



सत्यमेव जयते

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

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

(Monday the 18th day of April , 2022)

APPEAL No.72/2021

Appellant : M/s. BPL Telecom Limited,
Chandranagar.
Palakkad – 678 007

By M/s. Menon & Pai

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

By Adv. Dr.Abraham P.Meachinkara

This case coming up for final hearing on 13/04/2022
and this Tribunal-cum-Labour Court on 18/04/2022 passed the
following:

ORDER

Present appeal is filed from Order No. KR/KKD/14506/ Penal
Damages/2021/2539 dt. 02/08/21 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

01/04/2019 to 31/03/2020. The total damages assessed is Rs. 9,43,432/-.

2. Appellant is a company registered under the Companies' Act 1956. The appellant is covered under the provisions of the Act. The appellant is engaged in the manufacturing of power line communication carrier, EPABX, Push button Telephones etc. With the opening of the economy, free import of goods and entry of foreign manufacturer making huge investments, the appellant company started facing severe competition. The financial position of the appellant establishment started declining from the year 2000 onwards. From December 2005 there was delay in payment of wages to the employees and consequently there was delay in remitting contribution to the fund. The delay occurred on account of various mitigating circumstances and other factors beyond the control of the appellant. The severe financial crisis lead to curtailment of operation. The accumulated loss till 31/03/2019 was Rs.32.73 crores and the loss for the financial year ending 31/03/2020 was 3.34 crores. The true copies of the Profit and Loss account for the financial years 2018-2020 are produced and

marked as Annexure A1, A2 & A3. The respondent initiated action for assessing damages for delayed remittance of contribution. The respondent issued a notice fixing the enquiry through Google meet platform on 08/03/2021. The true copy of the said notice along with the delay statement dt. 02/02/2021 is produced and marked as Annexure A4. A representative of the appellant attended the hearing and explained the mitigating circumstances and also filed a written statement dt.07/04/2021. A copy of the said reply is produced and marked as Annexure A5. The Covid-19 pandemic worsened situation and the factory was closed since 14/04/2021. The appellant made another written submission dt. 09/06/2021 requesting the respondent to waive the damages as the appellant establishment was going through real financial crisis. Ignoring the contentions the respondent issued the impugned order, the copy of which is produced and marked as Annexure A6. The respondent authority failed to exercise its discretion available U/s 14B of the Act and Para 32A of EPF Scheme. In **RPFC Vs SD College, Hoshiapur**, 1997(2) LLJ 55 the Hon'ble Supreme Court held that though the Commissioner has no power to waive penalty altogether, he has discretion to reduce the percentage of damages.

In **RPFC Vs Harrison Malayalam Ltd**, 2013 (3) KLT 790 the Division Bench of Hon'ble High Court of Kerala held that the existence of mensrea and actusreus to contravene a statutory provision must also be held to be a necessary ingredient while levying damages. The Hon'ble Supreme Court of India in **McLeod Russel India Ltd Vs RPFC**, AIR 2015 SC 2573 and **Assistant PF Commissioner, EPFO and another Vs Management of RSL Textiles India Ltd** , 2017 (3) SSC 110 held that mensrea is a determinative factor while imposing damages U/s 14B of the Act. In **M/s.Sreekamakshy Agency Pvt Ltd Vs EPF Appellate Tribunal**, W.P.(C) No. 10181/2010, **Elston Tea Estate Ltd Vs RPFC and Another**, W.P.(C) No.21504/ 2010, and **Standard Furnishing Co. Ltd Vs Registrar EPF Appellate Tribunal**, 2020 3 KLJ 528 the Hon'ble High Court of Kerala held that the authorities under the Act has to assess as to whether the contribution is not paid due to any deliberate inaction on the part of the employers concerned.

3. Respondent filed counter denying the above allegations. Appellant is an establishment covered under the provisions of the Act with effect from 01/03/1996. Hence the appellant is liable to remit the contribution as per the Act and Scheme provisions

within 15th of the close of the month. The appellant delayed remittance of contribution for the period 04/2019 to 03/2020. The respondent therefore issued a summons dt. 02.02.2021 to show cause why damages should not be recovered for belated remittance of contribution. A detailed monthwise delay statement was also forwarded along with the summons. The appellant was also giving an opportunity for personal hearing on 08/03/2021. A representative of the appellant appeared on virtual mode and sought time to verify the damages calculation as per the delay statement send along with the summons. The representative of the appellant admitted during the virtual hearing that the employees' share of contribution was deducted when salary was paid. But even that part of the contribution was not remitted to the EPFO. This is a criminal breach of trust by the appellant. The representative of the appellant also pleaded financial hardship for delayed remittance of contribution. However he failed to produce any documents to substantiate the claim. On the next date of posting the appellant produced the balance sheet for four years. The financial problem pointed out by the appellant vide his written submission dt. 09/06/2021 cannot be accepted as it is

part and parcel of any business and cannot be a reason for escaping the statutory obligation. The appellant is required to remit the contributions as per Para 30 & 38 of EPF Scheme within 15 days of close of every month. The liability of the appellant started the moment the wages are earned by the members irrespective of whether it is actually paid or not. The only ground pleaded by the appellant before the respondent authority was that of financial difficulties. The Division Bench of the Hon'ble High Court of Kerala in **Calicut Modern Spinning and Weaving Mills Ltd Vs RPFC**, 1982 KLT 303 held that the employer is bound to contribute under the Act every month voluntarily irrespective of the fact that the wages have been paid or not. 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 of 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”. The Hon'ble Supreme Court of India in **Chairman, SEBI Vs Sri Ram Mutual Fund and Another**, 2006 (5) SCC 361 held that intention

of parties is not relevant and mensrea is not an essential ingredient for contravention of the provisions of a civil Act .

4. The appellant establishment delayed remittance of contribution for the period 04/2019 to 03/2020. Para 30 & 38 of EPF Scheme mandates that the appellant is required to remit the contribution within 15 days of close of every month after the salary is earned by the employees irrespective of whether the salary is paid or not. The respondent therefore initiated an enquiry U/s 14B of the Act read with Para 32A of EPF Scheme. The respondent issued a summons with delay statement and also giving an opportunity to the appellant to appear on the virtual mode. A representative of the appellant attended the hearing through virtual mode, admitted the delay and pleaded that the delay was due to the financial constrains of the appellant establishment. The appellant also produced the balance sheet for four years to substantiate their case that the appellant establishment was under financial strain during the relevant point of time. They also filed a written statement stating that the appellant establishment was closed due to Covid-19 pandemic. The respondent took a view that financial constrains cannot be a ground for delayed remittance of

contribution as the Scheme provisions clearly mandates that the employer will have to remit both the contribution once the wages are earned by the employees. The respondent therefore issued the impugned order.

5. In the present appeal also the learned Counsel for the appellant reiterated its earlier position before the respondent authority that the delay in remittance was due to the financial constrains of the appellant establishment . The appellant also produced Annexure A1 to A3 balance sheets to substantiate their financial difficulties. From the balance sheet for the year ending 31/03/2018 it is seen that the current assets of the appellant establishment was Rs.36.17 crores. For the year ending 31/03/2019 the same was Rs.25.45 crores. For the year ending 31/03/2020 it was Rs.80.74 crores. Further the revenue income of the appellant for the year ending 31/03/2018 is Rs.19.57 crores and for the year ending 31/03/2019 it was Rs.15.93 crores and for the year ending 31/03/2010 it was Rs. 9.13 crores. Further it is seen that during the year ending 31/03/2018 the appellant paid salaries and wages to the tune of Rs.7.16 crores and remitted provident fund contribution of Rs.53.33.lakhs, for the

year ending 31/03/2019 the salary and wages paid to the employees was Rs.7.81 crores and contribution paid to provident fund was Rs.56.72 lakhs. For the year 31/03/2010 the salary and wages paid was Rs.6.29 crores and contribution paid to provident fund was Rs.40.77 lakhs. Hence it is clear that the delay in remittance of provident fund contribution cannot be exclusively attributed to the financial constrains of the appellant establishment. The delay can only be attributed as a deferred payment after all other statutory liabilities are met. The learned Counsel for the appellant pointed out that the appellant company was under loss during the relevant time. For the year ending 31/03/2018 there was a loss of Rs.3,49,88,196/- and for the year ending 31/03/2019 there was a loss of Rs.25,59,46,587/- and for the year ending 31/03/2020 there was a loss of Rs.3,34,60,058/-. Hence the claim of the learned Counsel for the appellant that there was loss during the relevant point of time cannot be disputed. The learned Counsel for the respondent however pointed out that the figures appearing in the balance sheet shall not be taken as a ground for deciding the quantum of damages as these documents were not substantiated before the

respondent authority. The Hon'ble Supreme Court of India in **Management Trichinappaly Mills Vs National Cotton Mills Works Union**, Air 1960 SC 1003 held that the balance sheet by itself will not prove the financial position of an establishment unless the figures in the balance sheet are proved through a competent witness before the lower court or the concerned authority. However the fact that the appellant establishment was running under loss cannot be disputed.

6. The learned Counsel for the appellant also pleaded that in view of the various decisions cited by him, the respondent authority ought to have taken in to account the fact that there was no intentional delay or mensrea in belated remittance of contribution. The learned Counsel for the respondent pointed out that it was admitted during the proceedings U/s 14B before the respondent authority that the employees share of contribution deducted from the salary of the employees was also not remitted by the appellant establishment. The learned Counsel for the appellant tried to impress upon the fact that there was delay in payment of wages. The documents now produce by the appellant will not substantiate the claim that there was delay in payment of

wages. When the wages are paid, the employees' share of contribution is deducted from the salary of the employees. Non-remittance of the 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. 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”

7. It is an accepted proposition of law that the financial difficulties established by the appellant before the respondent authority can be a ground for interfering with the assessment of damages U/s 14B of the Act. Though the ground of financial constraints pleaded by the learned Counsel for the appellant cannot be fully accepted as a reason for delayed remittance of contribution, the fact remains that the appellant establishment was under loss during the relevant point of time. The plea of the appellant that the appellant establishment was closed from March 2020 due to Covid-19 pandemic is not relevant as the assessment period is prior to the Covid-19 lockdown. However considering the loss sustained by the appellant establishment during the relevant point of time, the appellant is entitled for some relief with regard to the quantum of damages U/s 14B of the Act.

8. Considering all the facts, circumstances pleadings and evidence 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 the impugned order.

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

Sd/~

(V. Vijaya Kumar)
Presiding Officer