



सत्यमेव जयते

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

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

(Tuesday the 22nd day of March, 2022

APPEAL No.452/2019
(Old No. ATA 247(7)/2016)

Appellant

M/s. Toonz Animation India (P) Ltd
731-735, Nila, Technopark Campus,
Kariavattom,
Trivandrum – 695 581.

By M/s. Menon & Pai

Respondent

The Regional PF Commissioner
EPFO, Regional Office, Pattom
Thiruvananthapuram - 695 004.

By Adv. Ajoy P.B.

This case coming up for final hearing on 09/02/2022
and this Tribunal-cum-Labour Court on 22/03/2022 passed
the following:

ORDER

Present appeal is filed from notice No. KR / 16437 / RO
/ TVM / PD /2015 / 4951 dt. 29/10/2015 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 03/2013 to 03/2015. The total damages assessed is Rs.11,06,902-.

2. The appellant is one of South Asia's leading animation company engaged in the development and production of animated content for feature films, television internet and a broad spectrum of media platforms. The appellant has its facility and staff in Philippines, Singapore, Canada, USA and India. The facility at Techno Park, Trivandrum employees 400 highly trained artists. The appellant provides variety of services including contract production, co-production and original content development. The appellant is known for its A-list clientele, including among others, global entertainment giants like Hallmark, Walt Disney, Paramount, Marvel and Warner Brothers. The appellant company has been following the transfer pricing policy wherein all Invoices are raised in favour of TEPL, with cost plus 17%, since all the contracts are given by the customers to the associate concern in Singapore. The appellant started facing difficulties since 2011-2012, as it was relying on the work from USA and other western countries. The recession knocked the bottom of appellant company. As a result of financial crisis the company could not pay wages to its

employees in time and consequently there was delay in remittance of contribution. The respondent initiated action for assessment of damages for delayed remittance of contribution for the period March 2013 to June 2015. A true copy of the show cause notice dt. 29/05/2015 is produced and Marked as Annexure A1. The appellant submitted a reply stating that the delay was neither deliberate nor willful and it was due to the financial crisis faced by the appellant establishment. It was also stated that the wages were also being paid in installments. A true copy of the reply dt. 14/10/2010 is produced and marked as Annexure A2. Ignoring the contentions of the appellant, the respondent issued the impugned order. The appellant failed to exercise his discretion available U/s 14B of the Act. The Hon'ble Supreme Court of India in **RPFC Vs SD College Hoshiarpur**, 1997 (2) LLJ 55 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 **Regional PF Commissioner Vs Harrison's Malayalam Ltd.**, 2013 (3) KLT 790 held that when there is no willful violation, the quantum of damages should be more or less compensatory in nature.

3. The respondent filed counter denying the above allegations. The appellant is chronic defaulter in payment of provident fund dues. Since there was delay in remittance of contribution for the period 03/2013 to 03/2015 the respondent issued notice U/s 14B of the Act read with Para 32A of EPF Scheme. A detailed delay statement was also enclosed along with the statement. The appellant was given an opportunity for personal hearing on 15/10/2015. A representative of the appellant appeared and filed a written statement dt. 14/10/2015. According to the representative the delay in remittance was unintentional as the company has been facing series of misfortunes for several months. The financial difficulties or other misfortunes cannot be a justifiable reason to waive or reduce penal damages. The respondent authority therefore issued the impugned order assessing damages as per Para 32A of EPF Scheme. 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 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. Besides 50% of the contributions deposited late represented the employees' share which had been deducted from the employees' wages and was a trust money with employer for deposit in the statutory fund. The delay in the deposit of this part of the contribution amounted to breach of trust and does not entitle the employer to any consideration for relief.”

4. The Hon'ble Supreme Court of India in **Hindustan Times Ltd Vs Union of India**, AIR 1998 SC 682 rejected the financial difficulties as a plea for reducing or waiving damages.

5. The appellant establishment delayed remittance of provident fund contribution for the period 03/2013 to 03/2015. The respondent therefore initiated action U/s 14B of the Act read with Para 32A of EPF Scheme. The respondent issued notice along with a detailed delay statement showing the monthly delay and proposed damages U/s 14B of the Act. The appellant was also given an opportunity for personal hearing. A

representative of the appellant attended the hearing and filed a brief written statement stating that the delay was unintentional as the appellant was facing series of misfortunes for the last several months. It was also pleaded that the salary of the employees were paid in installments. The respondent authority considered the submission of the representative of the appellant and held that financial difficulties or the misfortunes suffered by the appellant is unfortunate but the same cannot be a justifiable reason for waiving or reducing the penal damages.

6. In this appeal also the learned Counsel for the appellant pleaded that though the respondent was convinced that the appellant establishment had financial difficulties during the relevant point of time failed to reduce or waive damages by exercising his discretion available U/s 14B and Para 32A of EPF Scheme. Though the appellant pleaded financial difficulties they failed to produce any documents to substantiate the claim of financial difficulties. Even the claim of the appellant that the salary of the employees were paid in installments is not prove through any documentary evidence.

7. 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.

8. It is not clear from the impugned order as to how the respondent authority arrived at a conclusion that there was financial difficulty though for a short period. The learned Counsel for the appellant specifically pleaded in this appeal that the appellant failed to produce any documents other than the written brief submission regarding the financial difficulties. The learned Counsel for the respondent also pointed out that the appellant admitted that the wages were paid to its employees, though in installments. However the employees' share of

contribution deducted from the salary of the employees was also not paid in time. Non-remittance of contribution deducted from the salary of the employees is an offence of breach of trust and the appellant cannot plead that there is no intentional delay in non-remittance of contribution deducted from the salary of the employees. Further as per Para 30 of EPF Scheme, an employer shall in the first instance, pay both the contribution payable by himself and also on behalf of the member employed by him directly or through a contractor. Hence it is clear that the provident fund dues are payable on due basis and not on the salary paid by an employer. Even the finding by the respondent authority that there was some financial difficulties for a short period by itself cannot be a reason for delayed remittance of contribution. The learned Counsel for the appellant also relied on the decision of **RPFC Vs Harrison's Malayalam Ltd** (Supra), to argue that mensrea is a relevant consideration while deciding the quantum of damages. The respondent organization challenged the above the judgment of the Division Bench of the Kerala High Court before Hon'ble Supreme Court in SLP No. 21174 of the 2015 and the Hon'ble Supreme Court vide its judgment dt. 06/05/2016, while upholding the percentage of damages

held that the question of law involved in the case is kept open to be divided in an appropriate case.

9. 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”

10. Considering the facts, circumstances and pleadings in this appeal, I am not inclined to interfere with the impugned order, as the appellant failed to substantiate the claim of financial difficulties at the relevant point of time.

Hence the appeal is dismissed.

Sd/~

(V. Vijaya Kumar)
Presiding Officer