सत्यमेव जयते

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

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

(Thursday the 31st day of March, 2022)

APPEAL No.313/2019
(Old no.965(7)2015)

Appellant : M/s.Age Industries (P) Ltd
Kousapara
Palakkad

By Adv.C. B. Mukundan

Respondent : The Assistant PF Commissioner
EPFO, Sub Regional Office, Kaloor
Kochi - 682017

By Adv.Sajeev Kumar K. Gopal

This case coming up for final hearing on 30.09.2021 and this Industrial Tribunal-cum-Labour Court on 31.03.2022 passed the following:

O R D E R

Present appeal is filed against order no.KR/KCH/24346/ENF-1(5)/2015/ RB No.242(1)/745-E dt.27.04.2015 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on omitted wages for the period from 04/2009 to 07/2012. The total dues assessed is Rs.5,87,360/-.

2. The appellant is a private limited company registered under Companies Act and covered under the provisions of the Act. The appellant company is engaged in manufacturing of surgical rubber gloves. Appellant engaged a few employees through a contractor M/s.Obak Human Resource Outsourcing (P) Ltd. The contractor was independently covered under the provisions of the Act under code no.KR/KCH/24346. The appellant used to ensure proper compliance by the contractor in respect of the employees deputed by him. An Enforcement Officer of the respondent organisation inspected the records of the contractor and found that the contractor is not remitting contribution on complete wages. The Enforcement Officer therefore computed additional contribution payable by the contractor. The respondent authority initiated an enquiry U/s 7A of the Act against the contractor. As part of the enquiry, the appellant was also directed to produce certain records. The appellant made its oral submissions stating that the contractor has remitted contribution as per the provisions of the Act and Sec 2(b) of the Act specifically excludes allowances. The contractor paid certain amount to its employees as a reimbursement of expenses incurred by the employees towards their journey to the workplace and back, washing of their uniforms and food. These amounts are paid as conveyance allowance, washing allowance, shift allowance and food allowance respectively. The appellant

paid dues on 75% of the total emoluments paid to the employees. As per Sec 6, the appellant is liable to pay contribution on basic, DA and retaining allowance. Ignoring the contentions of the appellant, the respondent issued the impugned order dt.09.04.2015, a copy of which is produced and marked as **Annexure A1**. The respondent organisation vide its circular no.C-III/ 110001/4/3(72)14/circular/headquarters/6693 dt.06.08.2014 has taken a policy decision that the employers who are paying EPF dues on less than 50% of wages only have to be subjected for inspection. As per Sec 2(b), emoluments earned by an employee in accordance with the terms of the contract of employment will alone come under the purview of the basic wages. Since the allowances are paid without any terms of contract, the same will not come within the definition of basic wages. Though the appellant produced all the relevant records, the respondent made a summary assessment of dues based on the salary statement relating to a single month i.e. for the month of February 2012.

3. The respondent filed counter denying the above allegations. The appellant is covered under the provisions of the Act. The appellant establishment is engaging manpower from M/s.Obak Human Resource Outsourcing (P) Ltd which is covered independently. M/s.Obak Human Resource Outsourcing is a contactor engaged in providing manpower to

various principal employers. The terms of contact are different with different principal employers. Since the appellant took the services of M/s.Obak Human Resource Outsourcing by taking manpower, the appellant is treated as a principal employer under the provisions of the Act and Scheme. The Enforcement Officer pointed out several discrepancies in the matter of compliance under the Act. The wage structure of the employees deployed with various principal employers varied from establishment to establishment. In majority of the cases contribution was paid only on basic wages. No DA is seen paid by the contractor. However the wages are split into various allowances. The appellant is engaging several contract employees through M/s.Obak Human Resource Outsourcing and the appellant is the principal employer in relation to these contract employees. The personnel engaged by the appellant are employed in connection with the work of the establishment and therefore they are treated as employees of the principal employer U/s 2(f) of the Act. Sec 2(b), Sec 6, Sec 8A of the Act and Paragraphs 30 & 36B makes it obligatory on the part of the principal employer to ensure satisfactory compliance from the contractor. As per the wage register produced, the wages of the employees are split into basic, shift allowance, Ent allowance, washing allowance and conveyance allowance. Provident fund contribution is paid on basic pay only. The Enforcement Officer who conducted the

inspection submitted copies of wages registers as well as invoices. As per the decision of the Hon'ble Supreme Court of India in **RPFC-II Vs Vivekananda Vidyamandir**, 2005 2 LLJ 721 and also the decision of the Hon'ble High Court of Gujarat in **Gujarat Cypromet Limited Vs APFC**, 2004 (3) CLR 485 all allowances other than those which are specifically excluded U/s 2(b)(2) will form part of basic wages. The respondent authority U/s 7A can examine the wage structure to ensure that there is no subterfuge to evade provident fund contribution. The appellant establishment was given more than adequate opportunity before the impugned order was issued. It is seen that the appellant was reimbursing wages ranging from Rs.150/- to Rs.221/- per day for different categories of employees. The total wages for the month of February 2012 as per the invoices is Rs.4,80,857/- whereas provident fund was remitted only for Rs.1,33,800/-. The rest of the wage components are split into basic, shift allowance, Ent allowance, washing allowance and conveyance allowance.

4. M/s.Obak Human Resource Outsourcing (P) Ltd is a contractor supplying manpower to various principal employers. An Enforcement Officer who conducted inspection of M/s.Obak Human Resource Outsourcing (P) Ltd reported that there is huge underreporting of wages with regard to the employees deployed by the contractor to various principal employers. The

respondent authority initiated an enquiry U/s 7A of the Act. All the principal employers involved were also summoned to attend the enquiry. They were also directed to produce records relating to the contract to evaluate and assesses the dues. Appellant is one of the principal employers who has entered into a contract with M/s.Obak Human Resource Outsourcing (P) Ltd to supply manpower on certain agreed terms. A representative of the appellant attended the enquiry, produced the records called for and pleaded that contribution in respect of the contract employees deployed by M/s.Obak Human Resource Outsourcing (P) Ltd is paid on 70% of the gross salary and the allowances such as shift allowance, Ent allowance, washing allowance and conveyance allowance will not attract provident fund deduction. After hearing the contractor as well as the appellant, the respondent authority found that all these allowances will attract provident fund deduction and therefore issued the impugned order directing the appellant as well as the contractor jointly and severally responsible for the same.

5. In the impugned order, the learned Counsel for the appellant took a view that the allowances being paid by the contractor to its employees will come within the excluded allowances as per Sec 2(b) of the Act. The learned Counsel also submitted that the allowances such as washing allowance, food allowance, shift allowance and conveyance allowance are paid as

reimbursement of actual expenditure incurred by the contract employees. Further it was also stated that all these allowances put together will come to only 30% of the emoluments paid to the contract employees and contribution is being paid on 70% of the total wages.

6. The relevant statutory and legal position relating to the allowances paid by the appellant to the contract employees are discussed below. The relevant provisions of the Act to decide the issue whether the conveyance allowance and special allowance 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 " .

7. 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. In a recent decision in **Gobin (India) Engineering Pvt Ltd Vs Presiding Officer, CGIT cum Labour Court, Ernakulam and another**, W.P.(C) no.8057/2022 the Hon'ble High Court of Kerala examined the categorisation of allowances and the test evolved by the Hon'ble Supreme Court in **RPFC, West Bengal Vs Vivekananda Vidyamandir & Other**, 2020 17 SCC 643. The Hon'ble High Court held that there is no doubt that basic wages would also include allowances except HRA but the respondent authority will have to examine the nature of allowances and the duties of the employees including the timings. The Hon'ble High Court held that

" But the fact of the matter is both the authorities framed an opinion that the said allowances would be applicable to all the allowances. That finding according to me required a detailed examination of the records by considering the nature and duties of the jobs including the timings etc. In other words the universal formula of adding all

allowances would not be appropriated as to what were the norms of the work prescribed for the workmen during the relevant period ".

8. It is seen that the appellant through its contractor is paying conveyance allowance, shift allowance and food allowance to its contract employees. The learned Counsel for the appellant pointed out that it is only a reimbursement of actual expenditure incurred by the contract employees. However it is very clear that it is not a reimbursement of expenditure incurred by the employees. A certain percentage of the basic pay is given to all employees as allowances and therefore the claim of the learned Counsel for the appellant regarding reimbursement of actual expenditure is not correct. The Hon'ble High Court of Kerala in a recent decision in **Gobin (India) Engineering Pvt Ltd Vs Presiding Officer, CGIT cum Labour Court, Ernakulam and another**, W.P.(C) no.8057/2022 held that the allowances will also form part of basic wages in view of the decision of the Hon'ble Supreme Court in **RPFC-II, West Bengal Vs Vivekananda Vidyamandir & other**, 2020 17 SCC 643 and also the single bench decision of the Hon'ble High Court of Kerala in **Employees Provident Fund Organization Vs M. S. Raven Beck Solutions (India) Ltd,** W.P.(C) no.17507/2016. However the Hon'ble High Court held that it is required to be examine whether the allowances in question are being paid to its employees were either variable or were linked

to any incentive for production resulting in greater output by an employee or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages it has to be show that the workmen concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. It is seen from the nomenclature of the allowances that the above allowances will not satisfy the test evolved by the Hon'ble Supreme Court as well as the Hon'ble High Court of Kerala in above referred decision.

9. The learned Counsel for the appellant challenged the quantification of the dues on the basis of one month wages paid to the employees in the month of February 2012. It is seen that a representative of the appellant attended the hearing and produced various documents called for by the respondent authority. From the impugned order, it is seen that on 30.07.2013 a representative of the appellant attended the hearing and produced copies of agreement dt.01.04.2009, 15.06.2010 and 15.06.2011 between the appellant and M/s.Obak Human Resource Outsourcing (P) Ltd. The representative also produced statements of wage reimbursement and invoices made to M/s.Obak Human Resource Outsourcing (P) Ltd. He further produced a copy of the ledger of appellant for payment made to M/s.Obak Human Resource Outsourcing (P) Ltd. It is also pointed out in the impugned

order that the representative could not explain certain contradictory information in the ledger. However it is seen that the respondent based his assessment on the report of the Enforcement Officer. According to the report of the Enforcement Officer, the total wage component paid by the appellant to the contractor for the month of February 2012 is Rs.4,80,875/- whereas the wage on which provident fund contribution is paid is Rs.1,33,800/-. The Enforcement Officer took the wage component as Rs.1,91,123/- and calculated the dues for all the months from 04/2009 to 07/2012. When the correct data and documents are available before the respondent authority, it is not clear as to why the respondent relied on the wages for the month of February 2012 to assess the contribution for the whole period from 04/2009 to 07/2012. It is also not clear why the Enforcement Officer decided to calculate wages as Rs.1,91,123/- when according to him the total wages paid for the month is Rs.4,80,875/-. It is clear from the above that the quantification of dues is done on a presumptive basis and not on the actual wages paid to the employees. Such calculations only will delay the extention of social security to poor employees for whom such assessment orders are being issued by the respondent. It is therefore not possible to accept the quantification of dues on allowances by the respondent authority.

10. Considering the facts, circumstances and pleading in this appeal, it is not possible to sustain the quantification of dues in the impugned order.

Hence the appeal is allowed partially, the quantification of dues in the impugned order is set aside and the matter is remitted back to the respondent to re-assess the dues within a period of 6 months after issuing notice to the appellant as well as the contractor. The finding that the allowances will form part of basic wages is upheld. If the appellant or the contactor fails to appear in the enquiry or fails to produce any documents called for, the respondent authority is at liberty to decide the matter according to law. The pre-deposit made U/s 7(O) of the Act as per the direction of this Tribunal shall be adjusted or refunded after finalisation of enquiry.

Sd/-

(V. Vijaya Kumar)
Presiding Officer