



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

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

(Wednesday the 22nd day of December, 2021)

APPEAL No.748/2019
(Old No. ATA 469(7) 2012)

Appellant

Sree Vijayananda Vidyapeedam
Aranmula. P.O
Pathanamthitta District
Kerala State
South India – 689614.

By Adv. C.M. Stephen

Respondent

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

By Adv. Nitha. N.S.

This case coming up for final hearing on 03/09/2021 and this
Tribunal-cum-Labour Court on 22/12/2021 passed the following:

ORDER

Present appeal is filed from notice No. KR / TVM / Circle:15
/Damages / KR / 22728 / CA /9289 dt. 03/10/2011
& order No. KR/ 22728 / TVM / PD /NS/2011/10072 dt.24/10/2011
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 01/2001 to 03/2009. The total damages assessed is Rs.3,28,796/-.

2. Appeal against notice dt. 03/10/2011 is not maintainable and the same is rejected.

3. The appeal is filed before EPF Appellate Tribunal as ATA No. 469(7)/2012. The appeal was admitted vide order dt.04/07/2012. The impugned order was stayed subject to the condition that the appellant shall remit an amount of Rs. 1 lakh within 4 weeks of the order. The learned Counsel for the respondent could not confirm the remittance.

4. The appellant is an educational institution affiliated to the Central Board of Education, New Delhi. Copy of the affiliation certificate is produced and marked as Annexure A3 series. The appellant establishment is covered w.e.f 01/06/2007 vide coverage memo dt. 29/09/2008. A copy of the coverage memo is produced and marked as Annexure A4. The preponement of coverage to 1/2001 is without any authority. The true copies of the challans for having remitted the amount in time for the period from 01/06/2007 to 31/03/2009 is produced and marked as Annexure A5 series. Copies of the returns filed during the relevant period is marked as Annexure A6

series. The respondent authority cannot issue a composite order which is beyond his jurisdiction. A true copy of the trust deed of Sree Vijayananda Guru Devasmaraka Charitable Trust is produced and marked as Annexure A7 which would clearly show that the appellant establishment is only a charitable institution. The respondent failed to consider the financial position of the appellant establishment during the relevant period. A true copy of the financial statement for the year 2011-12 is produced and marked as Annexure A8. No opportunity was given to the appellant to assess the process by not disclosing the basis for reaching the figures in the impugned order. There was no deliberate and intentional delay in remittance of provident fund contribution. The respondent failed to issue show cause notice to the appellant before imposing damages and interest.

5. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act w.e.f 01/01/2001. The appellant defaulted in payment of contribution for the period from 01/2001 to 03/2009. The belated payment of contribution will attract damages U/s 14B of the Act read with Para 32A of EPF Scheme. Hence a show cause notice dt. 03/10/2011 was issued to the appellant to appear before the respondent authority on 10/10/2011. A detailed delay statement was also enclosed along with

the notice. None appeared in the enquiry nor there was any request for adjournment. Hence the respondent authority proceeded to issue the impugned order. On the request of the appellant the appellant establishment was covered under the provisions of the Act w.e.f 01/06/2007. Subsequently during inspection it was noticed that the employment strength of the appellant establishment crossed 20 as on January 2001 and the coverage was preponed to 01/2001. The appellant accepted the liability and remitted the contribution, but belatedly. Since the appellant failed to remit the contribution an enquiry U/s 7A of the Act was initiated wherein the date of coverage was preponed and the provident fund dues for the period from 01/2001 to 03/2009 was recovered from the appellant establishment. Since there was delay in remittance of contribution a notice was issued for which there was no response from the appellant and ultimately the impugned order U/s 14B is issued. The impugned order is issued after following the procedure prescribed U/s 14B of the Act. It is clear from the facts of this case that appellant fail to remit even the employees share of contribution deducted from the salary of the employees. It is a settled legal position that the financial difficulties cannot be a justifiable ground for the employer to escape provident fund liability.

6. The appellant establishment was covered under the provisions of the Act w.e.f 01/06/2007, as per Annexure A4. Subsequently during the inspection of the appellant establishment, the respondent found that the appellant satisfied the requirement for coverage as on 01/2001 and therefore the coverage is preponed to 01/2001. The appellant failed to remit the contribution. Therefore the respondent initiated action U/s 7A of the Act and recovered the dues. Since there was delay in remittance of contribution the respondent initiated action for assessing damages U/s 14B read with Para 32A of EPF Scheme. The respondent issued Annexure A1 notice dt.03/10/2011 directing the appellant to attend the hearing on 10/10/2011. A detailed delay statement showing the wage month, due date, the amount paid, the actual date of payment and proposed damages was also communicated to the appellant. The appellant failed to attend the enquiry on the appointment date or filed any objection to the delay statement . The appellant did not seek any adjournment as well. The respondent authority therefore proceeded to issue the impugned order assessing damages.

7. In this appeal, the appellant has taken a stand that the preponement of coverage is not correct. It is seen that the issue was taken up U/s 7A of the Act and the same was finalized and the

appellant also remitted the contribution. Hence the appellant cannot challenge the coverage in a proceedings U/s 14B of the Act. Another ground taken in this appeal is the remittances were made in time. The appellant produced A5 series of challans for remittance of contribution for the period from 01/06/2007 to 31/03/2009. On a perusal of the above challans it is clear that there was delay in remittance of contribution. However the appellant is silent with regard to delay in contribution from 01/2001 onwards. The appellant also pleaded that the delay in remittance was due to the financial difficulties of the appellant establishment. However no documents are produced before the respondent authority and also in this appeal to substantiate the claim of financial difficulties. 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 seen that the appellant has not approached this Tribunal with clean hands. It clearly suppresses the fact that the coverage of the appellant establishment was preponed to January 2001 in an enquiry U/s 7A of the Act. The appellant is therefore liable to remit contribution from January 2001 and the delay in remittance will attract damages U/s 14B of the Act. Another ground pleaded by the appellant is that there was no intentional delay in remittance of provident fund contribution.

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. The appellant also pleaded that appellant establishment had no notice regarding the 14B proceedings and the mode of calculation of damages is not known to him. It is seen that the Annexure A1 dt.03/10/2011 is a notice issued to the appellant U/s 14B and 7Q to appear before the respondent authority on 10/10/2011 at 11.am. The Annexure A1 also contained the details of calculation of the damages. Having failed to respond to the notice, the appellant cannot come up in appeal and plead that he was not given an opportunity for personal hearing. It is a consistent view of courts that when an opportunity is given to the employer and he fails to utilize the same to his advantage, he cannot subsequently plead that he was not provided an opportunity and also the order issued is not a speaking order. The Hon'ble High Court of Bombay

in **Super Processors Vs Union of India**, 1994 (3) LLJ 564 Bombay considered the above issue and held that

“Para 15 . However in the present case, the employer has failed to file a reply, failed to adduce evidence and has chosen to remain absent. In the present case 10 adjournments were granted but no reply was filed. I fail to see what reasons can be expected from the RPF”.

11. Since the petitioner have chosen not to filed to reply to the show cause notice and not lead evidence in support thereof, there was nothing which was adjudicate upon. Hence the impugned order cannot be assailed on the ground that it is not a speaking order.” A similar view was also taken the Hon'ble High Court of Punjab and Haryana in **T.C.M Woolen Mills Vs RPF**, 1980 (57) FJR 222. The Hon'ble High Court held that “ where no reply was filed by the employer against notice issued to him U/s 14B of the Act, he cannot complaint that the Commissioner did not make a speaking order as required by law. Unless the objections and factual matters are pressed before the Commissioner, he cannot imagine the same and adjudicate thereon.”

12. As already pointed out the appeal against the show cause notice dt. 03/10/2011 is not maintainable. Therefore there is no order

U/s 7Q from which this appeal can be filed. Even otherwise there is no provision U/s 7(I) to challenge a demand issued U/s 7Q of the Act .

13. The learned Counsel for the respondent pointed out that no appeal is maintainable from an order issued U/s 7Q of the Act. On a perusal of Sec 7(I) of the Act, it is seen that no appeal is provided from an order issued U/s 7Q of the Act. In **Arcot Textile Mills Vs RPFC**, AIR 2014 SC 295 the Hon'ble Supreme Court held that no appeal is provided from an order issued U/s 7Q of the Act. The Hon'ble High Court of Kerala in **District Nirmithi Kendra Vs EPFO**, W.P.(C) 234/2012 also clarified that no appeal can be prefer against an order issued U/s 7Q of the Act. In **M/s ISD Engineering School Vs EPFO**, WP(C) No. 5640/2015(D) and also in **St. Mary's Convent School Vs APFC**, WP (C) No. 28924/2016 (M) held that the order issued U/s 7Q of the Act is not appealable.

14. 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