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

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

(Wednesday the 5th day of January, 2022)

APPEAL No.100/2019

(Old no.791(7)2014)

Appellant : M/s.Riches Jewel Arcade Ltd
VII/267/1, M. C. Towers
NH 212, Kalpetta
Wayanad - 673121

By M/s.Menon & Pai

Respondent : The Assistant PF Commissioner
EPFO, Sub Regional Office
Eranjipalam P.O.
Kozhikode - 673006

By Adv.(Dr.)Abraham P. Meachinkara

This case coming up for final hearing on 21.09.2021 and this Industrial Tribunal-cum-Labour Court on 05.01.2202 passed the following:

O R D E R

Present appeal is filed against order no.KR/KK/23727/ENF-2(4)/2014-15/1892 dt.10.06.2014 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on evaded wages and also non enrolled

employees for the period from 01/2013 to 08/2013. The total dues assessed is Rs.1,43,914/-.

2. The appellant is a private limited company registered under Companies Act, 1956. The company is engaged among other things in the sale of jewellery and allied products. The appellant is covered under the provisions of the Act soon after the commencement of business the appellant prepared draft Standing Orders and forwarded the same for certification under Industrial Employment (Standing Orders) Act. The proceedings are now pending before the certifying office. The Enforcement Officer of the respondent organisation conducted an inspection, verified the records and submitted a report to the respondent. On the basis of the report the respondent authority initiated an enquiry U/s 7A of the Act. The issues involved were whether trainees are coverable under EPF Act and whether contributions are payable on the allowances such as lunch allowance, medical allowance, conveyance allowance and HRA. The representative of the appellant explained that the trainees of the appellant are governed by Industrial Employment (Standing Orders) Act and hence they are excluded. With regard to allowances, it was stated that the above allowances are compensatory in nature and hence do not form part of basic wages. The appellant explained that HRA is specifically excluded and other allowances are

paid on actual basis. Ignoring the above contentions, the respondent issued the impugned order. The respondent issued the impugned order in total disregard to the legal position that the appellant is governed by the provisions of the Standing Orders Act. Further the impugned order also goes against the judgment of the Hon'ble Supreme Court in **RPFC Vs Central Arecanut and Coco Marketing and Processing Company Ltd, Mangalore**, 2006 (2) SCC 381. The finding of the respondent authority that contribution is payable on medical allowance, lunch allowance, conveyance allowance and HRA is not legally sustainable. HRA being compensatory allowance, the same is expressly excluded U/s 2(b) of the Act. A combined reading of Sec 6, Sec 2(b) of the Act and Para 29 of EPF Scheme would clearly show that the allowances are excluded from payment of contribution.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act w.e.f. 21.01.2013. It was reported that the appellant establishment committed evasion of wages by not accounting actual wages as required to be done while making contribution. It was also reported that 7 employees were not enrolled to the fund. The appellant was therefore summoned U/s 7A of the Act. The appellant was represented in the proceedings. The representative of the appellant filed a written statement. After taking into account all the

relevant facts, the respondent issued the impugned order. In the written representation filed by the appellant, the appellant contended that the trainees are engaged under Standing Orders of the appellant establishment and the Standing Orders are in the process of certification. However the appellant failed to produce any documents to prove that the appellant establishment has initiated the process for getting the Standing Orders certified under the provisions of Industrial Employment (Standing Orders) Act. Sec 2(f) of the Act defines an employee to include an apprentice or trainees but excludes the apprentices engaged under Apprentices Act, 1961 or the Certified Standing Orders. All other trainees will be treated as an employee U/s 2(f) of the Act. The basic wages by its own definition encompasses all payments except specific exclusion. All such allowances which are ordinarily, necessarily and uniformly paid to the employees are to be treated as part of basic wages. The confusion in definition primarily arises from the expression "commission or any other similar allowance" payable to the employee in Sec 2(b)(2) of the Act as commission and any other allowance are read as two separate expressions and hence any other allowance is read as an omnibus exclusion there by encouraging the subterfuge or splitting of wages to include provident fund liabilities. The expression "commission or any other similar allowances payable to the employee" is one continuous term meaning

commission or any other "commission" like allowances by whatever nomenclature referred. Thus the basic wages is subject to exclusion especially referred in the above definition and no other.

4. The learned Counsel for the appellant raised two issues in this appeal. The 1st issue is with regard to non enrollment of trainees and the 2nd issue is regarding evaded wages.

5. The first issue raised by the learned Counsel for the appellant is with regard to non enrollment of so called trainees to provident fund membership. According to the learned Counsel for the appellant, all these trainees are only learners and therefore they are excluded as per Sec 2(f) of the Act. According to him, Sec 12A of the Industrial Employment (Standing Orders) Act can be invoked to extend Model Standing Orders to the appellant establishment since Model Standing Orders provided for engagement of trainees. The appellant did not produce any Certified Standing Orders even in this appeal and relied on Sec 12A of the Industrial Employment (Standing Orders) Act. 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 dt.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. 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. 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 Officers. 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 ". 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.

6. 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 971to 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 news papers 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.

7. The Hon'ble High Court of Kerala in a recent decision dt.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 organisation are infact apprentices, lies on the establishment because that is a fact especially within the knowledge of the establishment which engages such persons ".

8. In this case, the appellant failed to produce any Certified Standing Orders even in this appeal, or any evidence to support their case that they initiated action for getting the Standing Orders certified. In **Cheslind Textiles Ltd Vs Presiding Officer, EPF Appellate Tribunal**, 2020 II LLJ 326(Mad) the Hon'ble High Court of Madras held that Sec 12 A of Industrial Employment

(Standing Orders) Act is applicable only when they have already applied for certification of draft standing orders U/s 3 of the said Act. It was also pointed out that the so called trainees are doing the same work as that of the regular employees and there is no training scheme or testing of skills which is normal in the case of trainees. It was also pointed out by the learned Counsel for the respondent that these so called trainees are later absorbed as permanent employees. The Hon'ble High Court of Kerala in **Rajesh Kurana Vs APFC**, 2009 3 LIC 2662 and the decision of the Hon'ble High Court of Madras in **Bharat Sanchar Nigam Ltd Vs UOI**, 2011 LLR 959 held that any pre-induction training will only be treated as regular employment and therefore they are required to be enrolled from the date of appointment. In view of the above position as explained above, it is not possible to consider the so called trainees as excluded U/s 2(f)of the Act and they can be treated only as employees and required to be enrolled to the fund from the due date of eligibility. Accordingly I don’t have no hesitation in holding that the so called trainees engaged by the appellant will have to be enrolled to the fund and the assessment of Rs.58,510/- made against the assessment of contribution is upheld.

9. The 2nd issue raised by the learned Counsel for the appellant is with regard to the evaded wages by the appellant establishment. According to

him, the appellant is liable to pay contribution only on basic, DA and retaining allowance. The other allowances will not form part of basic wages and therefore the assessment of dues in respect of various allowances by the respondent authority is not correct. It is seen that the appellant is paying lunch allowance, medical allowance, conveyance allowance and HRA to its employees. According to the learned Counsel for the respondent, the appellant is paying a major part of the salary of its employees as allowances. After examining the relevant legal positions, the respondent authority came to the conclusion that all allowances paid by the appellant establishment to its employees will form part of basic wages and therefore attracts provident fund deduction.

10. The relevant provisions of the Act to decide the issue whether the special allowances paid to the employees by the appellant will attract provident fund deduction are Sec 2(b) and Sec 6 of EPF & MP Act.

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.

Section6: 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 Govt, 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 where 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.

The confusion regarding the exclusion of certain allowances from the definition of basic wages and inclusion of some of those allowances in Sec 6 of the Act was considered by the Hon'ble Supreme Court in **Bridge & Roof Company Ltd Vs UOI**, (1963) 3 SCR 978. After elaborately considering all the issues involved, the Hon'ble Supreme Court held that on a combined reading of Sec 2(b) and Sec 6 where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages. Where the payment is available to be specially paid to those who avail the opportunity is not basic wages. The above dictum laid down by the Hon'ble Supreme Court was followed in **Manipal Academy of Higher Education Vs RPFC**, 2008 (5) SCC 428. In a recent decision in **RPFC, West Bengal Vs Vivekananda Vidya Mandir & Others**, AIR 2019 SC 1240 the Hon'ble Supreme Court reiterated the dictum

laid down by the Hon'ble Supreme Court in **Bridge & Roof Company Ltd** case (Supra). In this case the Hon'ble Supreme Court was considering various appeals challenging the orders whether special allowance, travelling allowance, canteen allowance, lunch incentive and special allowance will form part of basic wages. The Hon'ble Supreme Court dismissed the challenge holding that the " wage structure and 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 basic wages camouflaged as part of an allowances so as to avoid deduction and contribution accordingly to the provident fund accounts of the employees. There is no occasion for us to interfere with the concurrent conclusion of facts. The appeal by the establishments are therefore merit no interference " .

11. In **Montage Enterprises Pvt Ltd Vs EPFO, Indoor,** 2011 LLR, 867 (MP.DB) the Division Bench of the Hon'ble High Court of Madhya Pradesh held that conveyance and special allowance will form part of basic wages. In **RPFC, West Bengal Vs Vivekananda Vidya Mandir,** 2005 LLR 399 (Calcutta .DB) the Division Bench of the Calcutta High Court held that the special allowance paid to the employees will form part of basic wages particularly because no dearness allowance is paid to its employees. This decision was

later approved by the Hon'ble Supreme Court in **RPFC Vs Vivekananda Vidya Mandir** (Supra). In **Mangalore Ganesh Beedi Workers Vs APFC**, 2002 LIC 1578 (Karnat.HC) the Hon'ble High Court of Karnataka held that the special allowance paid to the employees will form part of basic wages as it has no nexus with the extra work produced by the workers. In **Damodarvalley Corporation, Bokaro Vs UOI**, 2015 LIC 3524 (Jharkhand .HC) the Hon'ble High Court of Jharkhand held that special allowances paid to the employees will form part of basic wages. The Hon'ble High Court of Kerala also examined the above issue in a recent decision dt.15.10.2020, in the case of **Employees Provident Fund Organisation Vs M.S.Raven Beck Solutions (India) Ltd**, W.P.(C) no.17507/2016. The Hon'ble High Court after examining the decisions of the Hon'ble Supreme Court on the subject held that the special allowances will form integral part of basic wages and as such the amount paid by way of these allowances to the employees by the establishment are liable to be included in basic wages for the purpose of deduction of provident fund. The Hon'ble High Court held that

> " This makes it clear that uniform allowance, washing allowance, food allowance and travelling allowance forms the integral part of basic wages and as such, the amount paid by way of these allowances 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 ".

Hence the law is now settled that all special allowances paid to the employees excluding those allowances specifically mentioned in Sec 2(b)(ii) of the Act will form part of basic wages, depending on facts and circumstances of each case.

12. It is seen that the respondent authority has included HRA also in the assessment of dues. The assessment of dues on HRA is against the provisions of the Act as Sec 2(b)(2) of the Act specifically excludes HRA from the definition of basic wages. To that extent the assessment of dues in respect of evaded wags cannot be upheld. Though the learned Counsel for the appellant pleaded that other allowances such as lunch allowance, medical allowance and conveyance allowance are not uniformly paid to all the employees, the appellant failed to produce any evidence to substantiate the contentions. There is also no evidence to demonstrate that the allowances in question being paid to its employees were either variable or were linked to

any incentive for production resulting in greater output by an employee. Hence the other allowances excluding HRA satisfies the test laid down by the Hon'ble Supreme Court in **RPFC Vs Vivekananda Vidyamandir & Other**, 2020 17 SCC 643.

13. Considering the facts, circumstances and pleadings in this appeal, the finding of the respondent authority that th e trainees are employees U/s 2(f) of the Act and therefore the assessment of dues in respect of these employees are upheld. The assessment of dues in respect of evaded wages cannot be upheld in view of the fact that the HRA component is also taken into account for assessment of dues.

Hence the appeal is partially allowed, the assessment of dues in respect of trainees are upheld, the assessment of dues in respect of evaded wages is set aside and the matter is remitted back to the respondent to re-assess the dues after excluding HRA from the assessment. The respondent shall issue notice to the appellant and assess the dues within a period of 6 months. If the appellant fails to attend the hearing or fails to produce the documents called for, the respondent is at liberty to decide the matter according to law.

Sd/-

(V. Vijaya Kumar)
Presiding Officer