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

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

(Thursday the 2nd day of December, 2021)

APPEAL No.155/2018

Appellant : M/s.Riches Jewel Arcade
Door No.26/211-1&2
M.C.Road, Ramanchira
Thiruvalla - 689101

By M/s.Ashok B. Shenoy

Respondent : The Assistant PF Commissioner
EPFO, Regional Office, Pattom
Trivandrum - 695004

By Adv.Nita N.S.

This case coming up for final hearing on 05.08.2021 and this Industrial Tribunal-cum-Labour Court on 02.12.2021 passed the following:

O R D E R

Present appeal is filed against order no.KR/TVM/26755/ENF-II(5)/ 2017/9691 dt.23.02.2018 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 09/2014 to 06/2016. The total dues assessed is Rs.11,73,983/-.

2. The appellant is an establishment covered under the provisions of the Act and is regular in compliance. The appellant received notice dt.31.08.2016 issued U/s 7A of the Act for determination of dues. A true copy of the said notice is produced and marked as **Annexure A1**. Along with Annexure A1 notice appellant was served with a copy of inspection report Part-II dt.18.07.2016 of the Enforcement Officer under the respondent. True copy of the inspection report is produced and marked as **Annexure A2**. Following Annexure A1 notice, another summons U/s 7A was also issued by the respondent. A copy of the same is produced and marked as **Annexure A3**. Annexure A1-A3 was issued on the question of splitting of salary into various allowances. The appellant attended the hearing and filed a written statement dt.12.06.2017, a copy of the written statement was produced and marked as **Annexure A4**. In the meanwhile the respondent conducted a fresh inspection through his Enforcement Officer and submitted a report dt.08.09.2017. Apart from the earlier allegation, it was also pointed out that employees included in the register of stipend and register of daily wages are not enrolled to EPF Scheme though they are enrolled to ESI Scheme. True copy of the said report is produced and marked as **Annexure A5**. Pursuant to

Annexure A5 report, respondent issued fresh notice dt.17.10.2017 U/s 7A of the Act proposing to assess the dues in respect of non enrolled employees and also on evaded wages. A copy of the notice dt.17.10.2017 is produced and marked as **Annexure A6**. The appellant submitted a detailed reply on both the issues. Copy of the said reply dt.03.01.2018 is produced and marked as **Annexure A7**. Without considering any of the contentions of the appellant, the respondent issued the impugned order assessing dues on evaded wages as well as non enrolled employees. A copy of the said order is produced and marked as **Annexure A8**. Annexure A8 is as much it reckons the allowances other than city compensatory allowance, uniform allowance, overtime allowance and leave surrender for levy of contribution under the said Act is illegal as it militates against the provisions in Sec 2(b) and Sec 6 of the Act. The respondent ought to have seen that going by Sec 2(b) and Sec 6 of the Act, the appellant is liable to pay contributions on basic pay and DA only. The conclusion of the respondent authority that the various allowances paid are only splitting up of DA payable to the employees has no basis in evidence. The finding of the respondent authority that less than 50% of gross salary in respect of all employees is treated as basic and more than 50% of the salary is bifurcated as different allowances and there is no evidence or explanation to show that such allowances are paid are also without any

basis in evidence. The persons engaged as trainees or apprentices cannot be treated as employees under 2(f) of the Act. The trainees received a lumpsum payment towards stipend pursuant to Model Standing Orders, as per the provisions of the Industrial Employment (Standing Orders) Act, 1946. The persons engaged as trainees are entitled for exclusion under Model Standing Orders by virtue of Sec 12A of the Standing Orders Act read with Clause 2(g) of Model Standing Orders framed by Kerala Industrial Employment Standing Orders Rules, 1958.

3. The respondent filed counter denying the above allegations. An Enforcement Officer of the respondent organisation conducted an inspection of the appellant establishment on 18.07.2016 and found that the establishment is remitting contribution only on a small portion of the basic wages. The appellant evaded provident fund dues by splitting the salary of employees into various allowances such as basic, uniform allowance, city compensatory allowance, medical allowances, education allowance, risk allowance, badge allowance, Ex-service allowance, driver allowance, supervisor allowance, graduation allowance, arrear salary, overtime, leave surrender, holiday wages, diamond allowance, special aptitude allowance etc so as to avoid paying provident fund contribution on the actual salary of the employees. The total of such allowances come to more than 50% of the total

salary, thereby reducing the contribution below 50% of the actual contribution liable to be paid by the appellant, to the detriment of the employees. It was also found that no DA is seen paid along with wages with a view of circumventing the statutory liabilities. In a subsequent inspection conducted by the Enforcement Officer it was reported that 42 eligible employees were not enrolled to provident fund on the pretext that they are trainees. An enquiry U/s 7A of the Act was initiated directing the appellant to appear and produce all relevant records on 28.11.2016. The enquiry was conducted on various dates. The appellant took a specific contention that education and city compensatory allowance payable to the employees do not form part of basic wages and accordingly he is not liable to pay provident fund contribution on such allowances. The appellant also filed detailed written statement which was also taken on record. On verification of the records maintained by the appellant, it is seen that all these allowances are paid universally, necessarily and ordinarily to all its employees and hence liable to be considered for deduction of provident fund. The respondent authority excluded certain allowances such as city compensatory allowance, uniform allowance, overtime allowance and leave surrender benefits from determination of provident fund dues. The non enrolled employees were clearly identified by the respondent authority before issuing the impugned

order. On the basis of the Annexure A4 representation filed by the appellant, the respondent authority sought clarification from the Enforcement Officer who conducted the inspection of the appellant establishment. The Enforcement Officer therefore filed his clarification which is produced as Annexure A5. The main contention of the appellant is that he is liable to deduct provident fund contributions only from the basic wages and not from various allowances. On the basis of the evidence available before the respondent authority, it was concluded that various allowances in question were essentially a part of basic wages camouflaged as allowances to avoid payment of contribution on the employer's share. Splitting of wages to circumvent the benefits otherwise eligible to the employees is against the spirit of the legislation. The law makers included all emoluments in the definition of basic wages but excluded certain components. By reducing the basic wages, the actual impact is reduction of contribution payable to the employees and in the instant case, the same is achieved by splitting wages into various allowances. The Hon'ble Supreme Court of India in **RPFC Vs Vivekananda Vidya Mandir and other and other connected cases**, 2019 LLR 339 held that emoluments paid to employees universally, ordinarily and necessarily will attract provident fund contribution. Applying the test to the facts of the present case, no material has been placed 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 and the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. After examining the wage structure and the components of salary, the respondent authority excluded certain emoluments like city compensatory allowance, uniform allowance, overtime allowance and leave surrender benefits from calculation of provident fund dues. By virtue of amended provisions of the Act, an employee includes any person engaged as an apprentice but not an apprentice engaged under the Apprentice Act or under the Standing Orders of the appellant establishment. After verification of the records of the appellant and also the report of the Enforcement Officer, the respondent authority concluded that these categories of employees are functionally the same as that of other employees in the nature of service benefits such as identity card, working time, holidays and pay days, shift working, attendance, late coming, absence without permission, leave, casual leave, incentive, termination, transfer, discipline and so on. It was also revealed that the employees are enrolled under ESI Scheme. It is also seen that all these so called trainees are paying professional tax. As per Sec 252 of Kerala Municipality Act, 1994 the employer is bound to

recover professional tax only from persons employed or engaged for salary or wages.

4. The Enforcement Officer attached to the office of the respondent conducted an inspection of the appellant establishment and found that more than 50% of wages paid to the employees of the appellant are split into various allowances. The appellant was remitting contribution on less than 50% of the gross wages. The Enforcement Officer therefore reported that the method adopted by the appellant is a clear subterfuge to avoid provident fund remittance by the appellant establishment. Accordingly an enquiry U/s 7A was initiated by the respondent. During the course of enquiry, the appellant filed a written statement and the respondent authority sought clarification on certain issues from the Enforcement Officer. The Enforcement Officer again visited the appellant establishment and reiterated his earlier stand that the splitting up of wages by the appellant establishment is a clear subterfuge. He further reported that there are two other categories of employees working in the appellant establishment. One is daily wage employees and the other one category is trainees and they are not enrolled to provident fund. The respondent authority issued a fresh summons U/s 7A including the non enrollment issue also as part of the enquiry. After elaborate consideration of the issues and records placed before him, the

respondent authority found that all allowances other than city compensatory allowance, uniform allowance, overtime allowance and leave surrender will form part of basic wages and therefore will attract provident fund deduction. The respondent authority also found that the so called trainees are actually employees drawing the same salary, allowance and terms of service as regular employees and therefore they are required to be enrolled to provident fund from their date of eligibility. The respondent authority therefore quantified the dues and issued the order.

5. In this appeal, the learned Counsel for the appellant flagged two issues for consideration. He did not dispute his liability to remit contribution in respect of daily waged employees.

6. The first issue raised by the learned Counsel for the appellant is that the appellant is liable to pay contribution only on basic, DA and retaining allowance. The 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 allowances such as uniform allowance, city compensatory allowance, medical allowance, education allowance, risk allowance, badge allowance, Ex-service allowance, driver allowance, supervisor allowance, graduation allowance, overtime allowance, leave surrender, holiday wages, diamond allowance,

special aptitude allowance and arrears of salary to its employees and these allowances form more than 50% of the gross salary of the employees and are also excluded from the provident fund deduction. After elaborately considering the evidences and documents produced by the appellant as well as the Enforcement Officer, the respondent authority concluded that all allowances excluding city compensatory allowance, uniform allowance, overtime allowance and leave surrender, will form part of basic wages and therefore will attract provident fund deduction.

7. 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.

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 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 " .

8. 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.

9. It is seen that many of the allowances paid are job related allowances such as risk allowance, badge allowance, Ex-service allowance, driver allowance, supervisor allowance etc. It is clear that these allowances are paid to a class of employees to argue that these allowances are not paid uniformly to all the employees. The appellant has devised this technique only to avoid provident fund deduction from such allowances. It is a settled legal position that arrears of salary will attract provident fund deduction and therefore it is rightly considered by the respondent authority as basic wages for calculation of provident fund dues. It can also be seen that the respondent authority examined all the details and came to the conclusion that only 4 categories of payments or allowances can only be excluded for the

purpose of provident fund deduction. As rightly pointed out by the learned Counsel for the respondent, it was the responsibility of the appellant to produce further evidence, if any, regarding exclusion of other allowances. In the absence of any material on record, it is not possible to arrive at a different conclusion other than the one reached by the respondent authority.

10. The second 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 provide for engagement of trainees. The appellant did not produce any Certified Standing Orders 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. This is particularly relevant in the facts of the case as the appellant establishment is engaging almost 1/4th 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. 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 ". 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.

11. 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 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.

12. 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 ".

13. In this case, the respondent authority had very clearly concluded that the service conditions such as identity card, working time, holidays and pay days, wages, wage rate, shift working, attendance and late coming, absence without permission, leave, casual leave, promotion, incentive, termination, transfer, disciplinary action etc., of the so called trainees are exactly the same as that of the regular employees. The emoluments of the trainees are also split into various allowances and the gross pay is same as that of the regular employees. 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 probationers or 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. It was also

pointed out by the learned Counsel for the respondent that Assistant Sales Manager Grade II, Business Development Executive, Guest Relation Executive, Senior Guest Relation Executive and Smith are also taken as trainees for exclusion from the benefit of provident fund. The respondent authority also found that the so called trainees are entitled for special attitude allowance, leave surrender, overtime, holiday wages and risk allowance. 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.

14. Considering all 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