



सत्यमेव जयते

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

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

(Wednesday the 2nd day of June, 2021)

APPEAL No.188/2018

Appellant

M/s.Traco Cable Company Ltd
JFTC, Chumathara
Pathanamthitta – 689 103.

By M/s.Menon & Pai

Respondent

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

By Adv. S.Prasanth

This case coming up for final hearing on
19/03/2021 and this Tribunal-cum-Labour Court on
02/06/2021 passed the following:

O R D E R

Present appeal is filed from Order
No.KR / TVM / 22685 /Damages Cell / 2018-19 / 2041
dt.05/06/2018 assessing damages U/s 14B of the EPF and MP
Act, 1952 (hereinafter referred to as 'the Act') for belated

remittance of contribution for the period from 02/2016 to 11/2017. The total damages assessed is Rs.10,28,723/-.

2. The appellant is a Government of Kerala undertaking with the registered office at Cochin and 3 different units located at different places at Kerala. The Thiruvalla unit of appellant, commenced its operations in the year 1999 and is engaged in the manufacturing of high quality electronics cables and wires. There was delay in remittance of Provident Fund contribution during the relevant period because of financial constraints of the appellant establishment. The accumulated loss of the company exceeded the net worth of the appellant company. True copy of the annual report for the year 2015-16, 2016-17 and the financial statement for the year 2016-17 are produced and marked as Annexure A1 series. The financial position of the appellant company started deteriorating from the year 2010. With mounting cash loss, the salaries and wages also could not be paid in time. Though there was delay in remittance of contribution the delay was not deliberate or willful and was due to circumstance beyond the control of the appellant. The respondent initiated action for levying damages for belated remittance of contribution for the period 02/2016 to

11/2017. The notice issued by the respondent is produced and marked as Annexure A2. A representative of the appellant attended the hearing and submitted that the delay was due to the acute financial crisis of the appellant establishment. Without considering the contentions made by the appellant, the respondent issued the impugned order which is produced and marked as Annexure A3. The respondent failed to use its discretion provided U/s 14B of the Act and along with Para 32A of the EPF Scheme. In ***RPFC Vs SD college Hoshiarpur***, 1997(2) LLJ 55 the Hon'ble Supreme Court 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 hon'ble High Court of Kerala in ***RPFC Vs Harrisons Malayalam Ltd***, 2013 (3) KLT 790 held that the respondent shall considered the financial difficulty projected by the appellant while deciding the quantum of damages. In ***Mcleod Russel India Ltd Vs RPFC***, AIR 2015 SC 2573 the Hon'ble Supreme Court of India held that the presence of mensrea or actus reus would be a determinative factor in imposing damages U/s 14B as also the quantum thereof. The said principle was

restated by Hon'ble Supreme Court in ***APFC and another Vs Management of RSL Textiles India Pvt Ltd***, 2017 3 SSC 110.

3. The respondent did not file any counter, however filed an argument note. According to the respondent the appellant defaulted in payment of statutory contribution during the period 02/2016 to 11/2017. Any delay in remittance of contribution will attract damages U/s 14B of the Act read with Para 32A of EPF Scheme. Hence notice dt.23/04/2018 was issued to the appellant to show cause why damages specified in Para 32A of EPF Scheme shall not be assessed against appellant for belated remittance of contribution. A representative attended on 16/05/2018. According to appellant the delay in remittance of contribution was not intentional and was due to financial difficulty faced by the appellant. The appellant failed to produce any document to substantiate their claim of financial difficulty and also any cogent reason for not remitting the contributions in time. It was also pointed out that the delayed contribution also includes the employees' share of contribution deducted from the salary of the employees.

4. The only ground pleaded by the appellant for delayed remittance of contribution is that of financial difficulty

during the relevant period of time. According to respondent no documents were produced before the respondent authority to substantiate their claim of financial difficulty. However the appellant produced the true copy of annual report for the year 2015-16 and 2016-17 along with the financial statement. According to the learned Counsel for the appellant the document now produced by the appellant will sufficiently indicate the financial constraints of the appellant establishment during the relevant period of time. On a perusal of the annual report for the year 2015-16 it is seen that the appellant company has incurred a loss of Rs.969.89 lakhs during the year 2015-16. It is further seen that for the year ending 31/03/2016 the total revenue from operations comes to Rs.12,333.42 lakhs and the employees benefit expenses were Rs.1957.30 lakhs. It is further seen that amount of Rs.1564.74 lakhs was paid as salaries and wages during the year and amount of Rs.218.55 lakhs is accounted towards Provident fund contribution. For the year ending 2016-17 it is seen that the appellant company has earned a profit of Rs.133.94 lakhs. The annual report further states that the accumulated loss of the company have far exceeded the net worth of the appellant company. For the year

ending 31/3/2017 the total revenue of the appellant establishment was Rs.13,747.98 lakhs and the employees benefit expenses were Rs.2114.10 lakhs. From the above general description of the financial statement of the appellant establishment it can be seen that though the appellant establishment was having financial constraints that by itself cannot be a ground for the delayed remittance of contribution. According to the learned Counsel for the respondent, the annual report and the financial statement now produced by the appellant shall not be considered for deciding the financial status of the appellant establishment since those documents were not properly proved and explained before the respondent authority. The Hon'ble Supreme Court of India in ***Bengal Kagabkal Mazdoor Unit Vs Titagarh Paper Mills Co Ltd***, 1964 SCR 38 held that the financial statements in the balance sheet as regard to current assets and liability cannot be taken as sacrosanct. Further, the correctness of figures shown in the balance sheet are also required to be established by proper evidence before the Court.

5. The learned Counsel for the appellant argued that it is a settled legal position that the respondent authority U/s 14B

has the discretion to waive or reduce damages on the basis of the circumstances of each case. The Hon'ble High Court of Kerala in ***RPFC Vs Harrisons Malayalam Ltd*** (Supra) took a view that an establishment crippled with financial difficulties cannot be burdened with penal consequence by way of damages, so as to sound death knell of the establishment itself. The Hon'ble High Court also held that financial difficulty can be one of the mitigating circumstances. In ***M/s Bojaraj Textile Mills Ltd Vs EPF Appellate Tribunal, New Delhi and others***, 2020 LLR 194 the Hon'ble High Court of Madras held that there should be a finding on mensrea before the damages are assessed. The Hon'ble High Court also held that the financial crisis on the part of the employer, if proved by the employer, levy of damages is not justified without giving reasons thereto. It was also pointed out by the learned Counsel for the appellant that, Rule 12 of EPF Appellate Tribunal (Procedure) Rule, 1997 mandates filing of reply by the respondent if they intent to contest the appeal. The learned Counsel for the appellant also relied on the decision of the Hon'ble High Court of Kerala in ***M/s Sreekamskshy Agency Pvt Ltd Vs EPF Appellate Tribunal and another***, W.P.(C) No. 10181 of 2010 to argue that the

authorities under the Act has to assess as to whether the contribution is not paid due to deliberate inaction on the part of the employer. In ***Standard Furnishing (Unit of Sudarshan Trading Co Ltd) Vs Registrar, EPF Appellate Tribunal***, 2020(3) KLJ 528 the Hon'ble High Court of Kerala held that levy of damages is not automatic and that all the circumstances which led to the delay in remitting the provident fund contribution had to be factored by the authorities concerned before issuing the order.

6. As already pointed out the appellant establishment was facing financial constraints at the relevant point of time. However as explained above, the financial constraints discussed above cannot be an adequate justification for delayed remittance of provident fund contribution. The appellant establishment was generating huge revenue income and was also spending huge amounts towards employees' benefits. The documents now produced by the appellant would also show that in 2016-17 the appellant establishment earned profit, though there was accumulated loss. The learned Counsel for the respondent contented that the appellant establishment even failed to remit the employees' share of contribution deduct from the salary of

the employees in time. Though the appellant admitted that there was delay in payment of wages the same was not substantiated by the appellant. The documents now produced by the appellant also will not support the claim of the appellant. When the salaries of the employees are paid in time, the employees' share of contribution is deducted from the salary of employees. The employees' share of contribution is approximately 50% of total contribution payable by the appellant establishment. It is seen from Annexure A2 document produced by the appellant establishment that delay in remittance of contribution varies from 7 days to 405 days. The average delay is more than 200 days in remitting the contribution. The employees' share of contribution deducted from the salary of the employees is also withheld by the appellant for such long periods. The non remittance of contribution deducted from the salary of employees is an offence U/s 405/406 of Indian Penal Code. Having committed an offence of breach of trust, the appellant cannot plead that there was no mensrea in belated remittance of contribution atleast to the extend of 50% of total contribution.

7. The learned Counsel for the appellant relied on the decision of the Division Bench of Hon'ble High Court of Kerala

in ***Harrisons Malayalam Vs RPFC*** (Supra). It is pointed out that the Hon'ble Supreme Court of India in SLP No 21174/2015 though rejected the special leave petition filed by the respondent, has kept the question of law open to decide in an appropriate case.

8. Considering the facts that the appellant is a State Government Public Sector undertaking and also the fact that the cumulative loss of the appellant establishment has exceeded the net worth of the appellant company and further the facts and circumstances as discussed above, I am inclined to hold that interest of justice will be met if the appellant is directed to remit 60% of the damages as per the impugned order.

Hence the appeal is partially allowed, the impugned order is modified and the appellant is directed to remit 60% of the damages assessed as per the impugned order.

Sd/-
(V. Vijaya Kumar)
Presiding Officer