



सत्यमेव जयते

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

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

(Friday the 11th day of December, 2020)

APPEAL No.450/2018

(Old No. 117 (7) 2011)

Appellant

M/s. Ismart Business Solutions
Pvt. Ltd.,
IT Park, Plot No. 16 A, 'B' Block,
Kakkanad
Kochi-682037.

By Adv. Menon & Pai

Respondent

The Regional PF Commissioner
EPFO, Sub Regional Office
Kochi -682017

By Adv. Sajeev Kumar K Gopal

This case coming up for final hearing on 25/11/2020 and this Tribunal-cum-Labour Court on 11/12/2020 passed the following:

O R D E R

Present appeal is filed from order No. KR/ KC/ 15925/PD/B/T (2)/2010/16012 dt. 14/12/2010 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 03/2006 to 02/2009. The total damages assessed is Rs. Rs. 2,36,350/-.

2. The appellant is Private Limited Company registered under Company's Act, 1956. The appellant is engaged in the business of providing ERP Solutions to plantation industry. In the year 2004 the appellant purchased a loss making establishment functioning under the name and style of M/s. Soft Systems Ltd. Even after taking over, the company continued to incur loss. Hence there was delay in payment of wages for the period from 3/2006 to 2/2009 and consequently there was delay in remittance of provident fund contribution. The delay was due to reasons beyond the control of the appellant and was neither willful nor deliberate. The copies of Balance Sheet for the accounting years 2006-2007, 2007-2008 & 2008-2009 are produced & marked as Annexure A1 series. The appellant received a notice dt. 06/09/2010 from the respondent directing to show cause why damages stipulated U/s 14B of the Act shall not be levied on the appellant for belated remittance of provident fund contribution. The appellant filed a detailed written statement

explaining the factual and legal position. Without considering any of the reasons given by the appellant, the respondent issued the impugned order. The respondent failed to exercise the discretion available U/s 14B of the Act and also Para 32A of EPF Scheme. In **RPFC Vs SD College Hoshiarpur** , 1997 (2) LLJ 57 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. In **Indian Telephone Industries Vs APFC**, WP(C) No, 32515 of 2005 the Hon'ble High Court of Kerala held that the authority exercising powers U/s 14B has the discretion to reduce the damages and is not bound by any rigid guidelines unless there is deliberate Act of defiance of law or contumacious conduct.

3. Respondent filed counter denying the above allegation. The appellant defaulted in payment of provident fund contribution for the period from 03/2006 to 02/2009. Being a statutory obligation, belated remittance of contribution as provided U/s 6 of the Act will attract damages U/s 14B of the Act read with Para 32A of EPF Scheme. Hence a notice was issued to the appellant to show cause why penal

damages shall not be levied for belated remittance of contribution. A detailed delay statement was also enclosed with the notice. The appellant was also given a personal hearing on 18/8/2010. The appellant was represented in the enquiry. The appellant produced documents to support their claim that the establishment was having financial difficulties. According to them, the appellant purchased a loss making unit in 2004 and the company was incurring loss since then. The appellant also pleaded that there was delay in payment of wages. After examining all the documents produced by the appellant, the respondent authority found that there was no valid ground for the withholding the payment of provident fund. The appellant failed to remit even employees' share of provident fund contribution deducted from the salary of the employees. Respondent therefore issued the impugned order. There is a statutory liability cast upon the appellant under Paras 30 & 38 of the Employees' Provident Fund Scheme to remit monthly contribution within 15 days of close of every month. The liability under the Act arises the moment the wages are earned by the employees irrespective of whether it is actually paid or not. The damages U/s 14B goes to

augment the trust funds and it is not taken as a revenue by the respondent organization. The Hon'ble Supreme Court of India in **Organo Chemical Industries Vs Union of India**, 1979 (2) LLJ 416 SC held that the expression damages occurring in Sec 14B of the Act is in substance the penalty imposed on the employer for the breach of statutory obligation. The predominant objective is to penalize, so that the employer is thwarted and deterred from making any further defaults. With regard to **Indian Telephone Industries case** (Supra) it is pointed out that the respondent organization has filed Writ Appeal 2181/2006 before the Hon'ble Division Bench against the said judgment, and the Hon'ble High Court was pleased to dispose of the Writ appeal vide judgment dt. 28/08/2008 directing to Central Board of Trustees to consider the application for waiver submitted by the establishment, untrammelled by any of the observations made by the learned single Judge. The Hon'ble Division Bench also held that the observations of the learned single Judge is not sustainable for the reason that the declaratory relief granted by the learned single Judge is impermissible in law. It is also pointed out that appeal number ATA 231 (7) 2006 filed

by the appellant on the same grounds against penal damages levied for the period from 04/2002 to 03/2005, was dismissed by the EPF Appellate Tribunal vide its order dt. 20/01/2011. The Hon'ble Supreme Court of India in **Hindustan Times Ltd Vs Union of India**, AIR 1998 SC 682 rejected the contention of financial difficulties for belated payment of Provident Fund Contribution In **Calicut Modern Spinning & Weaving Mill Vs RPFC**, 1981 (1) LLJ 440 the Hon'ble High Court of Kerala also held that even in case of lock-out, strike etc failure to make contribution resulting in default will have to be visited with damages U/s 14B of the Act. In **Sky Machinery Ltd Vs RPFC**, 1998 LLR 9825 the Hon'ble High Court of Orissa held that financial crunch will not be sufficient for waving damages for delay in depositing provident fund contribution.

4. According to the learned Counsel for the appellant the main and only ground for delayed remittance of contribution is that of financial difficulties. The learned Counsel for the appellant argued that the respondent has the discretion to levy damages depending on the facts and circumstances of each case. However he failed to exercise that

discretion while issuing the impugned order. The Division Bench of the Hon'ble High Court of Kerala in **RPFC Vs Harrison's Malayalam Ltd**, 2013 (3) KLT 790 held that the financial difficulties of the establishment shall also be considered while levying damages U/s 14B . An establishment crippled with financial difficulties cannot be burdened with penal consequence by way of damages so as to sound death knell of the establishment itself. The Hon'ble High Court of Madras in **Bojraj Textile Mills Ltd Vs EPF Appellate Tribunal**, 2020 LLR 194 held that the levy of damages without proving mensrea on the part of the employer is not sustainable. In **Sreekamakshy Agency Private Limited Vs EPF Tribunal**, WP (C) No.10181 of 2010 the Hon'ble High Court of Kerala held that damages are levied for deliberate non- payment in time therefore the authorities under the Act has to assess as to whether the dues is not paid due to any deliberate inaction on the part of the employers concerned. In **Elston Tea Estate Ltd Vs RPFC**, WP (C) 21504 of 2010 the Hon'ble High Court of Kerala held that the financial constrains have to be demonstrated before the authority with all cogent evidence for satisfaction to arrive at the conclusion

that it has to be taken as a mitigating factor for lessening the liability. In **Standard Furnishing Vs Registrar, EPF Appellate Tribunal**, 2020 (3) KLJ 528 the Hon'ble High Court of Kerala held that the levy of damages is not automatic and all the circumstances which lead to the delay in remittance of provident fund contribution have to be factored by the authorities concerned before issuing the order. The main ground pleaded by learned Counsel for the appellant for reducing damages is financial difficulties. According to the appellant after taking over the loss making company M/s. Soft Systems Limited, there was financial difficulties for the appellant establishment. The appellant produced the Balance Sheet from 31/03/2006 to substantiate their case of financial constrains. The Hon'ble Supreme Court of India in **Aluminium Corporation Vs Their workmen**, 1963 (II) LLJ 629 SC and various other decisions held that the Balance Sheet & Profit and Loss Account is not an evidence for proving the current assets and liabilities of an establishment unless the documents are proved before the concerned authority. Further the documents produced by the appellant do not show such a financial constraint to delay the

provident fund contribution of its employees in time. For the financial year ending 31/03/2006 the appellant has incurred a loss of Rs. 118.43 lakhs. However there were a profit of Rs.61.23 lakh for the year ending 31/03/2011. It is also seen that the income of the appellant establishment has increased by 75.52 % compared to 2006. The annual report also says that the operations and the financial situations of the company has been stabilized in 2007. In the year 2008 also it is seen that there is an increase of 42 % in total income where as there is a loss of 83.93 lakhs. The current liability of the appellant has also come down to Rs. 102.98 lakhs in 31/03/2007 to 93.69 lakhs as on 31/3/2008. However it is seen that the appellant establishment is a chronic defaulter in payment of provident fund contribution. There was total damages of Rs.13,05,230/-as on 31/03/2007 and this liability has gone up to Rs.15,65,732/-as on 31/03/2008. From the above, it is very clear that the financial position of the appellant was not that bad warranting delayed payment of provident fund contribution. Further the learned Counsel for the respondent pointed out that the employees' share of contribution deducted from salary of the employees were also

not paid by the appellant in time. Though the learned Counsel for the appellant argued that there was delay in payment of wages to the employees, such a claim is not supported by any evidence. However the documents produced by the appellant would clearly show that the wages and salary to the employees' were paid generally in time. Non remittance of employees share of contribution deducted from the salary of the employees is an offense 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 extend of the employees share deducted from the salary of the employees. The only supporting factor for the appellant in this appeal is that the appellant was running under loss for few years for the relevant point of time. To that extend the appellant is entitled for some relief.

4. Considering the facts, circumstances, evidence and arguments, I am inclined to hold that interest of justice will be met if the appellant is directed to remit 75% of the damages assessed U/s 14B of the Act.

Hence the appeal is partially allowed the impugned order U/s 14B is modified and the appellant is direct to remit 75% of the damages.

Sd/-

(V. Vijaya Kumar)
Presiding Officer