



सत्यमेव जयते

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

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

(Tuesday the 12th day of October, 2021)

APPEAL No.228/2018

(Old no.149(7)2006)

Appellant : The Cochin Malabar Estates and
Industries Ltd
owning Pullikanam Estate
Malabar House, Bristow Road
Willingdon Island
Cochin - 682003

By M/s.Menon & Pai

Respondent : The Assistant PF Commissioner
EPFO, Sub Regional Office
Kottayam - 686001

By Adv.Joy Thattil Ittoop

This case coming up for hearing on 07.07.2021 and this Industrial
Tribunal-cum-Labour Court on 12.10.2021 passed the following:

ORDER

Present appeal is filed from order no.KR/KTM/346/PD/ENF-1(7)2006/4768
dt.07.12.2005 assessing damages U/s 14B of EPF & MP Act, 1972 (hereinafter

referred to as 'the Act') for belated remittance of contribution for the period from 11/2001 to 02/2003. The total damages assessed is Rs.22,64,120/-.

2. The appellant is one of the tea plantations of the appellant company. The respondent authority issued an order assessing damages. Aggrieved by the order, the appellant approached the EPF Appellate Tribunal, New Delhi in ATA No.149(7/2006). The EPF Appellate Tribunal vide its order dt.25.10.2007 modified the order directing the appellant to remit 70% of the damages assessed by the respondent authority. The appellant thereafter approached the Hon'ble High Court of Kerala in W.P.(C) no.20549/2008. The Hon'ble High Court of Kerala vide its judgment dt.31.03.2006 disposed of the petition with a direction to EPF Appellate Tribunal, New Delhi to dispose the appeal on the basis of the directions issued in the said writ petition. The Hon'ble High Court in Para 9 of its judgment stated that

“ 9. It can be seen that this Court had taken note of the financial crisis faced by the plantation industry in the state during the period subsequent to 1998-99 and it was found that the Tribunal had not consider the circumstances under which the default happened to occur and also the fact that the company had already paid the contributions when it started operation. According to the learned Counsel for the petitioner the circumstances arising in this case are identical. The

petitioner has produced Exbt.P1 order dt.29.06.2007 issued by the Ministry of Commerce and Industry with respect to a rehabilitation package for tea gardens. This letter is issued subsequent to Exbt.P4 order passed by the Tribunal. However it refers to the condition of the estate for the period prior to the date of the order. It is the case of the petitioner that payment was being made promptly when the petitioner was functioning normal. And going by the dictum laid down by this Court in the judgment (Supra), the damages levied on petitioner also should have been reduced. It is seen that the Tribunal did not have the occasion to take note of the seriousness of the financial crisis in the back ground of the rehabilitation scheme framed by the Central Govt to revive the closed tea gardens communicated as per Exbt.P1 letter on 29.06.2007. It did not have the occasion to consider the impact of the judgment (Supra) ”.

3. With the above observations the Hon'ble High Court set aside the order of EPF Appellate Tribunal, New Delhi and remitted the case back to the Tribunal to re-examine the order in view of the above observations. The EPF Appellate Tribunal, New Delhi transferred the file later to its bench at Bangalore

and thereafter is transferred to this Tribunal on abolition of EPF Appellate Tribunal.

4. After receipt of the files from Bangalore, notices were issued to the appellant as well as the respondent and the matter was heard.

5. According to the learned Counsel for the appellant, the plantation industry was facing acute crisis during 1998-99 onwards. Some of the manifestations of the crisis include high volatility and persistence of low commodity prices, decline in production, mounting costs of production, dwindling investments for renewal, removal of trade barriers and the adverse impacts of extreme climatic changes. The cumulative impact of all these factors impacted the plantation industry de-stabilizing the economy. Due to these situations the appellant was constrained to delay payment of wages to its employees as a result of which there was unintentional delay in payment of contribution to the fund from 04/1999. As far as the appellant tea estate is concerned, it was functioning intermittently and the company was incurring huge loss. The appellant, however mobilized funds and paid salary inspite of the fact that there was huge loss for the period from 1999-2000 to 2002-2003. For the financial year 1999-2000 the net loss for the year was Rs.11.31 Crores and the accumulated loss was Rs.21.86 Crores. For the year 2000-2001 the net loss for the year was Rs.8.86 Crores and the accumulated loss was Rs.13.72 Crores.

For the year 2001-2002 the net loss for the year was Rs.9.78 Crores and the accumulated loss was Rs.44.02 Crores. For the year 2002-2003 the net loss for the year was Rs.2.58 Crores and the accumulated loss was Rs.43.08 Crores. The annual reports for the relevant periods are produced and marked as Annexure B to Annexure F. M/s.Pullikanam Estate owned by the appellant delayed payment of wages to its employees and therefore there was delay in remittance of contribution for the period from 11/2001 to 02/2003. The respondent initiated action for assessing damages. The appellant replied, stating that the delay in remittance was due to financial constrains of the appellant establishment. The respondent, ignoring the contentions, issued an order dt.07.12.2005, a copy of which is produced and marked as Annexure A. The appellant preferred an appeal before EPF Appellate Tribunal. The appeal was numbered as ATA no.149(7)/2006. The EPF Appellate Tribunal partially allowed the appeal and modified the order of the respondent authority and directing the appellant to remit 70% of the damages. The appellant preferred W.P.(C) no.20549/2008 against the order of the EPF Appellate Tribunal and the Hon'ble High Court remitted back the case to EPF Appellate Tribunal for re-consideration vide its order dt.04.10.2016.

6. The respondent failed to exercise its discretion provided U/s 14B of the Act and Para 32A of EPF Scheme. In **RPFC Vs S.D. 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. In **Santhi Garments Vs RPFC**, 2003 (1) CLR 228 (Mad) the Hon'ble High Court of Madras held that where there is no willful violation, the quantum of damages should be more or less compensatory in nature. In **RPFC Vs Harrisons Malayalam Ltd**, 2013 (3) KLT 790 the Division Bench of the Hon'ble High Court of Kerala held that the respondent shall consider the financial difficulties while deciding the quantum of damages and financial constrains are one of the mitigating circumstances that should be considered by the respondent authority. The Hon'ble High Court of Madras in **M/s.Bojaraj Textile Mills Ltd Vs EPF Appellate Tribunal**, 2020 LLR 194 held that levy of damages by Employees Provident Fund authority U/s 14B of the Act without proving mensrea or actus reus by passing a speaking order on the part of the employer is not sustainable. In **M/s.Sreekamakshy Agency Pvt Ltd Vs EPF Appellate Tribunal**, W.P.(C)no. 10181/2010 and in **Elstone Tea Estates Ltd Vs RPFC**, W.P.(C) 21504/2010 the Hon'ble High Court of Kerala held that the respondent authority shall consider the financial constrains demonstrated before it by the appellant. In **Standard Furnishing 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 all the circumstances which led to the delay in

remitting provident fund contribution have to factored by the authority concerned before issuing the order. The Hon'ble Supreme Court of India in **McLeod Russell India Ltd Vs RPFC**, AIR 2015 SC 2573 and in **Assistant Provident Fund Commissioner, EPFO Vs Management of RSL Textile India Ltd**, 2017 3 SCC 110 held that the presence or absence of mensrea or actus reus would be a determinative factor in imposing damages U/s 14B of the Act. The above decisions were followed by the Hon'ble High Court in the case of **South Indian Federation of Fisherman Societies Vs RPFC**, 2021 LLR 205.

7. The learned Counsel for the respondent pointed out that there was no dispute regarding the fact that there was delay in remittance of contribution for the period from 11/2001 to 02/2003. When there is delay in remittance of contribution the appellant is liable to remit damages U/s 14B of the Act read with Para 32A of the EPF Scheme. The only ground taken by the appellant before the respondent authority was financial difficulties. However financial difficulty is not substantiated by any documentary evidence. The Hon'ble High Court of Kerala in **Calicut Modern Spinning & Weaving Mills Ltd Vs RPFC**, 1982 LAB IC 1422 held that Para 38 of the EPF Scheme obliged the employer to make the payment within 15 days of close of every month and Para 30 cast an obligation on the employer to pay both the contributions payable by himself and on behalf of the member employed by him, in the first instance. It

was also pointed out by the Hon'ble High Court that financial constrains cannot be a reason for delayed remittance of contribution in view of the above statutory provision.

8. There is no dispute regarding the fact that there was delay in remittance of contribution. Respondent therefore initiated action for assessing damages. Notice was issued to the appellant and a representative of the appellant attended the hearing. He raised the issue regarding financial crisis of the appellant establishment but did not produce any documents to substantiate the same. The respondent therefore issued the impugned order assessing the damages. EPF Appellate Tribunal before which an appeal is filed reduced the damages to 70% taking into account the financial difficulties pleaded before it by the appellant. The Hon'ble High Court of Kerala in W.P.(C) no.20549/2008 found that EPF Appellate Tribunal, New Delhi had no occasion to consider the decision of the Division Bench of the Hon'ble High Court of Kerala in **Harrisons Malayalam** case (Supra) and also the Circular dt.29.06.2007 issued by Govt of India, Ministry of Commerce and Industry and therefore set aside the order of the EPF Appellate Tribunal and the matter is remitted back for re-decision.

9. In these proceedings the appellant produced the annual reports of the parent company who owns the appellant estate to substantiate the

financial difficulties of the appellant. According to the learned Counsel for the appellant, the appellant company suffered huge loss during 1999-2000 to 2002-2003. The learned Counsel for the respondent pointed out that the documents now produced by the appellant cannot be relied on to decide the quantum of damages as the documents produced are not proved by any competent person. In **Aluminium Corporation Vs its workman**, 1963 (2) LLJ 629 SC the Hon'ble Supreme Court held that the balance sheet as regards current assets and current liabilities cannot be taken as sacrosanct. The Hon'ble Supreme Court has emphasized in many cases that the correctness of the figures as shown in the balance sheet itself are to be established by proper evidence in Court by those responsible for preparing the balance sheet or by other competent witness. Even from a layman's point of view, if we look at the documents produced now, it can be seen that the annual reports are that of the parent company which owns many establishments including many plantations, rubber and tea of which the appellant is only one of the estates owned by the appellant company. Hence the balance sheet from a layman's point of view will not reflect the actual financial position of the appellant tea estate. Further it is seen that in all these reports in Annexure 2 auditors report, that there is a specific reference by the auditors that the appellant is not regular in depositing provident fund and Employees State Insurance dues.

For eg. in the annual report for the year 1998-1999, it is stated that the arrears of provident fund as on 31.03.1999 were Rs.13,82,074/- out of which Rs.13,27,047/- has since been deposited. However in Schedule 9 of the annual report for the year ended 31.03.1999, the contribution paid to provident fund and other funds are shown as Rs.69,59,617/-. For the year ending 31.03.2000 the arrears of provident fund has increased to Rs.70,12,711/- and the appellant remitted only Rs.11,99,286/-. The contribution to provident fund and other funds in Schedule 9 for the year ending 31.03.2000 is Rs.69,10,563/-. For the year ending 31.03.2001 the provident fund liability has increased to Rs.85,52,453/- and the remittance made during the year was only Rs.6,23,034/-. Contribution to provident fund and other funds as per Schedule 9 for the year is Rs.82,22,852/-. For the year ending 31.03.2002 the provident fund liability has increased to Rs.1,18,33,840/- and the contribution paid is only Rs.17,95,584/-. As per Schedule 9, for the year ending 31.03.2002 contribution to provident fund and other funds is shown as Rs.68,89,146/-. For the year ending 31.03.2003 the arrears of provident fund has increased to Rs.1,42,93,290 and the amount paid is only Rs.26,69,654/-. As per Schedule 9, the contribution to provident fund and other funds paid is Rs.60,96,071/-. The annual reports specifically states that there is no outstanding amount in respect of Income Tax, Sales Tax, Customs duty, wealth tax and Excise duty during the relevant period.

So it is very clear that basically the default is in respect of provident fund and other fund contributions and also Employees State Insurance contributions only. Though the learned Counsel took a plea that there was delay in payment of wages he could not substantiate the same even in these proceedings. However the documents produced by the appellant would indicate that the wages of the employees are paid in time because substantial amounts are reflected in the balance sheet as paid during the respective years. For the year ending 31.03.1999, salaries, wages and bonus paid to employees was Rs.7,21,70,118/- and for the year ending 31.03.2000, salaries, wages and bonus paid is Rs.6,63,46,027/-. For the year ending 31.03.2001 salaries, wages and bonus paid is Rs.7,29,38,822/- and for the year ending 31.03.2002 salaries, wages and bonus paid is Rs.6,36,51,371/-. For the year ending 31.03.2003 the salaries, wages and bonus paid is Rs.5,54,05,641/-. As already explained these are the figures for the group of estates and industries produced by the appellant in these proceedings. The appellant establishment is one of the tea plantations owned by the group and if there was delay in payment of wages it was for the appellant to substantiate the same by producing the relevant documents. Having failed to do so it can only be taken that the appellant establishment was paying salary and wages to its employees in time on the basis of the documents produced by them. When the salary and wages of

employees are paid, the employees' share of contribution is deducted from the salary of the employees which amounts to 50% of the total contribution. From the above narration of the documents produced by the appellant, it is clear that the appellant even failed to remit the employees' share of contribution deducted from the salary of employees in time. The non payment of the contributions deducted from the salary of the employees is an offence of breach of trust 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 extent 50% of the total contribution.

10. While remitting the case back to EPF Appellate Tribunal for re-consideration, the Hon'ble High Court of Kerala has made two observations. One is with regard to the decision of the Division Bench of Kerala High Court in **Harrisons Malayalam** case (Supra). The learned Counsel for the respondent pointed out that though the Hon'ble Supreme Court in SLP (C) No.21174/2015 did not interfere with the assessment order, the Hon'ble Court kept the question of law discussed in the above judgment open to be decided in an appropriate case. Hence the question whether the financial difficulties of an establishment can be a ground for reduction of damages U/s 14B is left open by the Hon'ble Supreme Court. The learned Counsel for the respondent also

pointed out that though the Hon'ble High Court of Kerala in **Harrisons Malayalam** case (Supra) elaborately discussed the financial crisis of the establishment, one of the main reasons for the Hon'ble Court to interfere with the assessment order of the respondent in that case was, that respondent did not take into account the fact that the recovery of assessed dues against that establishment was stayed by the Hon'ble Court. Hence it may not be correct that the financial constrains were the only reason why the Division Bench of the Hon'ble High Court of Kerala interfered with the assessment of damages in the said case. Another point considered by the Hon'ble High Court in this case was with regard to the Circular dt.29.06.2007 issued by the Central Govt. It was pointed out by the learned Counsel for the respondent that the assessment of damages in this case is with regard to the belated remittance of contribution for the period from 11/2001 to 02/2003 and the circular referred to by the Hon'ble High Court is dt.29.06.2007 and has no relevance to the impugned order. Further it is also seen that the said circular is only with regard to rehabilitation package for 33 closed tea gardens all over India and the major chunk of the closed tea gardens were in the state of West Bengal. At any cost the appellant plantation was not one of the beneficiary in the said circular.

11. As already pointed out the appellant plantation is not entitled for any relief for delayed remittance of employees' share of contribution deducted from the salary of the employees and not reemitted to the respondent in time, which amounts to 50% of the total contribution. However considering the financial constrains as pointed out by the learned Counsel for the appellant, 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.

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.

Sd/-

(V. Vijaya Kumar)
Presiding Officer