



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

सत्यमेव जयते

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

(Monday the 17th day of May, 2021)

Appeal No.45/2017

Appellant : M/s. Elston Tea Estate
P.B. No. 21,
Kalpetta,
Waranad – 673 121.

By M/s. Menon & Pai

Respondent : The Assistant PF Commissioner
EPFO, Regional Office
Kozhikode – 673 006

By Adv. Dr. Abraham P.Meachinkara

This is case is coming up for final hearing on
13/04/2021 and this Tribunal-cum-Labour Court on
17/05/2021 passed the following:

ORDER

Present appeal is filed from Order No. KR/KK/
235A/Enf-2 (3)/14B/2017/3047 dt.14.08.2017 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 11/2002 to 03/2008. The total damages assessed is Rs. 20,85,893/-.

2. The appeal was heard and dismissed vide order dt. 02/09/2019. The appeal was dismissed basically on the ground that the profit and loss account produced by the appellant pertaining to M/s Padhoor Plantations Pvt. Ltd for the period from 31/03/2000 to 31/03/2003 will not in any way disclose the financial position of the appellant establishment. The appellant also failed to establish the relationship between M/s. Padhoor plantation and the appellant. It was also pointed out that the damages were assessed for the period from 11/2002 to 03/2008 whereas the documents produced relates to the period 2000 to 2003. The appellant filed a review petition No.372/2019 wherein it was pointed out that M/s. Padhoor plantation Pvt. Ltd had merged with Elston Estate Industries Ltd and Elston Tea Estate is owned by the present company. Further the appellant, review petitioner also produced the balance sheet of the appellant company for the period from 2000 to 2008 stating that the non-production of balance sheets from

2004 to 2008 was a bonafide mistake. After hearing the parties the review petition was allowed vide order dt. 22/01/2021 and the matter was taken up for final hearing.

3. The respondent assessed the damages for the period from 11/2002 to 03/2008 and issued the order on 14/08/2009. The total amount of damages assessed was Rs.26,07,366/-. The appellant moved the EPF Appellate Tribunal New Delhi in Appeal No. ATA 309 (7) 2010. The EPF Appellate Tribunal vide its order dt. 04/06/2010 dismissed the appeal on the ground of limitation as the appeal was filed beyond 120 days allowed by the EPF Appellate Tribunal Procedure Rules. The appellant challenged the above order before the Hon'ble High Court of Kerala in WPC No. 21504/2010. The Hon'ble High Court of Kerala without going into question of limitation vide its order dt. 09/06/2017 directed to respondent authority to re-examine the question of financial difficulties of the appellant and assess the damages after affording the appellant an opportunity for personal hearing. The present order under challenge is issued on

the basis of the directions of the Hon'ble High Court of Kerala.

4. The appellant is a private limited company engaged in the manufacturing of tea and owns a tea estate. The globalization of trading and the changes in economic reforms intimidated the economic viability of the plantation industry as a whole. Since 1998 the plantation industry in south India is facing financial crisis due to severe decline in prices of its produce. The decline in profitability affected the operation of the appellant company thereby causing heavy loss to the appellant. From 2002 onwards there was considerable delay in payment of wages to the employees which lead to delay in remitting contribution to EPF. On a perusal of the impugned order it is clear that the respondent has not complied with the directions of the Hon'ble High Court of Kerala. In its judgement dt.09.07.2017 the Hon'ble High Court stated that financial constrains beyond ones control can be a mitigating circumstance for reducing damages U/s 14B of the Act. In **RPFC Vs SD College** 1977(1) LLJ 55 the Hon'ble Supreme Court held that though the

Commissioner has no power to waive penalty, he has the discretion to reduce the percentage of damages. In **Shanthi Garments Ltd Vs RPFC**, the Hon'ble High Court of Madras pointed out that where there is no wilful violation, the quantum of damages should be more or less compensatory in nature. The Hon'ble High Court of Kerala in **RPFC Vs Harrison's Malayalam**, 2013 (3) KLT 790 also upheld the above view and also pointed out that the existence of mensrea and actusreus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and the quantum thereof. In **McLeod Ressel Vs RPFC**, AIR 2015 Supreme Court 2573 and **APFC Vs Management of R.S.L Textiles India Ltd**, 2017 3 SCC 110 the Apex Court pointed out that the presence of mensrea would be a determinative factor in imposing damages U/s 14B as also the quantum thereof since it is not inflexible that 100% of arrears has to be imposed in all cases.

5. The respondent filed counter affidavit denying the above allegation. The appellant is an establishment covered under the provisions of the Act. As per the

provisions of the Act provident fund and other contributions have to be deposited by the employer by the 15th of next month in which the employee has worked in the establishment and the dues become payable to him because the worker has already performed his duty up to the last date of previous month. The contributions have to be deposited by the employer only after the beneficiary worker has already worked and earned the amount in terms of contract of employment and the provisions of the Act. When there is delay in payment of the statutory dues rightfully earn in terms of the provisions of the Act the appellant is liable to compensate the same as provided in the Act and Scheme provisions.

6. The respondent complied with the directions issued by the Hon'ble High Court of Kerala in W.P.(C)no.21504/2010 by affording the appellant an opportunity to be heard before the impugned order is issued. The Division Bench of Hon'ble High Court of Kerala in **Calicut Modern Spinning & Weaving Mills Ltd Vs RPFC**, 1982 KLT 303 held that the employer is bound to pay contributions under the Act every month

voluntarily irrespective of the fact that wages have been paid or not. More over granting any concession to the employer on their refusal to pay wages to the employees which is a fundamental right guaranteed under Article 21 of the Constitution is not a valid law. When delay in making payments of wages itself is not legal, granting any further concession consequential thereto can never be contemplated by the legislature. The Hon'ble Supreme Court in the case of **Chairman, SEBI Vs Sriram Mutual Funds**, Civil Appeal no.9523-9524/2003 observed " in our opinion the Tribunal has miserably failed to appreciate that by setting aside the order of the adjudicating officer the Tribunal was setting a serious wrong precedent whereby every offender would take shelter of alleged hardships to violate the provisions of the Act. In our opinion mensrea is not as essential ingredient for contravention of the provisions of a Civil Act. In our view, the penalty is attracted as soon as the contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In other

words the breach of civil obligation which attract penalty under the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not.”

7. The main ground pleaded by the learned Counsel for the appellant is the financial difficulties of the appellant establishment during the relevant period of time. The appellant produced the balance sheets of the appellant establishment for the period from 2003-04 to 2009-10 to substantiate their claim of financial difficulties. The balance sheet up to 2004-05 is that of M/s. Padhoor Plantation Pvt. Ltd and from 2005-06 onwards the same pertains to M/s Elston Tea Estate Ltd. It is clarified in the review application that M/s. Padhoor Plantation Pvt. Ltd merged with Elston Tea Estate and Industries Ltd and the Elston Tea Estate is owned by the present company. The appellant has already produced the Balance Sheet and Profit and Loss Account for 2002-03 along with the original appeal. The learned Counsel for the respondent argued that these documents were not produced before the respondent authority and therefore

the same shall not be relied on for the purpose of deciding the quantum of damages in this appeal. He further pointed out that the figures reflected in the Balance Sheet cannot be considered for deciding the financial status of an employer unless the figures reflected therein are properly proved before the respondent authority. The Hon'ble Supreme Court of India in ***Aluminium Corporation Vs Their Workman*** 1964(4) SCR 429 held that the mere statement in the balance sheet as regards current assets and current liabilities cannot be taken as sacrosanct. The Hon'ble Court also held that the correctness of the figures as shown in the Balance Sheet itself are to be established by proper evidence by those responsible for preparing the Balance Sheet or by a competent witness. The Hon'ble Supreme Court of India in ***Bengal Kagabkal Masdoor Union Vs Titagarh Paper Mills Co. Ltd*** , 1964 SCR 38 also took the same view with regard to the admissibility of the figures in balance sheet to express the financial position of an establishment. On a perusal of the balance sheets produced by the appellant in this appeal it is seen that

the appellant is chronic defaulter and is paying damages and interest as reflected in every balance sheet. Further it is seen that the appellant establishment is having huge revenue income and also huge amounts are being paid as salary and wages to its employees and it is seen that salary and wages are being paid on time. The learned Counsel for the appellant however pointed out that the balance sheet now produced also discloses the huge loss incurred by the appellant on an year to year basis. As on 31/03/2009 the total loss as per the balance sheet is Rs.6.21 crores. One thing that is clear from the documents now produced by the appellant is that financial difficulties by itself is not the reason for belated remittance of contribution. The approximate provident fund liability of the appellant establishment for the year ending 31/03/2009 is only 16 lakhs and the appellant establishment cannot plead the financial difficulties as a reason for non-remittance of the same in time. The learned Counsel for the appellant relied on the decision of the Hon'ble Supreme Court in ***Mcleod Russel India Ltd Vs RPFC***, 2014(3) KLJ 388 to argue that there was no

mensrea in the belated remittance of contribution. The Hon'ble Supreme Court held that

“ Further, the presence or absence of mensrea and or actusreus would be a determinative matter in imposing damages U/s 14B, as also the quantum thereof since it is not inflexible that 100% arrears has to be imposed in all cases. Alternatively stated, if damages have been imposed U/s 14B it would only be logical that mensrea and /or actusreus was prevailing at the relevant time. We may also note that this court had yet again reiterated the well known but often ignored principle that High Courts or any appellate authority created by a statute should not substitute their perception of discretion on that of the lower adjudicatory authority if, the impugned order does not otherwise manifest perversity in the course of decision making .”Going by the above dictum laid down by the Hon'ble Supreme Court the financial difficulties, if established by the appellant, can be a ground for claiming reduction or waiver of damages on the ground that there was mitigating circumstances leading to the delayed remittance of provident fund contribution.

8. The learned Counsel for the respondent relying on the documents produced by the appellant argued that the appellant was regular in paying salary to its employees. The appellant failed to substantiate their claim that there was delay in payment of wages to the employees. When the salaries of the employees are paid, the employees' share of contribution is deducted from the salary of the employees. According to the learned Counsel for the respondent, the appellant failed to remit even employees' share of contribution deducted from the salary of the employees in time. Non-remittance of the employees' share deducted from the salary of the employees and retaining the same with the appellant is an offense of breach of trust U/s 405 & 406 of Indian Penal Code. Having committed an offense of breach of trust the appellant cannot claim that the delay in remittance of provident fund contribution was not intentional and there was no mensrea in belated remittance of contribution.

9. Though the appellant failed to prove the figures in the balance sheet as pointed out earlier, the balance sheet now produced by the appellant shows that the

appellant was running under loss during the relevant point of time. Considering the fact that the plantation industry was going through a difficult phase financially during that point of time the loss incurred by the appellant establishment can be considered as a mitigating circumstance warranting some relief as far as levy of damages is concerned.

10. 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 levied U/s 14B of the Act.

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

Sd/-

(V. Vijaya Kumar)
Presiding Officer