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

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

(Wednesday the 30th day of March, 2022)

APPEAL No.457/2018
(Old no.983(7)2014)

Appellant : M/s.Amritha Institute of Medical Sciences (AIMS)
Ponekkara P.O.
Kochi - 682014

By Adv.C. Anil Kumar

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

By Adv.Sajeev Kumar K. Gopal

This case coming up for final hearing on 13.09.2021 and this Industrial Tribunal-cum-Labour Court on 30.03.2022 passed the following:

O R D E R

Present appeal is filed from order no.KR/KCH/15877/ENF-1(3)/2014/ 4688 dt.08.08.2014 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') for the period from 05/2008 to 10/2011. The total dues assessed is Rs.5,81,13,251/-.

2. The appellant hospital is managed by a public charitable trust. The hospital has its own rules and regulations which are in consonance with the laws prevailing and applicable to the land. It is a non-profit organisation with a mission to provide outstanding and affordable medical care. As per the regulations of Mahatma Gandhi University, the students under going the course of nursing will have to undergo practical training for a period of one year. The nursing students for completion of their course after obtaining the recognition from Kerala Nurses and Midwives Council have to undergo one year internship with any known recognised medical institute. For obtaining the degree by the University the said course is a mandatory requisite. Mahatma Gandhi University has signed a Memorandum of Understanding with the appellant that the nursing students can complete their internship with the appellant establishment. A copy of the Memorandum of Understating entered with Mahatma Gandhi University is produced and marked as **Annexure A**. The appellant is also running B.Sc nursing courses as a deemed University in which the appellant is a constituent. Therefore the interns from the Amrita Vishwa Vidyapeetham and Mahatma Gandhi University complete their internship with the appellant on the same terms and conditions. After completion of internship, they obtained the degree for B.Sc Nursing and they are eligible and qualified to be appointed as nurses. However they have to

undergo the on job training in the institute where they are employed before they are regularly absorbed in the hospital or institution. The appellant institute provide for completion of the training before considering the candidates for regular employment. There is a need for training, as it is not at all necessary that the trainees completed their internship with the appellant institute. The appellant has its own service and conduct rules which is in line with Model Standing Orders framed under the Industrial Employment (Standing Orders) Act 1946. The appellant also provides canteen facilities to the visitors and bystanders at subsidised rates. One Self Help Group namely Annapoorna Amrita Self Help Group came forward to take the responsibility of running the canteen. Appellant provided space, furniture, water & electricity and required equipments for free and also giving them subsidy to keep the food rates low. The Self Help Group is in no sense to be considered as a contractor. The agreement entered into between the Self Help Group and the appellant is produced as **Annexure B**. There is a separate staff canteen for the staff and the employees working in the mess were already enrolled to provident fund. Some of the Kar-Sevaks are also rendering free service in these canteens. They are not employees of the appellant.

3. The appellant is an establishment covered under the provisions of the Act. A squad of Enforcement Officers of the respondent conducted an

inspection of the appellant on 07.12.2011 & 14.12.2011. According to the squad, the salary is being split into various heads such as basic wage, Dearness Allowance, house rent allowance, travelling allowance, performance allowance, compensatory allowance/other allowances. Contribution is being paid on basic wage and DA only. The appellant produced the documents to the extend possible. The squad of officers asked for production of further documents which could not be produced due to some agitation by the staff of the appellant establishment. The squad of Enforcement Officers submitted a report to the respondent authority, a copy of which was forwarded to the appellant also. A true copy of the report is produced and marked as **Annexure C**. The appellant institute clarified the issues raised by the squad of Enforcement Officers. A copy of the reply is produced and marked as **Annexure D**. The respondent authority summoned the appellant U/s 7A of the Act vide summons dt.12.08.2013. The appellant attended the hearing through its representative and produced the further records summoned by the respondent authority. Ignoring the contentions of the appellant, the respondent issued the impugned order which is produced and marked as **Annexure E**. The respondent authority while passing the impugned order has not exercised his powers judicially. As per the direction of the Hon'ble High Court and also the Hon'ble Supreme Court in **Food Corporation of India**

case the respondent authority shall identify the employees before assessing the dues. Identification of employee means proper identification of the particular employee with a view to get the benefits of the scheme. The respondent without identifying the employees has determined the dues with regard to the security staff. The respondent further determined the dues on the services of the devotees considering them the employees of the appellant. U/s 7A(2) the respondent authority has all the powers to enforcing the attendance and requiring the discovery and production of documents. The respondent while determining the dues in respect of interns, ignored the Memorandum of Understanding entered into between the appellant and the Mahatma Gandhi University. The respondent also failed to appreciate the community service rendered by the devotees. The women devotees working in the said canteen cannot be treated as employees under the provisions of the Act. The respondent erred in law in determining the dues on the amount which is being paid to the employees other than basic wages and DA. The respondent also erred in law in not considering the service and conduct rules of the appellant which are in line with the Model Standing Orders. As per the service rules of the appellant establishment, a trainee is one who is engaged for a specific period of time as a learner with little or no experience in the relevant field. Further an apprentice means a person who is undergoing

apprenticeship training for a specified period after which his training will be discontinued.

4. The respondent filed counter denying the above allegations. The appellant hospital is covered under the provisions of the Act w.e.f. 20.07.1998. Govt of Kerala on the requests from students of private nursing colleges withdrew the internship stating that as per Indian Nursing Council norms, B.Sc Nursing course is a four year course inclusive of 6 months internship which takes 5 years or more to complete the course whereas students studying outside Kerala pass out within 4 years and explore the job opportunities. In view of the above, Govt of Kerala vide order no.G.O.(Rt)No.3666/2011/H&FWD dt.20.10.2011 withdrew the compulsory nursing service of one year, a copy of the G.O. dt.20.10.2011 is produced and marked as Exbt R1. Hence the internship programme is no more existence after the G.O. dt.20.10.2011. The Memorandum of Understanding was made on 14.05.2008 and the G.O. withdrawing the internship was dt.20.10.2011. Model Standing Orders are not applicable to hospitals in view of the decision of the Hon'ble High Court of Kerala in **Cosmopolitan Hospital Pvt Ltd Vs T.S.Anilkumar**. Since the appellant establishment failed to comply properly, a squad of Enforcement Officers were deputed to investigate and secure compliance from the appellant establishment. The squad of Enforcement

Officers reported that there are two categories of trainees i.e., interns and trainees and they are not enrolled to provident fund membership. The attendance of these two categories of employees are properly maintained in automated punching system along with regular employees. The records of these trainees are either not maintained or maintained in a haphazard manner. The term 'employee' as defined U/s 2(f) of the Act covers in its definition any person engaged in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer. Trainees employed under Standing Orders of the appellant establishment or under Apprentices Act, 1961 only will be excluded from the provisions of the Act. The Hon'ble High Court of Kerala has clarified that Industrial Employment (Standing Orders) Act is not applicable to hospitals. The squad of Enforcement Officers reported the details of 246 and 357 persons belonging two different batches of interns and another list of 223 trainees working in the establishment. Canteen and security employees' dues are not determined in the impugned order. Sec 2(b) and Sec 6 of the Act provides that the appellant is liable to remit contribution on all remuneration other than those which are excluded U/s 2(b) of the Act. The allowances paid by the appellant includes house rent allowance, additional house rent allowance, travelling allowance, special allowance, performance allowance,

compensatory allowance etc. The house rent allowance paid to the employees varies from 70 to 130% of basic wages. It is seen that apart from house rent allowance, additional house rent allowance is also being paid to the employees. Though house rent allowance and additional house rent allowance component are very high, the same are excluded from the assessment. The special allowance, travelling allowance etc., are paid to all employees uniformly but at different rates. The representative of the appellant contented that the instruction given by the Enforcement Officer is implemented and the defects are rectified w.e.f. 01/2012. The Hon'ble Supreme Court of India in **RPFC Vs Vivekananda Vidya Mandir,** Civil Appeal no.3965-3966/2013 held that all allowances universally paid to a class of employees will form part of basic wages if the same is not paid for any additional work being extended by the employees. The squad of Enforcement Officers who conducted inspection of the appellant establishment verified the books of account maintained by the appellant and submitted their report. The respondent authority has followed the mandate U/s 7A of the Act while issuing the impugned order. The name of M/s.Lakeshore Hospital & Research Centre mentioned in the impugned order is only a clerical error. The facts, figures and the reasoning all are applicable to the appellant establishment only. The squad of Enforcement Officers who conducted the inspection of

the appellant establishment was provided with all the information required by them by the appellant. The wage details are provided in a CD which is the basis of the present assessment. The squad of Enforcement Officers also collected the names and details of all the interns and trainees against whom assessment is made in the impugned order. The appellant did not produce any documents to substantiate their claim during the course of 7A enquiry. Hence this is a case where all the relevant documents were available to the respondent which clear identification of employees at the time of the enquiry U/s 7A of the Act. Hence the decision of the Hon'ble Supreme Court in **Food Corporation of India Vs Provident Fund Commissioner** is not applicable to the facts of the present case. The Hon'ble Supreme Court in **ESIC Vs Kalpaka International**, 1993 2 SCC 9 held that the employer cannot escape the liability to remit contribution on the ground that the employees are no more in service. In **Harrisons Malayalam** case the Hon'ble Supreme Court held that it is totally irrelevant that the employees were no longer in existence and identifiable.

5. The respondent authority in the impugned order has raised many issues but answered only two issues and the dues are also quantified on the basis of those two issues. The respondent authority raised the issues regarding

1. non enrollment of interns and trainees,
2. bifurcation of wages,
3. non enrollment of canteen employees and
4. non enrollment of the security guards.

The respondent authority decided the first two issues on the basis of the data made available by the squad of Enforcement Officers who conducted the inspection of the appellant establishment.

6. The 1st issue is with regard to enrollment of interns and trainees. For the sake of convenience it is better to analyse the interns and trainees separately. According to the learned Counsel for the appellant, interns are students deputed by Nursing Colleges and Universities for completing their internship as part of their course. The appellant produced Annexure A Memorandum of Understanding between Mahatma Gandhi University and appellant establishment dt.14.05.2008. According to Annexure A, Memorandum of Understanding, the appellant establishment can take 194 nursing students as interns in 5 centres of the appellant establishment. According to the Memorandum of Understanding the internship programme is for students on successful completion of B.Sc Nursing course. An intern is defined as " a candidate who has successfully completed 4 year B.Sc Nursing programme and is in the process of transition from the role of student to a

staff nurse". The Annexure A Memorandum of Understanding clearly states that degree will be awarded by the University only after successful completion of the internship. It also stated that the amount of stipend during the internship will be Rs.3500/- per month. On a detailed examination of the Annexure A Memorandum of Understanding between the appellant and Mahatma Gandhi University, it is clear that the interns are nursing students sponsored by the University for an internship programme for one year and they will be awarded degree only after successful completion of the internship. The learned Counsel for the appellant also pointed out that the appellant establishment is also a deemed University and they also takes nursing students on same terms as that of Mahatma Gandhi University. However the details of the same are not furnished by the appellant. As already pointed out, as per the Annexure A Memorandum of Understanding, Mahatma Gandhi University allowed internship for 194 students only whereas the intake of interns reported by the squad of Enforcement Officers is 246 and 357. This will require a proper clarification by the appellant establishment. The learned Counsel for the respondent pointed out that the internship programme was withdrawn by the Govt vide Exbt.R1 G.O. dt.20.10.2011 and therefore the appellant cannot claim that they engaged interns on the basis of the Memorandum of Understanding signed with the University. It is seen

that the impugned assessment of dues for intern is done for the period 05/2008 to 10/2011 and therefore the Memorandum of Understanding will come well within the period of assessment. Withdrawal of the internship by the Govt was challenged before the Hon'ble High Court by the Private Hospital Association and the order of the Govt was upheld by the Hon'ble High Court. Hence the finding of the respondent authority that the interns are employees under the Act cannot be upheld.

7. The next issue is regarding the trainees engaged by the appellant establishment. According to the learned Counsel for the appellant, the appellant establishment is having a Service and Conduct Rules which is in line with the Model Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946. According to the Counsel, the Service and Conduct Rules provide for engagement of trainees. According to the learned Counsel for the respondent, Industrial Employment (Standing Orders) Act is not applicable to hospitals and therefore, on the basis of the Service and Conduct Rules the appellant cannot plead that they can engage trainees. First of all, the Service and Conduct Rules of the appellant establishment cannot be treated as Model Standing Orders under the Industrial Employment (Standing Orders) Act, 1946. It is to be noted that the appellant engages nurses as interns for a period of one year on a stipend of Rs.3500/-.

Thereafter the appellant is again engaging them for the period of one year as trainees, claiming that they are trainees under the Service and Conduct Rules. The learned Counsel for the appellant also pointed out that the assessment is made on presumptive basis without identifying the trainees/employees. According to the learned Counsel for the respondent all the non enrolled interns as well as the trainees were clearly identified in the squad report on the basis of the documents produced by the appellant at the time of inspection. The assessment is done on the basis of the wage details provided by the appellant in a CD and therefore the claim of the appellant that the employees are not identified or the assessment is made on the presumptive has no basis in facts or law. 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 large number of employees 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.

8. The question whether a nurse who had undergone the prescribed course and had undergone the practical training during their course requires any further training in hospitals was considered by the Hon'ble High Court of Kerala in **Kerala Private Hospital Association Vs State of Kerala**, W.P.(C) no.2878/2012. The Hon'ble High Court vide its judgment dt.14.03.2019 held that " the decision taken by the private hospital managements to insist one year experience for appointment of staff nurses in private hospitals is against the provisions of the Nurses and Midwifes Act, 1953 ". In the above case the Hon'ble High Court was examining whether the nurses who completed their course and had undergone training as part of the course are required to be trained as trainee nurses for one year in private hospitals. The order issued by the Govt of Kerala fixing one year training and also fixing the stipend was withdrawn by the Govt and it was held to be valid by the Hon'ble High Court. The learned Counsel for the respondent relying on the decision of the High Court of Kerala in **Cosmopolitan Hospital Pvt Ltd Vs T.S. Anilkumar**, WP(C) 53906/2005 argued that Industrial Employment (Standing Orders) Act is not applicable to hospitals. He also relied on the decision of the Delhi High Court in **Indraprastha Medical Corporation Ltd Vs NCT of Delhi and others**, LPA no.311/2011 to argue that industrial standing orders is not applicable to hospitals. However the Hon'ble High Court of Kerala in **Sivagiri Sree**

Narayana Medical Mission Hospital Vs RPFC, 2018 4 KLT 352 took a contrary view stating that the Industrial Employment (Standing orders) Act is applicable to hospitals. The learned Counsel for the respondent also pointed out that in **Indo American Hospital** case (Supra) the Hon'ble High Court of Kerala refused to interfere with the orders issued by the respondent holding that the trainees will come within the definition of Sec 2(f) of the Act. According to him, the decision in **Sivagiri Sree Narayana Medical Mission Hospital** (Supra), has not become final as the writ appeal from the above decision is pending before the Division Bench of the Hon'ble High Court of Kerala. While holding that Industrial Employment (Standing Orders) Act is applicable to the hospitals, the Hon'ble High Court of Kerala in **Sivagiri Sree Narayana Medical Mission Hospital** (Supra) also 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 " .

Apart from the question whether Industrial Employment (Standing Orders) Act is applicable to hospitals, this is a fit case wherein the test given by the Hon'ble High Court of Kerala in **Sivagiri Sree Narayana Medical Mission Hospital** (Supra) cited above is required to be applied in all fours. 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. It was also held by the Hon'ble High Court of Kerala that nurses cannot be appointed as nursing trainees after completing their course and prescribed training during their course. 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 squad of 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 large number 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.

9. 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 ”.

10. It is clear from the structure of the training programme as interns and later as trainees that it is a clear case of exploitation of the nurses by the appellant establishment. According to the learned Counsel for the respondent these trainees are doing the same work as that of regular employees and therefore cannot escape the conclusion that they are employees coming U/s 2(f) of the Act. The appellant establishment failed to produce any document to prove that the nursing staff are only engaged as trainees and they are being paid stipend. The appellant even failed to produce any document before the respondent authority also at the time of 7A enquiry. It is clear from the above discussion that the trainees engaged by the appellant establishment will come within the definition of employees U/s 2(f) of the Act and are required to be enrolled to the fund from their date of eligibility.

11. The next issue involved in the impugned order is with regard to the splitting of wages for evasion of provident fund contribution. According to the learned Counsel for the appellant the appellant establishment has already revised their pay structure w.e.f. 01.01.2012 and therefore the present assessment with regard to evaded wages ought to have been avoided by the

respondent authority. According to the learned Counsel for the respondent, appellant establishment is splitting its wages into basic, DA, house rent allowance, additional house rent allowance, travelling allowance, special allowance, performance allowance and compensatory allowance. House rent allowance and additional house rent allowance are being paid at 70 to 130% of the basic wages which clearly establish a subterfuge by the appellant establishment. However HRA and additional HRA are excluded from the assessment. All other allowances are being paid uniformly to a class of employees and therefore will form part of basic wages. The relevant provisions of the Act to decide the issue whether the other 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 " .

12. 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 dt.24.03.2022 in **Gobin India Engineering Pvt Ltd Vs Presiding Officer, CGIT 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 ".

It is seen that the house rent allowance and additional house rent allowance paid by the appellant establishment to its employees are very high as pointed out by the learned Counsel for the respondent. However the respondent authority has excluded both the components from the assessment of contribution. All other allowances as indicated by the nomenclature is paid to a class of employees without relating the same to any additional production by the employees. The allowances are not any incentive for production resulting in greater output by an employee or were being paid especially to those who avail the opportunity. To exclude these allowances the appellant ought to have shown that the employee concerned has become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. The appellant failed to produce any documents either in the enquiry U/s 7A or in this appeal to substantiate their claim that these allowances will not form part of basic wages.

13. Taking into account the above facts, I am of the considered view that the allowances paid by the appellant to its employees excluding house rent allowance and additional house rent allowance will form part of basic wages and this part of the assessment by the respondent is upheld.

14. Considering the facts, circumstances and evidence in this appeal, I am inclined to hold that

1. The interns cannot be treated as employees and the assessment against them cannot be upheld
2. The trainees will come within the definition of employee U/s 2(f) and therefore the assessment of dues in respect of trainees are upheld
3. The finding of the respondent authority regarding the evasion of wages and consequent assessment of dues is also upheld

Hence the appeal is partially allowed, disallowing the assessment of dues in respect of interns. However the assessment of dues in respect of trainees and evaded wages is upheld. The matter is remitted back to the respondent to re-asses the dues excluding the assessment of dues in respect of interns within a period of 6 months from the date of receipt of this order after issuing notice to the appellant. If the appellant fails to appear or fails to

produce records called for, the respondent is at liberty to assess the dues according to law. The pre-deposit made by the appellant U/s 7(O) of the Act as per the direction of EPF Appellate Tribunal shall be adjusted or refunded after finalisation of the enquiry.

Sd/-

(V. Vijaya Kumar)
Presiding Officer