सत्यमेव जयते

BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL

TRIBUNAL-CUM-LABOUR COURT, ERNAKULAM

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

(Tuesday the 9th day of March, 2021)

Appeal No.403/2018

Appellant	:	M/s. Casamia 5/283 A, Wynad Road, Eranhipalam Kozhikode – 673 020
		By M/s. Menon & Pai
Respondent	:	The Assisstant PF Commissioner EPFO, Regional Office Eranhipalam P.O, Kozhikode -673 006
		By Adv. Dr. Abraham P Meachinkara

This appeal came up for hearing on 28/01/2021 and this Industrial Tribunal cum Labour Court issued the following order on 09/03/2021.

O R D E R

Present appeal is filed from Order No. KR / KK / 28771 / Enf-1(4) / 14B / 2018 / 5016 Dt. 08/10/2018 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 04/2017 to 03/2018. The total damages assessed is Rs. 73,899/-. The interest demand U/s 7Q of the Act for the same period is also being challenged in this appeal.

2. The appellant received a notice dt. 11/05/2018 alleging delay in remittance of contribution for the period from 10/2012 to 12/2018. The notice is produced and marked as Exbt A3. The appellant filed a detailed reply dt. 30/6/2018 a copy of which is produced and marked as Exbt A4. The appellant was also afforded an opportunity for personal hearing on 07/08/2018. The appellant appeared before the respondent and filed a detailed reply a copy of which is produced and marked as Exbt. A6. The delay in remittance of contribution was not willful. The delay in remittance of contribution in respect of two non-enrolled employees were due to the fact that they were excluded employees as they were drawing a salary of more than Rs.6500/- during the relevant point of time. Though the appellant was clear that the two employees against whom the assessment was made by the respondent were excluded, the

appellant was compelled to remit the contribution in view of the coercive action and also because of the threat of criminal prosecution by the respondent. The appellant is not a habitual defaulter and there is no evidence to substantiate the claim of the respondent that the delay was intentional. The appellant establishment was running under heavy loss during the relevant point of time. The audited Balance Sheet for the year 2015-2016, 2016-2017 and 2017-2018 are produced as Exbts A7, A8 and A9 respectively. As per Exbt A7 the accumulated loss for the year 2015-2016 was Rs. 14.93 lakhs for the year 2016-2017 the accumulated loss was Rs. 28.47 lakhs. For the year 2017-2018 the accumulated loss was Rs. 6.57 lakhs. Even the rent due for the premises could not be paid due to acute financial stringency.

3. The respondent filed written statement denying the above allegations. Appellant is an establishment covered under the provision of the Act. Hence the appellant is liable to remit the contribution as per the provision of Sec 6 within the stipulated time. There was delay in remitting contribution for the period from 04/2017 to03/2018.Hence a notice dt.

11/05/2018 was issued to appellant to show cause why damages as envisaged U/s 14B of the Act should not be recovered from the appellant. The appellant was also given an opportunity for personal hearing on 13/06/2018. A representative of the appellant attended the hearing and filed a written statement requesting waiver of damages and interest. The Hon'ble High Court of Kerala in ***Calicut Modern Spinning and Weaving Mills Vs RPFC,*** 1982 KLT 303 held that an employer is bound to pay contributions under the Act every month voluntarily irrespective of the fact that wages have been paid or not. The claim of the appellant that there was delay in payment of wages is a violation of the fundamental rights guaranteed under Article 21 of the Constitution. When delay in making payment of wages itself is not legal granting any further concessions consequential thereto can never be contemplated by the legislature. In ***Chairman, SEBI Vs Sree Ram Mutual Fund,*** Civil Appeal No. 9523-9524/2003 the Hon'ble Supreme Court held that mensrea is not an essential ingredient for contravention of the provisions of a civil Act and penalty is attracted as soon

as contravention of the statutory obligation as contemplated by the Act is established and therefore the intention of the parties committing such violation becomes immaterial.

4. According to the learned Counsel for the appellant, the appellant establishment is not a chronic defaulter. The delay basically occurred because the forced enrollment of two non-enrolled employees. The respondent initiated an enquiry U/s 7A of the Act, to assess the dues in respect of these two employees for the period from 10/2012 to 02/2014 and from 08/2006 to 04/2017.The delay in remittance of contribution in respect of regular employees for the period 08/2016 to 04/2017 was also explained to the respondent. The respondent assessed an amount of Rs.1,21,507/- and after deducting the advance of Rs. 27,196/- the appellant was directed to remit an amount of Rs. 94,311/-. The impugned order U/s 7A was in respect of two employees who were exclude employees as per provisions of the Act as they were paid wages above Rs.6500/-. The employees also filed undertakings before at the respondent confirming the fact that they were drawing salary above Rs. 6500/-. This position

was also brought to the notice of the respondent vide Annexure A13 statement. Ignoring all the contentions, the respondent issued the order U/s 7A of the Act assessing dues in respect of these two employees. However even before the time limit for filing the appeal was over, the respondent took coercive action against the appellant for the recovery of the amount. The Hon'ble High Court of Kerala in ***Popular Industries Vs APFC and Recovery Officer,*** 2014 (4) KLT 538 held that an appellate remedy available to an assesee cannot be rendered nugatory before even the statutory period is over. It is a settled legal position that the respondent has discretion U/s 14B of the Act as well as Para 32A of EPF Scheme to levy damages taking into account the facts and circumstances of each case. In ***Regional PF Commissioner Vs Harrisons Malayalam Ltd.,*** 2013(3) KLT 790, the Division Bench of the Hon'ble High Court of Kerala held that the financial difficulties of an establishment is a valid criteria while deciding the damages U/s 14B of the Act. In ***Bojaraj Textile Mills Vs EPF Appellate Tribunal,*** 2020 LLR 194 the Hon'ble High Court of Madras held that mensrea or

actus reus shall be proved by passing a speaking order by the respondent. In ***M/s Sree Kamakshy Agency Ltd Vs. EPF Appellate Tribunal,*** WP (C) No. 10181/2010 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 action on the part of the employer. In ***Standard Furnishing (Unit of Sudarshan Trading Co. Ltd) Vs EPF Appellate Tribunal,*** 2020 (3) KLJ 528 the Division Bench of the Hon'ble High Court of Kerala held that levy of damages is not automatic and all the circumstance which lead to the delay in remittance of provident fund have to be factored by the authorities concerned before issuing the order. As already discussed above, in this particular case the delay in remittance was due to the fact that a retrospective assessment with regard to two employees were made by the respondent and according to the learned Counsel for the appellant the respondent recovered the amount through coercive action even before the expiry of time limit of filing the appeal. The appellant produced documents to substantiate their claims that the two

employees against whom the dues were assessed were excluded employees. The appellant ought to have challenged the order in appeal, had the appellant been really aggrieved regarding the assessment, even if the amount is recovered by the respondent. Having accepted the decision of the 7A authority, the appellant cannot challenge the same in a proceedings U/s 14B of the Act. However the learned Counsel for the appellant submitted that the appellant was under a bonafide belief that the two employees are excluded employees and therefore they were not required to be enrolled to provident fund membership. To that extend no intentional delay in remittance of contribution can be alleged against the appellant and no mensrea can also be attributed for delayed remittance of that part of the contribution.

5. The learned Counsel for the appellant also relied on Annexures A7, A8 and A9 audited Balance Sheets for the year 2015-2016, 2016-2017 and 2017-2018 respectively to argue that the appellant establishment was under severe financial difficulties during the relevant point of time. According to learned Counsel for the respondent the

appellant had accounted the provident fund contribution in respect of its employees in the above documents and any delay in remittance of the same with the respondent will attract damages U/s 14B of the Act. However in the facts and circumstance of this case, the main challenge is with regard to retrospective enrollment of two employees and the respondent cannot claim that the contribution accounted in Annexure A7 to A9 was not remitted by the appellant in time. However it is relevant for delayed remittance of contribution in respect of regular employees. With regard to delay in remittance of contribution in respect of regular employees the learned Counsel for the respondent argued that even the employees' share deducted from the salary of the employees was not remitted in time. 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.

6. Considering all the facts, circumstance, evidence and pleadings in this appeal, I am inclined to hold that

interest of justice will be met, if the appellant is directed to remit 60% of the damages assessed U/s 14B of the Act.

7. The learned Counsel for the respondent submitted that no appeal is maintainable against an order issued U/s 7Q of the Act. On perusal of Sec 7(I) of the Act, it is seen that there is no provision to challenge an order issued U/s 7Q of the Act. The Hon'ble Supreme Court of India in ***Arcot Textile Mills Vs RPFC,*** AIR 2014 SC 295 held that no appeal is maintainable from an order issued U/s 7Q of the Act. The Hon'ble High Court of Kerala in ***District Nirmithi Kendra Vs EPFO,*** WP(C) No. 234/2012 also held that an appeal against 7Q order is not maintainable.

Hence the appeal is partially allowed, the impugned order is modified and the appellant is directed to remit 60% of the damages assessed U/s 14B of the Act. The appeal filed against Sec 7Q order is dismissed as not maintainable.

Sd/-

(V.Vijaya Kumar)
Presiding Officer