सत्यमेव जयते

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

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

(Monday, the 4th day of April 2022)

APPEAL No. 601/2019
(Old No. ATA 223 (7) 2013)

Appellant : M/s. Kalpaka Builders Pvt. Ltd.
1st Floor, Casagrante Building,
Deshabhimani Jn, Kaloor
Kochi – 682 017

By Adv.C.B.Mukundan

Respondent : The Assistant PF Commissioner
Employees PF Organisation
Bhavishya Nidhi Bhavan, Kaloor,
Kochi – 682 017.

By Adv. Sajeev Kumar K Gopal

This case coming up for final hearing on 23.09.2021 and this Tribunal-cum-Labour Court on 04.04.2022 passed the following:

ORDER

The final order in this appeal was issued on 04.04.2022. A typographical error crept into the date of the order. Instead of 04.04.2022, the date of the order is mentioned as 10.01.2022 in

the order. Necessary correction is incorporated as per Sec 7L(2) of EPF and MP Act 1952.

2. Present Appeal is filed from order No. KR/KC/21717/Enf-3(4)2012/18004 dated 05.03.2012 assessing dues under Sec 7A of EPF and MP Act 1952 (hereinafter referred to as 'the Act') on evaded wages for the period from 03/2009 – 10/2011. The total dues assessed is Rs.3,63,305/- (Rupees three lakh sixty three thousand three hundred and five only)

3. The appellant is a Limited company engaged in construction business and is covered under the provisions of the Act. An Enforcement Officer of the respondent inspected the appellant establishment and reported that there was evasion in wages in remitting contribution under the Act. The respondent authority initiated an enquiry under Sec 7A. A representative of the appellant appeared before the respondent. The case of the respondent was that the appellant has not taken the Dearness Allowance and various allowances paid to its employees for the purpose of calculating contribution under the Act. The appellant admitted that the non-remittance of contribution on D.A was due to ignorance. He paid dues only on basic. The appellant

therefore volunteered to remit the dues on D.A as provided under the Act. The appellant however objected to assessment of dues on other allowances. The respondent, ignoring the contentions of the appellant issued the impugned order. The claim of the respondent that it was not known and whether the difference in basic and the non-basic wages is due to D.A/V.D.A or any other allowance is not correct. The salary slips of each employee would clearly establish the full details of allowances paid to the employees. The Sec 6 of the Act contemplates only contributions on basic, D.A and retaining allowance. However the respondent proceeded to assess dues on all allowances including HRA subject to the wage ceiling of Rs.6500/-. It is a well settled law that allowance are paid as basic wages only if those are paid universally and that also to all the employees. In the appellant's case that the allowances in question were only paid to certain employees.

4. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act. The respondent authority initiated an enquiry under Sec 7A of the Act on a report from an

Enforcement Officer that the appellant is remitting Provident Fund contribution only on 25% of the wages paid by them to their employees. Prima-facie there was a case of gross under-reporting of basic wages and evasion of statutory contribution towards provident fund to the detriment of beneficiary employees. The enquiry started on 01.07.2011 and thereafter adjourned to 26.08.2011 and 22.09.2011. There was no representation on the side of the appellant. On 19.10.2011, a representative of the appellant attended the hearing and requested for time to produce the records called for. The respondent authority found that the salary paid to the employees was split up as basic and total earnings. There is no allowances like D.A, HRA, or any other allowance as per the books maintained by the appellant. Provident Fund was deducted only for basic wages which is 25% of the gross salary. The appellant could not explain the method adopted by them while splitting the basic and total wages. Hence it is clear that by keeping the basic wages as 25%, the appellant has evaded Provident Fund contribution to a large extent, to a detriment of the employees. The respondent therefore issued the impugned order assessing the dues subject to the wage ceiling of

Rs.6,500/-. The appellant filed a review application under Sec 7B of the Act. The enquiry was posted on 09.05.2012 and thereafter on the request of the appellant, the enquiry was adjourned to 14.6.2012, 24.7.2012, 12.09.2012, 27.09.2012, and to 08.11.2012. The appellant failed to produce any records and the enquiry was further adjourned to 29.11.2012 and 17.12.2012. On the request of the appellant the review petition was adjourned to 03.01.2013. It was clear by then that the appellant was only trying to delay the recovery of the assessed amount. Since the appellant failed to produce any new documents, the review application was rejected vide order dated19.02.2013. The claim of the appellant that they agreed to remit the contribution on D.A is not correct. There was no claim by the appellant during the enquiry under Sec 7A or during the review petition under Sec 7B that they are paying any allowances as claimed in this appeal.

5. The respondent authority initiated an enquiry under Sec 7A of the Act on the report of the Enforcement Officer that the appellant establishment is under reporting wages. During the enquiry, the respondent authority found from the records

produced by the appellant, that the appellant establishment has shown basic wages and total wages in the wage register. The basic is shown as 25% of the gross salary paid to its employees. Provident Fund contribution is paid only on the basic salary of 25% of the gross salary of the wages paid to the employees. Since it is clear from the records that the appellant is adopting a clear subterfuge to evade provident fund contribution, the respondent authority issued the impugned order. The review petition filed under Sec 7B of the Act was rejected by the respondent since the appellant was only trying to prolong the recovery by seeking adjournments. The respondent authority also found that inspite of so many adjournment. The appellant failed to produce any additional documents to substantiate their claim.

6. In this appeal, the learned Counsel for the appellant came with a pleading that the appellant during the 7A enquiry admitted their responsibility under the Act to remit contribution on D.A. However the appellant objected to the assessment of dues on various allowances. According to the learned Counsel for the respondent, there was no submission or admission by the

appellant before the respondent authority. In the impugned order itself, the respondent authority indicated that "on verification of the wages register, Provident Fund is deducted only on 25% of gross salary. There are two columns in the salary register, gross salary and basic pay. The difference between gross salary and basic pay is not known, whether it is D.A/V.D.A or any other allowance which are not mentioned". From the above, it is very clear that as per documents produced, there were only two entries in the wage register maintained by the appellant, one is basic and other is the gross salary. The appellant failed to explain such a bifurcation of wages during the 7A enquiry. The learned Counsel for the appellant came with a pleading that the wage slips produced by the appellant will show the allowances paid by the appellant to its employees. The learned Counsel for the respondent categorically denied the allegation arguing that other than wage register, no other document was produced by the appellant before the respondent authority.

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 :

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.

7. It can be seen that some of the allowances such as DA, excluded under Sec 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".

8. 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".

9. In a recent decision in ***Gobin (India) Engineering Pvt. Ltd. Vs Presiding Officer, CGIT and Another***, W.P.(C)No. 8057/2022, the Hon'ble High Court of Kerala held that the universal formula of adding all allowances would not be appropriate as to what were the norms of work prescribed for the workman during the relevant period. According to the Hon'ble High Court, it is required to be examined whether the allowances are linked to any incentive for production resulting in a greater output by an employee or the allowances are being paid especially to those who avail the opportunity. In this particular case, the appellant split 25% of the wages as basic wages and there is no explanation for the rest of the payments. Hence it is

very clear that the attempt of the appellant was only to evade provident fund contribution as no allowances are mentioned in the books of accounts of the appellant establishment. Hence it is not possible to examine the nature of allowances, if any, as the appellant himself could not explain the splitting of wages adopted by them. Therefore there is no scope for such an enquiry.

8. Considering the facts, circumstances, pleadings, arguments and evidences, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed.

Sd/-
(V.Vijaya Kumar)
Presiding Officer