



सत्यमेव जयते

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

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

(Thursday the 20th day of February, 2020)

**APPEAL No.389/2018
(Old No.525(7)2014)**

Appellant : M/s.EMS Memorial Co-operative
Hospital & Research Centre Ltd
Perinthalmanna Post
Perinthalmanna
Malappuram - 679322

By Senior Adv.U.K.Ramakrishnan &
Adv.V.Krishna Menon

Respondent : The Regional PF Commissioner
EPFO, Regional Office
Kozhikode - 673006

By Adv.(Dr.)Abraham P. Meachinkara

This case coming up for final hearing on 09.01.2020 and this Tribunal-cum-Labour Court on 20.02.2020 passed the following:

ORDER

Present appeal is filed from order no.KR/KK/17259/ENF-3(2)/14B/2014/2385 dt.19.06.2014 assessing damages U/s 14B of EPF & MP Act, 1952 for belated remittance of provident fund contribution for the period from 01.11.1998 to 31.01.2014. The total damages assessed is Rs.4,56,251/-.

2. The appellant is a co-operative society running a hospital. The appellant had engaged trainees for learning work during the period from 04/2004 to 10/2006. Since the trainees were not liable to be covered under the Act, appellant did not pay the contribution in respect of those trainees during 04/2004 to 10/2006. However on the basis of a report of the Enforcement Officer, the respondent initiated action U/s 7A of the Act. The enquiry also included assessment of dues in respect of contract employees engaged through M/s.House Masters, Cochin. During the course of enquiry, it was clarified to the respondent that M/s.House Masters is covered independently and they were complying under the provisions of the Act for all employees including those employees deployed in the appellant establishment and the dues in respect of M/s.House Masters was excluded from the assessment. However the respondent assessed provident fund dues in respect of the trainees deployed from 04/2004 to 10/2004. An amount of Rs.6,90,018/- was recovered from the account of the appellant by the respondent. Similarly there was an enquiry by the respondent to assess dues in respect of security guards deployed in the premises of the appellant for the period from 11/2004 to 04/2006. On conclusion of the enquiry, the respondent recovered an amount of Rs.1,65,644.85 from the account of the appellant. The appellant received a notice dt.03.04.2014 alleging delay in remittance of contribution during the period from 07/2011 to 05/2012,

10/2012, 01/2013, 02/2013, 05/2013 and 08/2013 and fixing a hearing on 15.05.2014. A representative of the appellant appeared in the hearing and contented that appellant had paid provident fund contribution in respect of the period 07/2011 to 05/2012 on time and there is no delay and in respect of rest of the month, the delay was very short and was around 8 days and the delay was not intentional or deliberate and was due to financial constraints only. During course of the hearing on 15.05.2014, the respondent handed over a statement to the representative of the appellant alleging that there was delay in payment of provident fund contribution for the earlier period also. The appellant therefore sought time and the matter was adjourned to 28.05.2014. The new delay statement handed over to the representative of the appellant is marked as Annexure A4. On a perusal of the statement, it is very clear that the Annexure A4 statement basically includes the amounts assessed and recovered in respect of trainees and the security staff for the period from 04/2004 to 10/2006. The appellant received Annexure A1 assessment order for trainees on 10.04.2007 and the respondent recovered the amount from the appellant's account on 15.05.2007 even before the expiry of the period for filing appeal. The delay if any, in payment of the contribution in respect of that assessment is only after the expiry of 15 days given in Annexure A1 order however the respondent treated the period from 04/2004 onward as delay for calculating

damages U/s 14B. The imposition of damages for the period 11/2004 to 04/2006 is also illegal. The security staff was taken on contract from M/s.Nirmala Security Services and the agency is supposed to pay the contribution in respect of the security staff deployed in the premises of the appellant. The Annexure A2 order assessing the dues in respect of the security guards was received by the appellant on 06.06.2006 and the respondent recovered the amount from the account of the appellant even before the expiry of the appeal. If at all there is any delay in payment of contribution in respect of security guards, it is only after the expiry of the period of 15 days given in Annexure A2 order. However the respondent treated the delay from 11/2004 onwards. The imposition of damages as per Annexure A4 statement is illegal for the reasons that no show cause notice is issued to the appellant before the assessment was taken up. The respondent initiated the 14B action after a long period which is unjust and illegal. The appellant has not acted deliberately and intentionally or in defiance of law as the appellant is of strong view that they are not liable to enroll trainees to provident fund and the responsibility of remitting contribution in respect of security guards is with the agency. The findings of the respondent that financial constraints are not legally acceptable reason for delayed remittance of contribution is illegal and unsustainable.

3. The respondent filed counter denying the above allegations. EPF & MP Act is a legislation for providing social security for the working class. It provides for compulsory deduction from the employees and equal contribution from the employer which is deposited in the account of the workers. The Act also provides for social protection such as insurance and pension benefits to the member employees. The employer is liable to remit provident fund and other contribution by 15th of the next month in which the employee had worked. The contribution had to be deposited by the employer only after beneficiary worker had already worked and thus earned the amount in terms of contract of employment and the provisions of the Act. Hence when an employer denied the employees the dues which they are rightfully entitled to in terms of the provisions of the Act, the same is to be looked into with suspicion. In case of failure on the part of the employer to remit the dues, the respondent initiates action under the Act for quantification and recovery of the same from the concerned employer. The appellant is an establishment covered under the provisions of the Act and therefore the appellant is legally bound to pay the statutory contributions U/s 6, 6A and 6C of the Act and various Schemes framed thereunder. The appellant failed to remit the statutory dues on time for the period from 01.11.98 to 31.12.2014. On verification of the statutory returns filed by the appellant, it is seen that there was delay in remittance of provident fund

contribution during the relevant period. Accordingly a notice was issued to the appellant to show cause along with a delay statement and also directed the appellant to appear in person or through a representative on 15.05.2014 before the respondent. On the request of the representative of the appellant, the enquiry was adjourned to 28.05.201. On 28.05.2014 the representative of the appellant admitted the delay in remittance of provident fund dues and submitted that the delay was not intentional but was due to circumstances beyond the control of the appellant including financial constraints and therefore requested for waiver of damages. The pleading by the appellant that they have engaged trainees and the delay was very short and there was no intentional or deliberate delay and the delay happened due to financial constraints and also beyond the control of the appellant cannot be accepted as grounds for reducing or waiving damages. In **Calicut Modern Spinning & Weaving Mills Ltd Vs RPFC**, 1982 KLT 303 the Division Bench of the Hon'ble High Court of Kerala observed that the employer is bound to pay contribution under the Act every month voluntarily, irrespective of the fact that wages have been paid or not. The Hon'ble Supreme Court in **Chairman, SEBI Vs Sriram Mutual Fund**, (2006) 5 SCC 361 held that mensrea is not an essential ingredient for contravention of the provisions of the civil Act.

4. Appearing for the appellant Sri.U.K. Ramakrishnan, Senior Advocate has taken this Court through the whole history and incidents which led to the assessment of damages for belated remittance of contribution in this case. According to the learned Counsel, the respondent initiated action against the appellant for non enrollment of trainees. The appellant had serious dispute regarding the claim of the respondent that the trainees are required to be extended the benefit of social security under EPF & MP Act. However before the appellant could take action to challenge the order issued U/s 7A of the Act assessing dues in respect of trainees, the respondent recovered the money through Bank attachment. Similarly, the respondent initiated action for assessment of dues in respect of security personnels deployed in the premises of the appellant through a contractor. The respondent issued orders U/s 7A and the amount was recovered even before exploring the possibility of recovering the amount from the contractor. Substantial part of the damages claimed as per the impugned order is covered by these two assessment orders issued by the respondent. The learned Senior Advocate also pointed out a technical anomaly that the assessment process was initiated for the delay in remittance for the period from 07/2011 to 08/2013. However during the course of hearing, the respondent handed over another statement claiming damages for the period from 11/1998 onwards which included the dues claimed under

Annexure A1 and A2 orders for trainees and security guards. According to the learned Senior Advocate the procedure adopted by the respondent is not correct and he should have issued a show cause notice before assessing damages for retrospective period.

5. The learned Senior Advocate relied on the decision of the Division Bench of Hon'ble High Court of Kerala in **RPFC Vs Harrison's Malayalam Ltd**, 2013 (3) KLT 790 to argue that financial difficulties will be a ground for claiming waiver or reduce damages. The learned Counsel also argued that existence of mensrea or actus reus to contravene a statutory provision must also be a necessary ingredient for levy of damages or quantum thereof. He relied on and quoted the decision of the Hon'ble Supreme Court in **McLeod Russell India Ltd Vs RPFC**, 2014 (15) SCC 263 to argue that " the presence or absence of mensrea and/or actus reus would be a determinative factor in imposing damages U/s 14B, as also the quantum thereof since it is not inflexible that 100% of the arrears have to be imposed in all the cases. **Alternatively stated, if damages have been imposed U/s 14B it will be only logical that mensrea and/or actus reus was prevailing at the relevant time**". The above decision was also followed by the Hon'ble Supreme Court in **APFC Vs Management of RSL Textiles India Ltd**, 2017 (3) SCC 110.

6. The learned Counsel for the respondent argued that Employees Provident Fund and Miscellaneous Provisions Act, 1952 is a central Act passed by Parliament of India to provide for the institution of provident fund, pension fund and deposit linked insurance to the employees working in the factories and other establishment to carry forward the Constitution mandate for providing social justice to the working class. An establishment which is covered under the provisions of the Act is required to enroll all the employees working under their roof to the benefit of provident fund. They are required to deduct the provident fund and other contributions and along with their contribution they are supposed to remit the money with the respondent on or before 15th of the next month. The respondent in turn hold the money in the investment account and invest the same in Govt securities. The yield out of the investment is disbursed to the employees in the form of interest, every year. The respondent is also liable to take care of the social security pension and insurance in the event of the unfortunate death of an employee. When there is a delay in remittance of contribution, the investment of the money get delayed and correspondingly there will be reduction in interest payable to the employees. The respondent is also liable to pay the pensionary and insurance benefit even if there is delay in remittance of contribution by the employers. The respondent is also liable to pay the eligible member all this benefits from their due date of eligibility

irrespective of the fact whether the employer pays the contribution in time or not. The Hon'ble Supreme Court in **Peoples Union of Democratic Rights Vs Union of India** 1982 3 SCC 235 held that labour laws are enacted for improving the conditions of workers and the employers cannot be allowed to buy off immunity against violations of labour laws by paying a paltry fine which they would not mind paying thus rendering it impossible to ensure observance of labour laws. In **Organo Chemical Industries Vs Union of India**, AIR 1979 SCC 1803 the Hon'ble Supreme Court held that financial loss cannot be a justifiable ground for delay in deposit of provident fund money which is an unqualified statutory obligation and cannot be allowed to be linked with financial position of the establishment over different points of time. The Hon'ble Supreme Court in the above case also held that the Scheme of the social security legislation will be frustrated if the employers delayed the remittance of provident fund contribution. The Hon'ble High Court of Madras in **South Indian Flour Mills Pvt Ltd Vs RPFC**, 1985 1 LLJ 292 (Mad HC) held that delay in depositing the provident fund amount has double effect. Firstly, the fund is deprived of the interest which it could have earned on the deposit. Secondly, the employee would be deprived of the interest accruable to his account because the employer has not deposited the money and to that extent the interest is lost. In **S. H. Salve Kadam Company Vs RPFC**, 1981 LAB IC 568 (Kant) the Hon'ble High

Court of Karnataka observed that when it is obligatory of the employer to ensure payment of contribution to the fund of the employee, the question of intention does not arise. If intention would be a necessary element the object of the Scheme will be frustrated. The learned Counsel for the respondent also argued that in **Chairman, SEBI Vs Sriram Mutual Fund and Other**, (2006) 5 SCC 361 the Hon'ble Supreme Court after examining various decisions held that mensrea is not an essential ingredient for contravention of the provisions of a civil Act. The breach of a civil obligation which attracts a penalty under the provisions of the Act would immediately attract the levy of penalty irrespective of the fact that whether the contravention has made by the defaulter with any guilty intention or not. The learned Senior Advocate for the appellant pointed out that the above decision was under the SEBI Act which mandates levy of penalty as the word used is 'shall'. As per Sec 14B of EPF Act, the word used is the authority "may" impose damages. Hence according to him, the language used in these 2 legislations are different and hence the decision of Hon'ble Supreme Court in **Chairman, SEBI Vs Sriram Mutual Fund** (Supra) cannot be relied on in this particular case.

7. Going by the facts of this case, it can be seen that the major part of the liability U/s 14B as per the impugned order pertains to Annexure A1 and A2 order assessing dues in respect of trainees and that of security staff.

As per the provisions of EPF & MP Act, 1952 the responsibility in respect of employees working with an establishment lies with the employer and he cannot escape the liability saying that those employees were engaged through contractor. With regard to the assessment of provident fund dues in respect of trainees also it was upto the appellant to challenge the same if they were aggrieved, even if the amount is already recovered by the respondent. Having failed to do so, the appellant cannot at this point of time argue that they were not liable to pay contribution in respect of trainees and also in respect of security guards deployed by them. Having said that, it is also required to be looked into whether there was any intentional delay in remittance of contribution in respect of trainees as well as the security guards. The learned Counsel for the respondent argued that having violated the provisions of the Act, the appellant cannot plead that there was no intentional or deliberate delay. As rightly pointed out by the learned Senior Counsel for the appellant there was no intentional or deliberate delay on the part of the appellant in remittance of these contributions. The appellant cannot take the same plea for delay in remittance of regular contribution. The learned Counsel for the respondent argued that the Hon'ble Supreme Court in **McLeod Russell India Ltd Vs RPFC**, (2014) 4 SCC 263 has reminded the High Courts and Appellate authorities that " we may also note that this Court yet again reiterate the well known but often

ignored principle that High Courts or any Appellate authority created by a statute should not substitute their perspective of discretion on that of the lower adjudicatory authority, the impugned order does not otherwise manifest perversity in the process of decision making". The learned Senior Counsel also highlighted a technical defect in the context of the 14B proceedings alleging that a proper show cause notice was not issued before assessing the damages from 1998. This is a matter pending adjudication for quite a long time and I am not inclined to remit the matter back to the respondent to re-assess the dues, as it is seen from the proceedings that the appellant was given adequate time after a copy of the statement was given to them.

8. Considering all the facts and circumstances and arguments on the side of the appellant as well as the respondent, I am inclined to hold that interest of justice will be met if the appellant is directed to remit 60% of the damages assessed 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