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

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

(Monday the, 18th day of April 2022)

APPEAL No. 624/2019
(Old No. ATA.546(7)2013)

Appellant : M/s.Unity Jewel Arcade Pvt.Ltd.
D.No.III/366, C & D,
Near K G Hospital,
Angamaly – 683 572

By M/s. Menon & Pai

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

By Adv.Sajeev Kumar K Gopal

This case coming up for final hearing on 29.12.2021 and this Tribunal-cum-Labour Court on 18.04.2022 passed the following:

ORDER

Present Appeal is filed from order No. KR/KCH/27941/Enf-3(7)/2013/3812 dated 24.06.2013 assessing dues under Sec 7A of EPF and MP Act 1952 (hereinafter referred to as 'the Act') on non-enrolled employees and evaded wages for the period from

04/2012 – 07/2012. The total dues assessed is Rs.1,31,345/- (Rupees One lakh thirty one thousand three hundred forty five only)

2. Appellant is a Private Limited Company registered under the Companies Act 1956. The company has its showroom at Angamaly. The company is engaged among other things, in the sale of jewellery and other allied products. The establishment is covered under the provisions of the Act. The appellant after commencement of its business got its Standing Orders certified by the competent authority under Industrial Employment (Standing Orders) Act. True copy of the Standing Order is produced and marked as Annexure A1. An Enforcement Officer conducted an inspection of the appellant establishment and submitted his report. The respondent initiated an enquiry under Sec 7A of the Act on the basis of the inspection report. The issues raised during the enquiry were whether the trainees are to be covered under EPF and contributions are payable on allowances such as special allowance, educational allowance, city compensatory allowance and special aptitude stipend. True copy of the notice dated 13.02.2013 and the observations based on the

inspection report are produced as Annexure A2 and A3 respectively. A representative of the appellant explained that the trainees are governed by certifying Standing Orders and therefore are excluded from provident fund membership. With regard to the allowances also the representative explained that the same will not form part of basic wages and therefore, will not attract provident fund deduction. The appellant submitted letters dated 20.03.2013 and 24.04.2013, copies of which are produced and marked as Annexure A4 and A5. Without considering any of the submissions made by the appellant, the respondent issued the impugned order. The appellant establishment is engaged in the business of sale of jewellery and allied products. Training is required for a person to be enrolled on the roles of an establishment. Hence training is imparted in making, handling, purchase, billing, product knowledge and dealing with customers. It is clear from Annexure A6 that the non-enrolled persons are only trainees under Sec 2(f) of the Act. Trainees under certified Standing Orders are not employees. Even otherwise Model Standing Orders are applicable to the appellant establishment. The Hon'ble Supreme Court of India in ***Regional Provident Fund***

Commissioner Vs Central Arecanut and Cocoa Marketing and Processing Co-Operative Ltd., 2006 (3) SCC 381, held that model standing orders are deemed to be applicable even if the standing orders are not certified by the competent authority. The respondent authority could not have questioned the authority of the certification of standing orders and engagement of trainees. The trainees, even if, engaged for a period of 6 months could be appointed as regular employees even after two months or less if they are found to be competent. The respondent ought to have conducted an enquiry under Para 26B of EPF Scheme to decide the eligibility of the trainees. Though the stipulated period of training is one year, the appellant offered employment to a large number of trainees and immediately, thereafter, they were enrolled to the fund. The respondent authority ought to have considered the definition of basic wages as per Sec 2(b), contribution as per Sec 6 of the Act and Para 29 of EPF Scheme while deciding that the allowances will form part of basic wages.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act w.e.f. 01.04.2012. The appellant employed

48 persons as on 04/2012. An Enforcement Officer inspected the appellant establishment and submitted a report dated 04.09.2012 stating that 26 employees were not employed to the fund from 04/2012 to 07/2012. He further reported that the wage of the employees' are split into special allowance, city compensatory allowance educational allowance and other allowance and the appellant is not remitting contribution for the same. The respondent authority initiated an enquiry on the basis of the report. A representative of the appellant attended the hearing and filed a written statement justifying their position. It was noticed that there are three categories of employees working in the establishment. One is permanent employees whose salary is split into basic, special allowance, city compensatory allowance, educational allowance and other allowance. The second category of employees are stipend staff whose salary is divided into basic, special allowance, educational allowance and special attitude stipend. No provident fund is paid in respect of these employees. The third category is daily wage employees. Daily wage employees are paid Rs.175 per day but they are not enrolled to the fund. The respondent authority after examining the records produced

by the appellant came to the conclusion that 26 non-enrolled employees are not apprentices as claimed by the appellant and they will come within the definition of the employee under Sec 2(f) of the Act. The respondent authority also found that the allowances such as special allowance, city compensatory allowance, educational allowance and special aptitude stipend being paid to the employees will form part of basic wages and therefore will attract provident fund deduction. Appellant establishment is not an industry. The establishment which is a trading and commercial establishment is not an industrial establishment within the meaning of definition under Sec 2(e) of Industrial Employment (Standing Orders) Act 1946. The predominant activity of the appellant establishment being trading and commercial, it does not fall under anyone of the four categories of Industrial Establishment as defined under Sec 2(e) of the Industrial Employment (Standing Orders) Act.

4. An Enforcement Officer of the respondent organisation during his inspection found that 26 employees were not enrolled to provident fund. He also found that the appellant is splitting the wages of employees into various allowances which is a clear

case of subterfuge as the contributions were not remitted on the allowances. The respondent authority initiated an enquiry under Sec 7A of the Act. A representative of the appellant attended the hearing and submitted that the trainees are apprentices engaged under the certified Standing Orders of the appellant establishment and therefore they will not come within the definition of employees. The appellant also pleaded that the allowances will not form part of basic wages as per Sec 2(b) and Sec 6 of the Act. The respondent authority after considering the submissions of the appellant, issued the impugned order.

5. The learned Counsel for the appellant reiterated its stands before the respondent authority in this appeal also. According to him, the respondent authority failed to consider that a trainee/apprentice under the Standing Orders is excluded under Sec 2(f) of the Act. He further pleaded that the allowances being paid to the employees and trainees will not form part of basic wages and therefore will not attract provident fund contribution.

6. The learned Counsel for the appellant pointed out that the Enforcement Officer ought to have been examined in the

enquiry. The learned Counsel for the appellant relied on the decision of the Hon'ble High Court of madras in ***M/s. Hatsun Agro Products Ltd. Vs Assistant Provident Fund Commissioner***, 2021 LLR 890, to argue that the respondent ought to have examined the Enforcement Officer who conducted the inspection of the appellant establishment before quantifying the dues. The facts of the above case are entirely different. In the above case, the petitioner wanted the Enforcement Officer to be examined and also provided a questionnaire containing 16 questions to be answered by the Enforcement Officer which is refused by the respondent authority. The issue involved also pertains to assessment of dues on transporters and transportation charges. In such a case, the evidence of the Enforcement Officer becomes relevant. In this case, the appellant never wanted the Enforcement Officer to be examined in the enquiry. Even otherwise, the facts of the case are admitted by the appellant and therefore examination of the Enforcement Officer is not going to help the appellant in any way. The learned Counsel for the appellant also argued that the beneficiaries are not identified by the respondent authority. He relied on the decision

of the Bombay High Court in ***Rallis India Limited Vs Assistant Provident Fund Commissioner***, 2014 LLR 25, to argue that identification of employees is relevant before assessing the dues on their wages. In the above case, it is seen that the Assistant Provident Fund Commissioner assessed 15% of the total freight charges paid as wages of the employees without identifying the beneficiaries. In such a context, the Bombay High Court found that the assessment of dues is on the basis of presumptions and cannot be accepted unless the employees are identified. In this case, the fact of engaging 26 trainees by appellant establishment is not disputed by the appellant. The only contention before the respondent authority in this appeal is that they are apprentices engaged under certified Standing Orders

7. According to the learned Counsel for the respondent, the definition of 'employee' as per Sec 2(f) of the Act treats apprentices also as employee, the specific exclusion being the apprentices engaged under the Apprentices Act, 1961 or under the Standing Orders of the establishment. The Hon'ble High Court of Kerala in ***Indo American Hospital Vs APFC***, W.P.(C)

No.16329/2012 vide its judgment dated 13.07.2017 in Para 7 held that

> "It is to be noted that an apprentice would come within the meaning of an employee unless he falls within the meaning of apprentice as referred under the Apprentices Act, 1961 or under the standing order of the establishment. If the trainees are apprentices and they can be treated as apprentices under the Apprentices Act or under the standing orders of the establishment, certainly, they could have been excluded but, nothing was placed before the authority to show that they could be treated as apprentices within the meaning of Apprentices Act or under the standing orders of the establishment. Therefore, I do not find any scope for interfering with the impugned order ".

Going by the observation of the Hon'ble High Court as reproduced above, the appellant herein also failed to substantiate their claim that the trainees are apprentices engaged under the certified Standing Orders of the appellant establishment. The appellant ought to have produced the training scheme, the duration of

training, the scope of training and also the evidence to show that they are appointed as apprentices under the standing orders, before the authority U/s 7A of the Act. This is particularly relevant in the facts of the case as the appellant establishment is engaging more than 50% of the total employment strength as trainees. As held by the Hon'ble High Court of Delhi in ***Saraswathi Construction Co Vs CBT***, 2010 LLR 684 it is the responsibility of the employer, being the custodian of records, to disprove the claim of the department before the 7A authority. The Hon'ble High Court of Kerala in ***Sivagiri Sree Narayana Medical Mission Hospital Vs Regional Provident Fund Commissioner,*** 2018 4 KLT 352 anticipated the risk of allowing establishments and industries to engage apprentices on the basis of standing orders. Considering the possibility of misuse of the provisions the Hon'ble High Court held that

> "Of course, there would be many cases, where the employers for the sake of evading the liabilities under various labour welfare legislations, may allege a case which is masquerading as training or apprenticeship, but were infact it is extraction of work from the skilled or

> unskilled workers, of course the statutory authorities concerned and Courts will then have to lift the veil and examine the situation and find all whether it is a case of masquerading of training or apprentice or whether it is one in substance one of trainee and apprentice as envisage in the situation mentioned herein above and has dealt within the aforesaid judgment referred to herein above".

The observation of the Hon'ble Court cited above, is required to be applied in all fours to the facts and circumstances of this case. Though it is denied by the appellant, there is a clear finding by the respondent authority that the so called trainees are doing the work of regular employees. There is also a clear finding that the so called stipend paid to these trainees are almost same as wages paid to the regular employees. Further all allowances paid to the regular employees are also being paid to the trainees. As already pointed out it was upto the appellant to produce the documents to discredit the report of the Enforcement Officers that the trainees are not engaged in the regular work and also that they are only paid stipend and not wages as reported by the

Enforcement Officer. The appellant also should have produced the training scheme/schedule and also the duration of training which will clearly indicate whether the trainees are engaged as regular employees. The Hon'ble High Court of Madras in ***MRF Ltd Vs Presiding Officer, EPF Appellate Tribunal***, 2012 LLR 126 (Mad.HC) held that " the authority constituted under the 7A of EPF & MP Act has got power to go behind the terms of appointment and find out whether they were really engaged as apprentices. The authority U/s 7A can go behind the term of appointment and come to a conclusion whether the workman are really workmen or apprentices. Merely because the petitioner had labelled them as apprentices and produces the orders of appointment that will not take away the jurisdiction of the authority from piercing the veil and see the true nature of such appointment". The Hon'ble High Court of Madras in the above case also held that though the apprentices appointed under the Apprentices Act or standing orders are excluded from the purview of the Act they cannot be construed as apprentices, if the major part of the workforce comprised of apprentices. In ***Ramnarayan Mills Ltd Vs EPF Appellate Tribunal***, 2013 LLR

849(Mad.DB) the Division Bench of the Hon'ble High Court of Madras held that if the apprentices are engaged for doing regular work or production, they will come within the definition of employee U/s 2(f) of the Act. In another case, the Division Bench of the Hon'ble High Court of Madras in ***NEPC Textile Ltd Vs APFC***, 2007 LLR 535 (Mad) held that the person though engaged as apprentice but required to do the work of regular employees is to be treated as the employee of the mill. In this particular case the respondent authority has concluded that the so called trainees were actually doing the work of regular employees and hence they cannot claim exclusion U/s 2(f) of the Act.

8. The appellant relied on the decision of the Hon'ble Supreme Court in ***Central Arecanut and Coco Marketing and Processing Company Ltd Vs RPFC***, AIR 2006 SCC 971 to argue that the trainees engaged by them are apprentices under the Act. In the above case, the establishment is an industry coming under the Industrial Employment (Standing Orders) Act and they were having a training scheme under which 40 trainees are taken every year after notifying in newspapers and after conducting

interview regarding suitability of trainees. In the present case as already pointed out the appellant failed to produce any training scheme and also prove that the trainees are actually apprentices and therefore the decision of the Hon'ble Supreme Court in the above case cannot be relied on by the appellant to support its case.

9. The Hon'ble High Court of Kerala in a recent decision dated 04.02.2021 in ***Malabar Medical College Hospital & Research Centre Vs RPFC***, O.P. No.2/2021 considered the above issues in detail. In this case also the issue involved was whether the trainees engaged by a hospital can be treated as employees U/s 2(f) of the Act. After considering all the relevant provisions the Hon'ble High Court held that

> "Para 8. A bare perusal of the above definition makes it clear that apprentice engaged under the Apprentices Act, 1961 or under the standing orders of the establishment cannot be termed as 'employee' under EPF Act. It is also clear that in the absence of certified standing orders, model standing orders framed under the Industrial Employment (Standing Orders) Act, 1946 hold the field

and the model standing orders also contain the provision for engagement of probationer or trainee. However, the burden for establishing the fact that the persons stated to be employees by the Provident Fund organization are infact apprentices, lies on the establishment because that is a fact especially within the knowledge of the establishment which engages such persons".

10. It is also interesting to know that though the appellant claimed that the trainees are paid stipend, it is seen that the stipend is also split into basic, special allowance, educational allowance and special aptitude stipend which will clearly show that the payment made to the trainees are not stipend but salary which will come within the definition of basic wages attracting provident fund deduction. It is also equally important that the appellant was engaging 48 regular employees and 26 trainees as on April 2012. Hence it is very clear that the so called trainees will come within the definition of employees under Sec 2(f) of the Act.

11. The next issue raised by the learned Counsel for the appellant is with regard to the allowances being paid to the

employees and whether those allowances will form part of basic wages. There is no dispute regarding the fact that the salary of the employees' are split into basic, special allowance, city compensatory allowance and education allowance. There is also no dispute regarding the fact that these allowances are being universally and uniformly being paid to all employees.

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.

12. 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".

13. In this case, the allowances paid are Special allowance, City Compensatory Allowance and Educational Allowance. 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, all the above allowances, which are 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.

14. In this case, the appellant has no case that these allowances are link to any incentive for production resulting in greater output by an employee and the allowances are not paid across the board to all employees. In order to claim the benefit of exclusion, the appellant ought to have shown that the employees concerned had become eligible to get these allowances beyond the normal work which he was otherwise required to put in. In such a situation, I am of the considered view that these allowances will form part of basic wages attracting provident fund deduction. It is interesting to note that these allowances are being paid to even the so called trainees.

15. Considering the facts, circumstances, pleadings and evidence in this appeal, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed

Sd/-
(V.Vijaya Kumar)
Presiding Officer