



सत्यमेव जयते

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

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

(Thursday the 6th day of May, 2021)

**APPEAL No.476/2019
(Old no.456(7)2016)**

Appellant : M/s.Steel Industrials Kerala Ltd
Foundry Unit
Ottappalam
Palakkad - 679103

By M/s.B.S.Krishnan Associates

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

By Adv.(Dr.)Abraham P. Meachinkara

This case coming up for final hearing on 16.03.2021 and this Tribunal-cum-Labour Court on 06.05.2021 passed the following:

ORDER

Present appeal is filed from order no.KR/KKD/0003199/000/ENF-4(1)/2015/9600 dt.13.01.2016 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 03/2012 to 02/2013. The total damages assessed is

Rs.5,20,017/-. The interest demanded U/s 7Q of the Act for the same period is also being challenged in this appeal.

2. The appellant establishment is a Govt. company registered under the Companies Act, 1956. The appellant company started in 1975 and is having units at Kannur, Kozhikode, Thuravoor, Cherthala, Trivandrum and Trichur. The appellant was running in profit in the initial stages and the provident fund contribution was also being paid on time. The appellant establishment starting incurring loss from the year 2000 and thereafter there was delay in remittance of provident fund contribution. The respondent issued notice dt.22.04.2015 to show cause why damages shall not be recovered from the appellant establishment. A representative of the appellant attended the hearing and submitted that the performance of the company is going down and the networth of the company has become negative during the year 2004 and as per the proceedings of Board for Industrial and Financial Reconstruction (BIFR) dt.31.08.2006 in case no 602/2005, the company was declared a 'sick industrial company' as on 31.03.2004 in terms of Sec 3(1)(O) of Sick Industrial Company (Special Provisions) Act, 1985. The declaration of the appellant company as a sick unit was also communicated to the respondent organization. During the pendency of the proceedings before BIFR, the manufacturing unit at Cherthala was delinked from the company with a view to implement a joint venture with

Indian Railways. The delinking was carried out by a book adjustment of Rs.1428.36 lakhs on account of which the BIFR de-registered the company from the purview of SICA as per the order dt.09.04.2012, as the networth of the company turned positive because of the above book adjustment. Appellant filed an appeal before AAIFR which did not entertain the appeal but later allowed as per the direction of the Hon'ble High Court of Kerala in W.P.(C) no.15982/2013. The AAIFR remand the matter to BIFR for further proceedings which is still pending. Ignoring all the above contentions the respondent issued the impugned orders. There is no apparent failure on the part of the appellant and therefore the quantum of damages should be compensatory rather than penal.

3. The respondent filed counter denying the above allegations. The appellant is foundry unit at Ottappalam which is covered under the provisions of the Act. The appellant committed default in remitting provident fund dues for the period from 03/2012 to 02/2013. The appellant is therefore liable to pay damages and interest for belated remittance of contribution. The respondent issued notice dt.22.04.2019 directing the appellant to show cause why damages and interest shall not be levied for belated remittance of contribution. A representative of the appellant attended the hearing and requested time to verify the remittance challans. The enquiry was adjourned. The representative

of the appellant attended the hearing on the next date confirmed the delay in remittance of contribution. Hence the respondent issued the impugned orders. The Act and Schemes are very specific with regard to the levy of damages and quantum of damages when there is delay in remittance of contribution. The appellant was also given a detailed statement of delay and was offered a personal hearing on 25.05.2015. The representative who attended the hearing admitted the delay. Though the appellant was under BIFR no rehabilitation package was approved by BIFR and therefore the appellant is not entitled for any relief in damages and interest. The Division Bench of the Hon'ble High Court of Kerala in **Calicut Modern Mills Vs RPFC**, 1982 KLT 303 held that the employer is bound to pay contribution under the Act every month voluntarily irrespective of the fact whether wages have been paid or not.

4. The appellant is an establishment under the Govt of Kerala having its manufacturing activities in different locations. The learned Counsel for the appellant submitted that the appellant establishment is under financial constraints from the year 2000. However according to the learned Counsel for the respondent, no documents were produced by the appellant before the respondent authority to substantiate the claim of financial difficulties. When the appellant makes a plea of financial difficulties it is up to him to substantiate the claim of financial difficulties before the respondent authority. The appellant

failed to produce any documentary evidence in this appeal also. In **M/s.Kee Pharma Ltd Vs APFC**, 2017 LLR 871 the Hon'ble High Court of Delhi held that the employers will have to substantiate their claim of financial difficulties if they want to claim any relief in the levy of penal damages U/s 14B of the Act. In **Sree Kamakshi Agency Pvt Ltd Vs EPF Appellate Tribunal**, 2013 1 KHC 457 also held that the respondent authority shall consider the financial constraints as a ground while levying damages U/s 14B if the appellant pleads and produces documents to substantiate the same. In **Elstone Tea Estates Ltd Vs RPF**, W.P.(C) 21504/2010 the Hon'ble High Court of Kerala held that financial constraints have to be demonstrated before the authorities with all cogent evidence for satisfaction to arrive at a conclusion that it has to be taken as mitigating factor for lessening the liability. However the learned Counsel for the appellant submitted that the appellant establishment was under BIFR and was declared 'sick', a copy of the order by BIFR was also forwarded to the respondent organization. Subsequently BIFR de-registered the appellant in view of delinking of one of its unit at Cherthala. Any way the proceedings before BIFR or AAIFR has no relevance as the SICA Act is abolished and the Govt of India has introduced the Insolvency and Bankruptcy Code 2016. If the appellant is interested to pursue the matter further, they should have taken up the matter under the IB Code 2016 within a period of 6 months. However the fact that

the appellant had gone under BIFR and was declared sick by BIFR would indicate the financial sickness of the appellant establishment.

5. The learned Counsel for the respondent submitted that the appellant even delayed the remittance of the employees' share of contribution deducted from the salary of the employees. The appellant has no case that the wages of the employees were not paid in time. When the wages are paid, the employees' share of contribution is deducted from the salary of employees. The non remittance of employees' share of contribution deducted from the salary of employees is an offence U/s 405/406 of IPC. Having committed an offence of breach of trust, the appellant cannot plead that there was no mensrea or intentional delay in remittance of contribution at least to the extend of employees' share which is 50% of the total contribution.

6. Though the financial difficulties of the appellant establishment is not fully established, considering the fact that the appellant establishment is a Govt of Kerala undertaking and fact that it has gone under BIFR and was declared sick would sufficiently indicate the financial sickness of the appellant establishment.

7. Considering the facts, circumstances and pleadings, I am inclined to hold that interest of justice will be met if the appellant is directed to remit 70% of the damages assessed as per the impugned order.

8. 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 U/s 7(I) 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 against 7Q order. The Hon'ble High Court of Kerala in **District Nirmithi Kendra Vs EPFO**, W.P.(C) 234/2012 also held that Sec 7(I) do not provide for an appeal from an order issued U/s 7Q of the Act. The Hon'ble High Court of Kerala in **M/s ISD Engineering School Vs EPFO**, W.P.(C) no.5640/2015(D) and also in **St. Marys Convent School Vs APFC**, W.P.(C) no.28924/2016 (M) held that the order issued U/s 7Q of the Act is not appealable. It is further seen that the appellant establishment has approached the Hon'ble High Court of Kerala in W.P.(C) no.25651/2019 and vide its order dt.18.03.2020 the Hon'ble High Court held that no appeal is maintainable against the order levying interest U/s 7Q, the same being statutory. The appellant also filed W.P.(C) No.25651/2019 before the Hon'ble High Court of Kerala challenging the recovery action in continuation of the impugned order. The Hon'ble High Court vide its order dt.18.03.2020 held that interest U/s 7(Q) being statutory, no appeal is maintainable.

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. The appeal against Sec 7Q order is dismissed as not maintainable.

Sd/-

(V. Vijaya Kumar)
Presiding Officer