



**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. 644/2019

(Old No. 147(7)2013)

Appellant : M/s. K.N.Security & Allied Services (P) Ltd.
Building No. VII/432B
Civil Station – Kunnumpuram Road
Kakkanad
Kochi – 682 030

By Adv. Anil Narayan

Respondent : The Assistant PF Commissioner
EPFO, Bhavishya Nidhi Bhavan
Kaloor, Kochi – 682 017

By Adv.Sajeevkumar K Gopal

This case coming up for final hearing on 08.09.2021 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 13.01.2022 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/21390/Enf.1(6)201/12153 dated 30.12.2011 assessing dues under Sec 7A of EPF and MP Act 1952 (hereinafter referred to as 'the Act') on evaded wages for the period from 12/2005 – 02/2008. The total dues assessed is Rs.3,62,504/- (Rupees three lakh sixty two thousand five hundred and four only)

3. The appellant is an empanelled security agency registered with Directorate General Re-Settlement, Ministry of Defence, Government of India (DGR) w.e.f. 22.06.2005. The appellant is covered under the provisions of the Act and is regular in compliance. A copy of the DGR Scheme is enclosed. The appellant establishment is closed w.e.f. 28.02.2008. The respondent initiated an enquiry under Sec 7A of the Act on the basis of an inspection report submitted by the Enforcement Officer. According to the report of the Enforcement Officer, uniform allowance and special equipment allowance paid along with the wages were not included in the assessment of dues for the period from 12/2005 – 02/2008. According to the appellant,

additional allowances would not come within the definition of basic wages under sec 2(b) of the Act. Ignoring the contentions of the appellant, the respondent issued the impugned order which is produced and marked as Exhibit A1. The appellant was not provided with a copy of the report of the Enforcement Officer nor the appellant was allowed to cross examine the Enforcement Officer who conducted the inspection of the appellant establishment. The appellant filed a review application under Sec 7B of the Act. A copy of the review application is produced and marked as Exhibit A2. The appellant has already paid Provident Fund contribution on basic wages and dearness allowance as provided under Para 53 of wage formula as per Appendix S of the guidelines issued by DGR. A true copy of the guideline issued by DGR is produced and marked as Exhibit A3. The respondent rejected the review application vide order dated 08.10.2012. A copy of the said order is produced and marked as Exhibit A4. A true copy of the petition filed by the appellant before the respondent dated 16.11.2012 is produced and marked as Exhibit A5. Special Equipment Allowance given to guards is actually special allowance given for working on weekly off days and national holidays. As per Exhibit A3 guidelines

issued by DGR, amounts paid to security guards for working in weekly off and National holidays are exempted from EPF contribution. The appellant being a DGR empanelled agency, is bound to follow the DGR guidelines regarding wage structure. The contention was accepted by the respondent in his reply dated 16.11.2012. A copy of the said reply is produced and marked as Exhibit A6.

4. The respondent filed counter denying the above allegations. The appellant is covered under the provisions of the Act. The appellant establishment was engaged in supplying ex-servicemen security staff to various Government undertaking Companies/Corporations etc. A complaint dated 24.12.2010 was received from the Secretary, All Kerala Ex-servicemen Security Staff Association of BSNL that the Ex-servicemen were working as security guards in BSNL under the appellant employer from 12/2005 – 02/2008 and the appellant has not remitted Provident Fund contribution on full wages for the period. An Enforcement Officer was deputed to investigate. As per the report of the Enforcement Officer, the salary of the employees includes basic wages, uniform allowance and special

equipment allowances. Only the basic wages is taken for Provident Fund remittance. The contract with BSNL is over during February 2008. The Enforcement Officer also submitted wage registers for the period 12/2005 – 02/2008. The respondent initiated an enquiry under sec 7A of the Act on 27.10.2011. An authorised representative appeared before the authority and stated that provident fund was deducted only on basic wages and this was done on a special request by the employees. The employees did not raise any objection during the period of contract. No DA is provided to the employees. After taking into account the submissions made by the Enforcement Officer and also the representative of the appellant, the respondent authority found that the salary of the appellant establishment paid to its employees is split into three heads. Provident Fund is deducted and paid only on basic wages exempting the allowances to evade Provident Fund liabilities. The respondent authority relied on the decision of the Hon'ble High Court of Gujarat in ***M/s. Gujarat Cypromet Ltd Vs APFC*** Hon'ble High Court of Madhya Pradesh in ***M/s. Surya Roshni Vs EPFO and Another*** and Hon'ble High Court of Madras in ***Poompuhar Shipping Corporation Ltd Vs RPFC*** to

substantiate its findings that allowance will form part of basic wages under sec 2(b) of the Act. The respondent authority relied on the wage registers produced by the appellant with regard to the security guards deployed with BSNL. On the basis of the above, the respondent issued the impugned order. The appellant filed a review application under Sec 7B of the Act on 13.01.2012. The respondent authority examined the contentions raised by the appellant in the review application and held that in the OMs dated 04.02.1994 and 11.11.1994, it was instructed to keep minimum wages formula to avoid exploitation of security staff. No where in the above instructions, it is stated that allowances or amounts paid above minimum wages shall be exempted from Provident Fund contributions. Exempting such portion of wages is not in accordance with sec 2(b) of the Act. The respondent initiated action for recovery of the outstanding dues. The appellant approached the Hon'ble High Court in W.P.(C) No.28587/2012 and the Hon'ble High Court directed the respondent to keep the recovery action in abeyance pending a final decision in this appeal. As per Sec 2(b) and Sec 6, the appellant establishment is liable to remit contribution on all allowances other than those allowances which are specifically

excluded under the provisions of the Act. An Enforcement Officer is an Inspector appointed under Sec 13 of the Act. Sec 13 conferred certain powers on the Inspectors to implement the provisions of the Act and the Schemes framed therein. Hence there is no harm in relying on the report of the Enforcement Officer in a quasi judicial proceedings under Sec 7A of the Act. As a matter of fact, the report of Enforcement Officer is provided to the appellant on request either during the course of the enquiry or prior to the date of enquiry. The appellant never requested for a copy of the report during the course of enquiry as the issue involved is only a question of law to be clarified on the basis of the available records. The request of the appellant dated 16.11.2012 was replied by the respondent authority. A copy of the said reply is produced and marked as Exhibit R1. The Division Bench of the Hon'ble High Court of Karnataka in **Group 4 Securities Guarding Ltd. Vs RPFC and Others**, held that the Commissioner in exercise of powers conferred on him under Sec 7A is entitled to go into the question whether splitting of pay by the employer to its employees is a subterfuge intended to avoid payment of contribution to Provident Fund. The Hon'ble Supreme Court of India in **Rajasthan Prem Kishan Goods**

Transport Co. Vs RPFC and others, (1996) 9 SCC 454 held that it is upto the Commissioner to lift the veil and read between the lines to find out the wage structure fixed by the employer to its employees and to decide the question whether the splitting up of pay has been made only as a subterfuge to avoid its contribution to Provident Fund.

5. The respondent authority received a complaint from the Secretary, All Kerala Ex-serviceman Security staff of BSNL that the security guards deployed by the appellant in BSNL are not getting Provident Fund contribution on the wages paid by the appellant establishment. An investigation by the Enforcement Officer established the fact that the appellant was not remitting contributions on uniform allowance and special equipment allowance. The respondent authority therefore initiated an enquiry under Sec 7A of the Act. A representative of the appellant attended the hearing and submitted that the appellant establishment is a DGR empanelled agency and they are following the guidelines specifically in regard to wage structure as mentioned in Exhibit A3 guidelines issued by DGR. The respondent authority noticed that there is no specific

guideline that the allowances paid to the employee need not be taken into consideration while remitting the contribution. The respondent authority also considered various decisions and judgements of High Courts and came to the conclusion that the uniform allowance and special equipment allowance paid by the appellant to its employees deployed at BSNL stations will come within the definition of basic wages and therefore will attract Provident Fund deduction. The respondent filed a review application under sec 7B of the Act which came to be rejected vide order dated 30.10.2012.

6. The appellant challenged the Sec 7A as well as Sec 7B orders in this appeal. No appeal is maintainable under Sec 7(I) from an order rejecting a review application under sec 7B of the Act. With regard to the impugned order under Sec 7A, the learned Counsel for the appellant submitted that they were following a wage structure as stipulated by the DGR in Exhibit A3 guidelines issued by them. As per Para 47 of Exhibit A3, the DGR has provided the wage structure of the employees to be deployed by empanelled agencies. According to this wage structure, the basic pay includes the Minimum wage + VDA. It

also provides for additional allowance payable for posting at remote disturbed areas and coal fields @ 20% of Basic pay. Further it also provides for 5% additional allowance to security guards when posted from outside the municipal limits. It doesn't provide for any other allowance. In this case, it is seen that the appellant is paid uniform allowance and special equipment allowance which are not at all provided in the guidelines issued by the DGR. Hence the case of the appellant that they were strictly following the DGR guidelines with regard to pay structure of the security guards is not correct. The learned Counsel for the appellant also pointed out that as per Para 53 of Exhibit 3 guidelines, the appellant is required to pay contribution only on basic wages. The learned Counsel for the respondent pointed out that there is no such provision in Para 53 which only provides an example in Appendix Q. Nowhere in Exhibit 3 guidelines it is mentioned that the allowances need not be accounted while remitting Provident Fund contribution in respect of its employees. Hence the claim of the appellant that they were following the guidelines in Exhibit 3 is not correct. Even otherwise if there is any instruction or guideline in violation of the provisions of the Act, the same is abinitio void.

7. The issue whether the uniform allowance and special equipment allowance will form part of basic wages is to be examined in the light of Sec 2(b) and Sec 6 of EPF and MP 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 :

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.

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 Majdoor 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”.

7. In this case, the allowances paid are uniform allowance and special equipment allowance being paid to the employees by the appellant. According to the learned Counsel for the appellant, uniform allowance is being paid to all security guards for maintaining their uniform. Special equipment allowance is given to guards as a special allowance for working on weekly off days and national holidays. Though the nomenclature is misleading, this allowance is also being paid to all security guards deployed by the appellant establishment to BSNL. 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, both 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.

8. The learned Counsel for the appellant also pointed out that the appellant was not provided a copy of the inspection report or allowed to cross examine the Enforcement Officer who conducted the inspection of the appellant establishment. According to the learned Counsel for the respondent, the impugned order is issued basically on the documents produced by the appellant. The issue raised by the Enforcement Officer whether the uniform allowance and special equipment allowance will attract Provident Fund deduction is a question of law to be decided by the respondent authority. Hence it was upto the appellant to request for a copy of the report if the same is

desired by the appellant. The appellant never raised this question before the respondent authority under Sec 7A of the Act or in the review application filed under Sec 7B of the Act. The issue regarding the report of the Enforcement Officer is raised for the first time in this appeal. As rightly pointed out by the learned Counsel for the respondent, the issue being decided in the enquiry under Sec 7A was known to the appellant and the appellant contested this issue under Sec 7A as well as in the review under Sec 7B. During none of these proceedings the appellant requested for supplying a copy of the report of the Enforcement Officer or requested for cross examining the Enforcement Officer. I don't think any prejudice is caused to the appellant by not providing a copy of the report of the Enforcement Officer to the appellant.

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

Hence the appeal is dismissed.

Sd/-
(V.Vijaya Kumar)
Presiding Officer