



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

Present: Shri.V.Vijaya Kumar, B.Sc., LLM, Presiding Officer.
(Thursday the 6th day of May, 2021)

APPEAL No.369/2019

Appellant M/s. Nirmalyam Residency Hotels (P) Ltd.,
Changaramkulam,
Alancode PO
Malappuram – 679 585.

By Adv. Joby Jacob pulickekudy

Respondent The Assistant PF Commissioner
EPFO, Sub-Regional Office
Eranhipalam P.O
Kozhikode-673 006.

By Adv. Dr. Abraham Meachinkara

This case coming up for final hearing on
16/03/2021 and this Tribunal-cum-Labour Court on
06/05/2021 passed the following:

O R D E R

Present appeal is filed from Order No.
KR/KK/28898/ENF-3 (3)/14B/ 2019 / 2771 dt. 05/08/2019
assessing damages U/s 14B of EPF & MP Act, 1952 (hereinafter
referred to as 'the Act') for belated remittance of contribution for
the period 03/2015 to 01/2019 (Remittances from 01/08/2015 to
30/04/2019. The total damages assessed is Rs. 1,73,284/-.

2. Appellant is a Company registered under Company's Act 1956. The appellant is running business Hotel. The appellant started its operation in 2013. The appellant was not coverable during 2014. In August 2018 a bar license was issued to the appellant and the employment strength reached 17. The employment strength reached 20 in November 2018. At present there are only 17 employees working in this establishment. The Hotel project got delayed more than 5 years and the appellant had to avail additional term loans from banks and other financial agencies. The total outstanding liability is to the tune of Rs. 7.33 crores. The above facts were brought to the notice of the respondent and requested for waiver or reduction of damages. Though the respondent has discretion to reduce or waive damages U/s 14B of the Act well as under Para 32A of EPF Scheme, the respondent failed to exercise any such discretion. 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 percentage of damages. The Division Bench of Hon'ble High Court of Kerala the case of **Regional PF Commissioner Vs Harrisons Malayalam Ltd**, 2013 (3) KLT 790 held that the authority U/s 14B of the Act has the discretion to reduce or waive damages considering the

mitigating circumstances which includes financial difficulties projected by the employer. In **McLeod Russell India Ltd Vs RPFC**, AIR 2015 SC 2573 the Hon'ble Supreme Court of India held that the presence of mensrea and actus reus should be a determinative factor while imposing damages U/s 14B as also the quantum thereof. The said principle is again restated by the Hon'ble Supreme Court of India in **Assistant PF Commissioner Vs Management of RSL Textiles India Pvt. Ltd**, 2017 (3) SCC 110. The delay in remitting the contribution was not deliberate or intentional but was due to reasons beyond the control of the appellant.

3. Respondent filed counter denying the above allegations. The appellant establishment committed delay in remittance of provident fund contribution for the period from 03/2015 to 01/2019. When there is delay or default in payment of contribution, damages U/s 14B of the Act read with Para 32A of will be attracted. Hence the respondent issued notice dt.20/06/2019 to the appellant directing them to show cause why damages U/s 14B shall not be levied. A detailed delay statement was also forwarded alongwith the notice. The appellant was also given an opportunity for personal hearing on 01/08/2019. A representative of the appellant attended the

hearing and pleaded that remittance was delayed due to financial difficulties. No documents were produced to substantiate their claim. After considering the pleadings made by the appellant the respondent issued the impugned order. The appellant establishment was covered under the provision of the Act w.e.f 11/2013 since the appellant employed 21 persons as on that day and any claim otherwise cannot be accepted. The remittance particulars furnished by the appellant in Annexure A1 statement is not correct and not as per the records maintained by the respondent. In ***Calicut Modern Spinning & weaving Mills Vs RPFC***, 1982 KLT 303 the Division Bench of the Hon'ble High Court of Kerala held that the employer is bound to pay contribution under the Act very month irrespective of the whether wages have been paid or not. The Hon'ble High Court also held that the financial constraints is not a ground for waiving or reducing damages. In ***Chairman, SEBI Vs Sriram Mutual Fund***, Civil Appeal No. 9523-9524/2003. The Hon'ble Supreme Court of India held that mensrea is not an essential ingredient for contravention of provisions of a civil Act. It also pointed out that penalty is attracted as soon as contravention of statutory obligation as contemplated by the Act is established and therefore

the intention of parties committing such violation becomes immaterial.

4. The only ground pleaded by the learned Counsel for the appellant for delayed remittance of contribution is that of financial difficulties. According to the learned Counsel for the appellant establishment was not coverable under the provisions of the Act as on 11/2013 as the number of employees were less than 20. However the learned Counsel for the respondent pointed out that the appellant establishment was statutorily coverable w.e.f 11/2013 as per the list of employees given by the appellant himself. According to the list of employees provided by the appellant establishment, the number of employees were 21. Therefore the appellant establishment is rightly covered under the provision of the Act w.e.f 11/2013. According to the learned Counsel for the respondent though the appellant claimed financial difficulties before the respondent authority, the same was not substantiated by the appellant. Even in this appeal the appellant produced two notices issued by Kerala Financial Corporation stating that there are outstanding loss to the tune of Rs.7.33 crores as on 23/12/2019. The letter dt. 5/3/2020 is an offer from Kerala Financial Corporation for one time settlement of the outstanding dues. The certificate dt. 27/05/2020 issued by

Kerala Financial Corporation states that the substantial part of the loan account is cleared by the appellant establishment. These documents are only the normal business transaction of any business concern and it will not in any way to prove the financial difficulties of the appellant establishment. Further it is also seen from the certificate that the appellant establishment has closed majority of the loan accounts and the outstanding amount as on that date is only 1.77 crores. It is a settled legal position that the appellant will have to prove the financial difficulties before the respondent authority to claim any relief in damages U/s 14B of the Act. 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 **SreeKamakshi 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.

5. The learned Counsel for the respondent pointed out that the appellant has no case that wages to the employees were not paid in time. The appellant also failed to show that there was delay in payment of wages to its employees. The appellant failed to remit even the employees' share of contribution deducted from the salaries of the employees in time. Having failed to remit the contribution deducted from the salary of the employees in time the appellant has committed an offence U/s 405 & 406 of Indian Penal Code. Having committed an offense of breach of trust the appellant cannot claim that there was no mensrea in belated remittance of contribution, at least to the extent of the employees share deducted from the salary of the employees.

6. Considering the facts circumstances, pleadings and evidence in this appeal I am not inclined to interfere with the impugned order

Hence the appeal is dismissed.

Sd/-
(V. Vijaya Kumar)
Presiding Officer