सत्यमेव जयते

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

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

(Monday the, 28th day of March 2022)

APPEAL No. 400/2018

(Old No. ATA.488(7)2014)

Appellant : M/s. Lakeshore Hospital & Research Centre Ltd. Maradu, Nettoor.P.O. Kochi – 682 040

By M/s. Menon & Pai

Respondent : The Regional PF Commissioner EPFO, Sub Regional Office, Bhavishyanidhi Bhavan Kaloor, Kochi – 682 017.

By Adv.S.Prasanth

This case coming up for final hearing on 18.11.2021 and this Tribunal-cum-Labour Court on 28.03.2022 passed the following:

ORDER

Present Appeal is filed from order No. KR/KC/19536/Enf. III(2)/2014/2353 dated 04.06.2014 assessing dues under Sec 7A of EPF and MP Act 1952 (hereinafter referred to as 'the Act') in respect of non-enrolled employees and on omitted wages for the

period from 01/2012 – 03/2013. The total dues assessed is Rs.13,73,648/- (Rupees Thirteen lakh seventy three thousand six hundred and forty eight only)

2. Appellant is a company owning a super specialty hospital. The hospital is covered under the provisions of the Act and all eligible employees are covered under EPF Scheme. During May 2015, the Enforcement Officers conducted inspections and pointed out that students undergoing various courses are to be covered under the Scheme. The appellant explained that they are not employees or trainees of the hospital. Courses are conducted by training institutions like 'Bharat Sevak Samaj', Christian Medical Association of India and IGNOU. After training, the students are issued certificated by the concerned institutions. These students are undergoing different training programmes as part of their curriculum. The appellant provides only the facility for training while undergoing various courses. The Enforcement Officers also reported that contribution is not paid on entire wages. The respondent initiated an enquiry under Sec 7A vide notice dated 23.07.2013 and fixing the enquiry on 28.08.2013. A copy of the notice is produced and marked as Annexure A1.

Appellant appeared before the respondent and explained that the students are not employed for wages and they are only learners. With regard to the claim for contribution on allowances, it was explained that all the employees are paid minimum wages and contributions are paid on Basic pay and Dearness Allowance. The employees who joined with a salary above the statutory limit was also enrolled to the fund. A true copy of the reply dated 29.08.2013 is produced and marked as Annexure A2. Ignoring the contentions of the appellant, the respondent issued the impugned order, a copy of which is produced and marked as Annexure A3. The respondent ought to have decided the eligibility of the employees to be enrolled to the fund under Para 26B of EPF Scheme. The students undergoing various courses conducted by 'Bharat Sevak Samaj' has authorised the hospital as a training centre for Vocational Training. A copy of a certificate issued by 'Bharat Sevak Samaj' dated 11.11.2013 is produced and marked as Annexure A4. The respondent authority went wrong in going into the concept of minimum wages while deciding the liability of the appellant to remit the contribution. Sri.C.J.Ramachandran Pillai is a retired Division Assistant Officer

of Kerala Fire Force and has been engaged by the appellant only as a consultant and he is paid only consultation fee. He is drawing pension from Government and he need not be enrolled to the fund. The order passed by respondent on the concept of minimum wages goes against the judgement of Hon'ble Supreme Court in the case of ***Airfreight Vs State of Karnataka***, 1999 (2) LLJ 705. As per Sec 6 and 2(b) of the Act and Para 29 of EPF Scheme, the appellant is liable to remit contribution only on Basic and DA paid to the employees.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act w.e.f. 31.12.2001. A squad of Enforcement Officers inspected the appellant establishment on 09.05.2013 and submitted a report dated 04.06.2013. According to the report all trainees of the hospital are enrolled to provident fund w.e.f. 01/2012 except 18 internship trainees and one Fire & Safety Officer who was not enrolled to the fund. The Enforcement Officers also reported that the appellant failed to remit contribution on actual eligible wages. A copy of the inspection report dated 04.06.2013 was issued to the appellant with a

direction to comply with instructions of the Enforcement Officers. Since the appellant failed to comply with the directions, an enquiry under Sec 7A of the Act was initiated. A representative of the appellant attended the hearing and filed a written statement. The representative of the appellant also requested for the details of calculation of contribution proposed in the inspection report. A rough calculation sheet was provided to the representatives of the appellant and the appellant submitted a detailed reply on the same. According to the appellant, the appellant establishment is an authorised Training Centre for conducting various courses. The students pay fees for the duration of the studies except internship training. During the internship training, the appellant pay an amount of Rs. 2000/- as stipend. On completion of the training, the students are given certificates by the training institutions. Sri. C.J. Ramachandran Pillai is a retired officer from Government service and a pensioner. He is only paid a consultation fee. With regard to omitted wages, the appellant submitted that Basic wages + DA for majority of the employees exceeds Rs.7500/- and they are remitting contribution at the rate of Rs. 780/- for those employees. There are only 52 employees

who are drawing wages less than statutory limit. The non-enrolled employees will come within the definition of employees under Sec 2(f) of the Act as trainees are also included in the definition with a specific exclusion of the trainees engaged under the Standing Orders of the establishment or under Apprentices Act 1961. The Hon'ble High Court of Calcutta in ***Central Provident Fund Commissioner and Another Vs Modern Transportation Consultancy Service (P) Limited and Others***, 2009 (3) LLJ 137 held that retired employees of railways cannot be treated as excluded employees. The Hon'ble High Court held that employees who withdrew full amounts from other provident funds cannot be treated as excluded employees. It is seen that the appellant establishment is paying a special allowance at the rate of 20% of the basic to all employees in addition to basic and DA. Special allowances are emoluments earned by the employees in accordance with the terms of the contract between the employer and employees and therefore the special allowance also answers the definition of basic allowance. Special allowance is earned by all the employees and therefore falls within the ambit of the definition of basic wages under Sec 2(b) of the Act.

The learned Senior Counsel for the appellant raised two issues in this appeal.

1. The non-enrolment of trainees to provident fund membership.
2. Whether special allowance will form part of basic wages?

With regard to the first issue there are two components. The first component is with regard to the non-enrolment of trainees to provident fund membership. In an earlier proceeding by the respondent authority, it was concluded that all the trainees are required to be enrolled to the fund. The appellant filed Appeal No. 657/2019 from that order, and this Tribunal found that the 140 trainees engaged by the appellant establishment will come within the definition of employees under Sec 2(f) of the Act and they are required to be enrolled to the fund. In that appeal also the appellant took a stand that some of the trainees are only students undergoing internship as part of their training. This tribunal did not accept the plea of the appellant since the details of the interns were not provided by the appellant. In the present proceeding it is seen that the respondent authority itself admitted the fact that all the trainees of the appellant establishment were enrolled to

provident fund membership from 01/2012. However as per the impugned order, the respondent authority found that the 18 interns who are only trainees who received stipend during their training period are also required to be enrolled to the fund. Though the appellant failed to produce the details regarding these 18 interns, the appellant produced evidence to show that the appellant hospital is a training Centre for 'Bharat Sevak Samaj' and this 18 non-enrolled trainees are students undergoing various courses with them. In the above circumstances, I am inclined to accept the argument of the learned Senior Counsel that the 18 non-enrolled interns are only students undergoing training in the appellant establishment and therefore they cannot be treated as employee as per Sec 2(f) of the Act.

4. Another issue raised in this appeal is regarding the non-enrolment of Sri.C.J.Ramachandran Pillai, Fire and Safety Officer. According to the appellant, he is an excluded employee as he retired from Government service. As per sec 2(f)(i) of EPF Scheme,

"*Excluded employee means an employee who having been a member of the fund withdrew the full amount of accumulations in the fund under clause (a) or (c) of sub-paragraph 1 of Paragraph 69".*

(ii) .....

As per Para 69(1)(a), a member may withdraw the full amount standing to his credit in the fund on retirement from service after attaining the age of 55 years. As per Para 69 (1)(e) a member can withdraw full amount immediately before migrating from India. From the above provisions, it is clear that an employee who was a member of employees provident fund and withdrew the full amount of his accumulation from the fund only will be treated as an excluded employee. In this case the appellant has no case that Sri.C.J Ramachandran Pillai was member of EPF and withdrew the accumulation to claim the status of an excluded employee. It was also submitted that Sri.C.J Ramachandran Pillai is only a consultant and therefore will not come within the definition of employee. As per Sec 2(f) any person who is employed for wages in or in connection with the work of the establishment is an employee and therefore it is not possible to accept the claim of the

appellant that Sri.C.J Ramachandran Pillai is not an employee under Sec 2(f) of the Act.

5. Another issue raised by the learned Counsel for the appellant is whether the special allowance being paid to all the employees of the appellant establishment at the rate of 20% of the basic wages will come within the definition of basic wages under Sec 2(b) of the Act. Sec 2 (b) of the Act defines the basic wages and Sec 6 of the Act provides for the contribution to be paid under the Schemes:

> ***Section 2(b)*** *: "**Basic wages**"* means all emoluments which are earned by an employee while on duty or (on leave or holidays with wages in either case) in accordance with the terms of contract of employment and which are paid or payable in cash to him, but does not include :
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> 1. Cash value of any food concession.
> 2. Any Dearness Allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living) HRA, overtime allowance, bonus, commission or any other similar allowances payable to the

employee in respect of his employment or of work done in such employment.

3. Any present made by the employer.

Section 6: Contributions and matters which may be provided for in Schemes. The contribution which shall be paid by the employer to the funds shall be 10% of the basic wages, Dearness Allowance and retaining allowances if any, for the time being payable to each of the employee whether employed by him directly or by or through a contractor and the employees contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding 10% of his basic wages, Dearness Allowance, and retaining allowance if any, subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Section.

Provided that in its application to any establishment or class of establishment which the Central Government, after making such enquiry as it deems fit, may, by

notification in the official gazette specified, this Section shall be subject to the modification that for the words 10%, at both the places where they occur, the word 12% shall be substituted. Provided further that there were the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for rounding of such fraction to the nearest rupee half of a rupee, or quarter of a rupee.

Explanation 1 – For the purpose of this section dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

6. It can be seen that some of the allowances such as DA, excluded U/s 2b (ii) of the Act are included in Sec 6 of the Act. The confusion created by the above two Sections was a subject matter of litigation before various High Courts in the country. The Hon'ble Supreme Court of India in ***Bridge & Roof Company Ltd Vs Union of India,*** 1963 (3) SCR 978 considered the conflicting provisions in detail and finally evolved the tests to decide which are the

components of wages which will form part of basic wages. According to the Hon'ble Supreme Court of India,

(a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.

(b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages.

The Hon'ble Supreme Court of India ratified the above position in ***Manipal Academy of Higher Education Vs PF Commission,*** 2008(5)SCC 428. The above tests were again reiterated by the Hon'ble Supreme Court in ***Kichha Sugar Company Limited Vs. Tarai Chini Mill Majzoor Union*** 2014 (4) SCC 37. The Hon'ble Supreme Court of India examined all the above cases in ***RPFC Vs Vivekananda Vidya Mandir and Others,*** 2019 KHC 6257. In this case the Hon'ble Supreme Court considered whether travelling allowance, canteen allowance, lunch incentive, special allowance, washing allowance, management allowance etc will form part of basic wages

attracting PF deduction. After examining all the earlier decisions and also the facts of these cases the Hon'ble Supreme Court held that " the wage structure and the components of salary have been examined on facts, both by the authority and the Appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wages camouflage as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. There is no occasion for us to interfere with the concurrent conclusion of the facts. The appeals by the establishments therefore merit no interference." The Hon'ble High Court of Kerala in a recent decision rendered on 15/10/2020 in the case of ***EPF Organization Vs MS Raven Beck Solutions (India) Ltd,*** WPC No. 1750/2016, examined Sec 2(b) and 6 of the Act and also the decisions of the Hon'ble Supreme Court to conclude that

> "this makes it clear that uniform allowance, washing allowance, food allowance and

travelling allowance, forms an integral part of basic wages and as such the amount paid by way of these allowance to the employees by the respondent establishment were liable to be included in basic wages for the purpose of assessment and deduction towards contribution to the provident fund. Splitting of the pay of its employees by the respondent establishment by classifying it as payable for uniform allowance, washing allowance, food allowance and travelling allowance certainly amounts to subterfuge intended to avoid payment of provident fund contribution by the respondent establishment".

The Hon'ble High Court of Madras in ***Universal Aviation Service Private Limited Vs Presiding Officer EPF Appellate Tribunal,*** 2022 LLR 221 again examined this issue in a recent decision. The Hon'ble High Court of Madras observed that it is imperative to demonstrate that the allowances paid to the employees are either variable or linked to any incentive for production resulting in greater

output by the employee. It was also found that when the amount is paid, being the basic wages, it requires to be established that the workmen concerned has become eligible to get extra amount beyond the normal work which he is otherwise required to put. The Hon'ble High Court held that

> "Para 9: The predominant ground raised by the petitioner before this Court is that other allowances and washing allowance will not attract contributions. In view of the aforesaid discussions and law laid down by the Hon'ble Supreme Court in ***Vivekananda Vidya Mandir case (supra)***, the petitioner claim cannot justified or sustained since "other allowance" and washing allowance have been brought under the purview of Sec 2 (b) read with Sec 6 of the Act".

In this case, the allowance in dispute is special allowance being paid to the employees by the appellant at the rate of 20% of the basic. According to the learned Counsel for the respondent,

the special allowance is being paid to all employees uniformly at the rate of 20% of the basic. Hence applying the tests laid down by the Hon'ble Supreme Court in ***RPFC Vs Vivekananda Vidya Mandir and Others,*** 2020 17 SCC 643 and also in ***Gobin (India) Engineering Pvt. Ltd. Vs Presiding Officer, CGIT & Labour Court and Another***, W.P.(C)No. 8057/2022, special allowance which is uniformly and ordinarily paid to all employees and are not linked to any incentive for production or being paid especially to those who avail the opportunity, will form part of Basic wages and therefore will attract Provident Fund deduction.

6. In this case, the appellant has no claim that the special allowance being paid to the employees is linked to any incentive for production resulting in greater output. The appellant failed to prove that the special allowance is paid to the employees who became eligible to get extra beyond the normal work which he was otherwise put in. It is also seen that all the employees are uniformly paid special allowance at the rate of 20% of the basic pay. Hence I have no hesitation in concluding that this special allowance being paid by the appellant to its employees will form part of basic wages and will attract provident fund deduction.

Hence the appeal is partially allowed, the assessment of provident fund contribution in respect of the interns cannot be legally sustained. However the assessment of dues in respect of Sri.C.J.Ramachandran Pillai is upheld. Further the assessment of dues on special allowance is also upheld.

Sd/-
(V.Vijaya Kumar)
Presiding Officer