozhikode – 673006.

By Adv. Dr. Abraham P.Meachinkara

This case coming up for final hearing on
01/01/2021 and this Tribunal-cum-Labour Court on
29/01/2021 passed the following:

O R D E R

Present appeal is filed from Order No.
KR/KK/14506/Enf-4 (2) 2014-15/5779 Dt. 11/08/2015.
assessing damages U/s 14 B of EPF & MP Act,1952
(hereinafter referred to as ‘the Act’) for belated remittance of

contribution for the period 1/2/2014 to 31/3/2015. The total damages assessed is Rs. 8,26,818/-.

2. The appellant is an establishment registered under Company's Act. The appellant is engaged in manufacturing and sale of PLCC equipments and its accessories, EPABX, Push Button Telephones etc. All the employees in the appellant company are covered under the provision of the Act. Because of the free import of goods the company was facing severe competition and therefore was running at heavy loss for several years. The appellant company was finding it difficult even to pay the loan amounts from the banks and financial institutions. The appellant company was forced to go for one time settlement with banks and there was huge outflow of money every month as instalments. This lead to acute shortage of working capital. There was difficulty in getting money from major customers. However the appellant company was remitting contribution, though there was delay in payment of wages to the employees. The delay occurred due to various reasons beyond the control of the appellant. The financial position of the appellant company was declining from 2007 onwards. The accumulated loss of the appellant company till

31/3/2014 was more than 33 crores and the loss for the financial year ended 2014 was Rs. 2.24 crores. The copies of the Profit and Loss Account for the financial year 2012-2013 and 2013-2014 are produced and marked as Annexure A1 & A2 respectively. On account of the financial position explained above there was delay in remittance of contribution during the period 2014-15. The respondent initiated proceedings U/s 14B of the Act. The appellant appeared before the respondent and explained the facts and filed a detailed reply to the notice, which is produced and marked as Annexure A4. Without considering the Annexure A4 representation the respondent issued the impugned order. The respondent failed to exercise the discretion vested on him U/s 14 B of the Act as well as Para 32 A of EPF Scheme. In ***RPFC Vs SD College Hoshiarpur***, 1977 (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. The Division Bench of the Hon'ble High Court of Kerala in ***RPFC Vs. Harrison Malayalam Ltd.***, 2013 (3) KLT 790 also accepted the above position and also held that financial constraints will be one of the mitigating

circumstances which shall be considered by the authority U/s 14B of the Act.

3. The respondent filed counter denying the above allegations. The appellant is required to pay the contribution U/s 6, 6A and 6C of the Act and the schemes framed there under. The appellant failed to pay the contribution within the time period prescribed under Para 30 & 38 of EPF Scheme. Since there was delay in remittance of contribution for the period 1/2/2014 to 31/3/2015, the appellant is liable to pay damages as required U/s 14B of the Act read with Para 32A of EPF Scheme. Hence a notice was issued to the appellant along with a copy of delay statement. None appeared for the personal hearing and there was no representation in writing from the appellant. Hence the respondent issued the impugned order assessing the damages. The financial constraints of the appellant establishment is not a ground for delay in remittance of contribution . The Division Bench of the Hon'ble High Court of Kerala in ***Calicut Modern Spinning and Weaving Mills Vs. RPFC***, 1982 KLT 303 held that the employer is bound to pay contributions under the Act every month irrespective of the fact that wages have been paid or not. Non-payment of wages or

delayed payment of wages is in violation of fundamental rights as guaranteed under Article 21 of the Constitution of India. When delay in making payment of wages itself is not legal, granting any further concession, consequential there to, can never be contemplated by the legislature. In **Chairman SEBI Vs Sri Ram Mutual Fund**, Civil Appeal No. 9523-9524/2003 the Hon'ble Supreme Court held that mensrea is not an essential ingredient for contravention of the provision of a civil Act. The breach of civil obligation which attracts penalty under the levy of penalty irrespective of the fact whether the contravention is made by the defaulter with guilty intention or not. The decision of the Division Bench of the Hon'ble High Court of Kerala in **Harrison Malayalam Ltd** case (supra) has not become final as the SLP filed by the respondent organization is pending before the Hon'ble Supreme Court. The ground of financial difficulties for delay in remitting provident fund contribution has been rejected by the Hon'ble Supreme Court **in Hindustan Times Vs Union of India**, AIR 1998 SC 688 In **Associated Industries Pvt. Ltd Vs RPFC**, 1963 (2) LLJ 652 the Hon'ble High Court of Kerala held that the employees are under legal obligation to deposit their share of contribution

to the fund within the time prescribed, the moment the Act and the scheme become applicable to them.

4. The only ground raised by the learned Counsel for the appellant in this appeal is with regard to the financial difficulties of the appellant establishment. The appellant also produced annexure A1 and A2 documents to substantiate their financial difficulties. According to the learned Counsel for the appellant the respondent failed to exercise its discretion U/s 14B of the Act in spite of the fact that the financial difficulties were proved by the appellant. Penalty is imposed as a punitive measure and therefore the defaulter should possess a culpable intent or mensrea to attract penalty. The appellant establishment was undergoing severe and acute financial crisis. The opportunity provided to the appellant clearly shows that the respondent has discretion while levying damages . In ***Shanti Garments Vs RPFC***, 2003 (1) CLR 228 (MAD) the Hon'ble High Court of Madras held that where there is a wilful violation, the quantum of damages should be more or less compensatory in nature and when the delay is deliberate or intentional, damages shall be compensatory as well as penal in nature. In ***Harrison Malayalam Ltd*** case (supra) the Hon'ble

High Court of Kerala held that an establishment crippled with financial difficulties cannot be burdened with penal consequences by way of damages. In **M/s Sreekamaksy Agency Pvt Ltd Vs. Employees Provident Fund Appellate Tribunal**, WPC No. 10181/2010 the Hon'ble High Court of Kerala held that damages are levied for deliberated non-payment of contribution in time. In **Elston Tea Estate Ltd Vs. RPF**, WPC No. 21504 of 2010 the Hon'ble High Court of Kerala held that financial constraint will have to be considered. However the financial constraints shall be demonstrated before the authority with all cogent evidence, to arrive at a conclusion that it has to be taken as a mitigating factor for lessening the liability. In **Standard Furnishing (Unit of Sudarshan Trading Vs EPF Appellate Tribunal**, 2020 (3) KLJ 528 the Hon'ble High Court of Kerala held that levy of damage is not automatic and all the circumstance which lead to the delay in remitting the provident fund contribution have to be factored by the authorities concerned.

5. As already pointed out the only ground pleaded by the learned Counsel for the appellant is that of financial difficulties. Though the appellant submitted that a

representative of the appellant attended the hearing U/s 14B and filed Annexure A4 representation, the impugned order clearly states that nobody attended the hearing or filed into representation as on the date of hearing. Having failed to utilize the opportunity to substantiate their case before the respondent authority, the appellant cannot come up in appeal and argued that their pleadings were not considered by the respondent. The Hon'ble High Court of Kerala in **Elston Tea Estate Ltd (supra)** held that the financial constraints have to be demonstrated before the authority with all cogent evidence for satisfaction to arrive at a conclusion that it has to be taken as a mitigating factor for lessening the liability. From the impugned order it is very clear that the appellant made no such attempt before the respondent authority. Even in this appeal the appellant produced a summary statement of two pages to argue that the appellant establishment is in financial difficulties and therefore the appellant is eligible to be considered for lesser liability. It has been held by the Hon'ble Supreme Court that the assets and liabilities reflected in the Balance Sheet cannot be taken as indication of the financial position of an establishment. In **Aluminium Corporation Vs**

Their Workmen, 1963 (2) LLJ 629 SC the Hon'ble Supreme Court held that the current assets and liabilities as reflected in the Balance Sheet cannot be accepted unless the figures reflected in the Balance Sheet are proved by a competent person. However it is seen that the appellant establish was running under loss during the relevant point of time. The appellant is therefore entitled for some relief as far as damages is concerned. The learned Counsel for the appellant also argued that the delay in remittance was only due to financial constraints and there was no mensrea in belated remittance of contribution. The documents produced by the appellant will clearly indicate that the financial difficulties by itself is not a reason for belated remittance of contribution. Though the appellant claimed that there was delay in payment of wages the same is not substantiated through any evidence. The learned Counsel for the respondent submitted that the employees share of contribution deducted from the salary of the employees were also not remitted by the appellant in time. Non-remittance of employees share of contribution deducted from the employees is an offence U/s 405 & 406 of Indian Penal Code. Having committed an offence of breach of trust,

the appellant cannot claim that there was no mensrea in belated remittance of contribution atleast to the extent of the employees share of contribution which is approximately 50 % of the total contribution. The learned Counsel for the respondent also pointed out that when there is clear violation of Para 30 & 38 of EPF Scheme, the appellant cannot claim that there is no mensrea.

6. Considering all the facts, circumstance, evidence and pleadings 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 as per impugned order.

Hence the appeal is partially allowed, and the impugned order is modified and the appellant is directed to remit 70% of the damages assessed U/s 14B of the Act.

Sd/-

(V. Vijaya Kumar)
Presiding Officer