



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

सत्यमेव जयते

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

(Thursday the 20th day of January, 2022)

Appeal No.424/2019

Appellant : M/s. Builtech Foundations
Door No. 1172, C-7, Thoppil Estate,
Vytila, Kochi – 682 019.

By M/s. Ashok B. Shenoy

Respondent : The Regional PF Commissioner
EPFO, Sub Regional Office
Kaloor, Kochi – 682017

By Adv. Sajeev Kumar K. Gopal

This case coming up for final hearing on 11/11/2021
and this Tribunal-cum-Labour Court on 20/01/2022 passed
the following:

ORDER

Present appeal is filed from order No. KR / KCH
/ 1369445 / Penal Damages / 2019 / 3498 dt. 16/09/2019
assessing damages U/s 14B of EPF & MP Act (hereinafter
referred as ‘the Act’) for belated remittance of contribution
for the period from 01/01/2016 to 31/03/2019. The
total damages assessed is Rs. 80,926/-.

2. Appellant is a partnership firm engaged in the business of execution of piling works. On 16/07/2019 the respondent issued notice proposing to levy damages for belated remittance of contribution and also directing the appellant to showcause why damages shall not be levied. A true copy of the summons is produced and marked as Annexure A1. The appellant was also given an opportunity for personal hearing. The appellant attended the hearing held on 30/07/2019 and stated that the delay in remittance was due to poor financial conditions and there is no deliberate or intentional default on their part. The appellant also filed a written statement on 19/08/2019. A copy of the written statement is produced and marked as Annexure A2. Without considering any of the objections the respondent issued the impugned order. Copy of the impugned order is produced and marked as Annexure A3. The respondent authority failed to consider the settled legal position that financial difficulties and mensrea are relevant considerations while deciding the quantum of damages U/s 14B of the Act. The impugned order failed to consider any of the above contentions made by the appellant before the respondent authority. An authority U/s

14B, wielding quasi judicial powers cannot be fettered by the administrative directions issued by the executive authorities. It is very clear that Annexure A3 order is driven by pre-determined bench mark and internal guidelines and not on the basis of a case to case evaluation and determination. The impugned order as a measure of penalty. Being punitive it is bad when it is mechanically passed without any application of mind. The impugned order is illegal as for assessment of delay and quantum of delay undertaken therein contravene Para 38 of EPF Scheme. As per Para 38 of EPF Scheme contributions are payable only within 15 days of close of every month, in which the wages are paid and deduction towards contribution is made. The respondent authority also failed to consider the 5 days grace period allowed as per circulars dt.19/03/1964 and 24/10/1973. The respondent is not an authority notified by the Central Government to exercise powers U/s 14B of the Act.

3. The respondent filed counter denying the above allegations. The appellant is an establishment covered under the provisions of the Act. The appellant delayed remitting contribution for the period 01/01/2016 to 31/03/2019. The

delay in remittance of contribution attract damages U/s 14B of the Act. Accordingly Annexure A1 summons dt.16/07/2019 was issued to the appellant. A detailed statement showing the delay was also forwarded along with the summons. The appellant was also afforded an opportunity for personal hearing. The representative of the appellant only pleaded financial difficulties. It is submitted that provident fund dues are statutory in nature which is to be paid within stipulated time irrespective of the financial conditions of appellant establishment. The Hon'ble Supreme Court of India in **Hindustan Times Ltd Vs Union of India**, AIR 1998 SC 688 held that bad financial condition is no defense for delayed deposit of provident fund money. The delayed provident fund contribution also includes the provident fund contribution deducted from the salary of the employees. The appellant could not prove that they were in continuous loss, were even unable to pay salary. The appellant admitted the delay contenting that the delay was due to shortage of funds vide their letter dt. 19/08/2019. The appellant also has committed an offense of breach of trust U/s 405 of Indian penal code. The Hon'ble Supreme Court of India in **Organo Chemical**

Industries Vs Union of India, 1979 (2) LLJ 416 SC held that “ even if it is assumed that there is loss as claimed it does not justify the delay in deposit of provident fund money which is an unqualified statutory obligation and cannot be linked with the financial position of the establishment over different points of time. Besides 50% of the contribution deposited late, represented the employees’ share which had been deducted from employees’ wages and was trust money with the employer for deposit in the statutory fund. The delay in deposit of this part of the contribution amounted to breach of trust and does not entitle the employer to any consideration for relief”. The respondent considered all the relevant facts placed before the appellant while issuing the impugned order. The Hon'ble Supreme Court of India in **Chairman, SEBI Vs Sri Ram Mutual Fund**, 2006 (5) SCC 361 held that mensrea is not an essential ingredient for contravention of provisions of civil Act .

4. The appellant establishment delayed remittance of contribution for the period 01/01/2016 to 31/03/2019. The respondent therefore initiated action for assessing damages U/s 14B of the Act. The respondent issued a summons along

with a detailed delay statement showing the dues, the due date of payment, the actual date of payment and delay in remittance. The appellant was also given an opportunity for personal hearing. The representative of the appellant attended the hearing, admitted the delay and filed a statement to the effect that the delay in remittance was due to financial constraints of the appellant establishment. After considering the submissions and written statement made by the appellant establishment, the respondent issued the impugned order.

5. According to the learned Counsel for the appellant the delay in remittance of contribution was due to the financial constraints of the appellant establishment. However the appellant failed to produce any document to substantiate the claim of financial difficulties. According to the learned Counsel for the respondent, the appellant failed to produce any supporting evidence even before the respondent authority. 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.

6. The learned Counsel for the appellant pleaded that the appellant even delayed payment of wages which also accounted for delayed remittance of contribution. In the absence of any evidence to that effects, it is not possible to accept the claim of the learned Counsel for the appellant. The Learned Counsel for the respondent, on the other side, pleaded that appellant failed to remit even the employees' share of contribution deducted from the salary of the employees. On a perusal of the delay statement it is seen that the delay in remittance varied from 9 days to 1474 days. The appellant has no justification in delaying the remittance of

employees' share of contribution deducted from the salary of the employees for such a long period. The appellant had no case that the salary of the employees are delayed for such a long period. Non-remittance of employees' share of contribution deducted from the salary of the employees is an offence of breach of trust U/s 405 & 406 of Indian Penal Code and the appellant cannot plead that there was no intentional delay in remittance of employees' share of contribution, which amounts to 50% of the total contribution.

7. The learned Counsel for the appellant also pleaded that there was no intentional delay and mensrea in belated remittance of contribution.

8. 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 actus reus is not an essential ingredient for imposing penalty/damages for breach of civil obligations/liabilities.”

9. The learned Counsel for the appellant pointed out that as per Para 38 of EPF Scheme the appellant establishment is liable to remit contribution within 1 month of payment of wages. He also pointed out that the appellant was not given the benefit of grace period of 5 days. The Hon'ble Supreme Court of India in **Organo Chemical Industries Vs Union of India**, 1979(2) LLJ 416 considered the implication of Para 38 of EPF Scheme and held that “ Para 38 provides that deposit of contribution shall be made by the employer within 15 days of close of every month, ie, the

contribution for a particular month has to be deposited by the 15th of the month following. Any breach of the above requirement is made a penal offence". The Hon'ble High Court of Kerala in **Jewel Homes Pvt. Ltd Vs Employees PF Organization**, WP(C) No. 25884/2011 considered the implication of the grace period and held that the grace period is applicable only in cases where the remittances are made within the grace period and not beyond the same. The claim of the learned Counsel for the appellant that the respondent is not a notified authority to conduct proceedings U/s 14B of the Act also is not correct. As per SO 1553 dt. 17.04.2002, the respondent is also a notified authority to conduct proceedings U/s 14B of the Act.

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

Hence the appeal is dismissed.

Sd/~

(**V. Vijaya Kumar**)
Presiding Officer