



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

सत्यमेव जयते

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

(Wednesday the 7th day of April, 2021)

Appeal No.351/2019

(Old No. 807 (7)/ 2015)

Appellant

M/s. Empee Distilleries Ltd
Kanjikode
Palakkad – 678 621

By Adv.C.B.Mukundan (For Appellant)
By Adv.C.Muralikrishnan.
(For the Resolution Professional)

Respondent

The Assistant PF Commissioner
EPFO, Sub Regional Office
Kaloor , Kochi – 682 017

By Adv. S. Prasanth

This case coming up for hearing on 22.02.2021
and this Industrial Tribunal-cum-Labour Court issued
the following order on 07/04/2021 .

ORDER

Present appeal is filed from a composite order
KR/KCH/24346/ENF-1(5)/2015/RB No.242(1)/745 dt.
27/4/2015 issued U/s 7A of EPF & MP Act, 1952
(hereinafter referred to as 'the Act') assessing dues on

evaded wages for various establishments including the appellant establishment for the period from 07/2010 to 07/2012. Total dues assessed against the appellant is Rs. 13,83,925/-.

2. The appellant is an establishment registered under Company's Act 1956. The appellant is running a distillery. The appellant was regular in compliance. The appellant engaged few employees through M/s. Obak Human Resources Outsourcing Private Limited. The contractor was independently covered under code No. KR/KCH/24346. The contractor was making proper compliance in respect of the employees employed by the appellant. The appellant also used to ensure compliance in the respect of all the employees deputed by the contractor. An Enforcement Officer of the respondent conducted an inspection of the records of the contractor establishment. On the basis of the reports of the Enforcement Officer the respondent authority initiated an enquiry U/s 7A of the Act. The appellant was represented in the enquiry. During the course of enquiry it was brought to the notice of the respondent that the appellant through the contractor has already paid the contribution

and the allowance paid to the employees are clearly excluded from the purview of basic wages. It is true that the contractor has paid conveyance, washing and food allowance to its employees. Such allowances will not come within the definition of basic wages as per sec 2(b) of the Act. The respondent organization vide its circular dt. 06/08/2014 has taken a policy decision that employers who are paying EPF dues only on less 50% of wages have to be subjected for inspection a copy of the circular dt. 06/08/2014 is produced and marked as Annexure A3. The appellant was paying contribution on 65% of wages paid to its employees. The appellant failed to furnish a copy of the inspection report and hence the basis of the proceedings were not known to the appellant. The appellant was also not permitted to examine Enforcement Officer who conducted the inspection of the records of the contractor.

3. The respondent filed counter denying above allegations. The appellant is covered under the provisions of the Act. The appellant is basically challenging the impugned order stating that the appellant is jointly and severally liable to remit the

statutory dues assessed in respect of contract employees engaged by the appellant through M/s. Obak Human Resources Outsourcing Private Limited. M/s Obak Human Resources Outsourcing Private Limited is covered under the provision of the Act w.e.f 01/06/2008 under EPF code number KR/KCH/24346. The establishment is a contractor providing manpower to various principal employers. The terms of contract varies from principal employer to principal employer. The contract establishment is providing manpower to the appellant also and therefore the appellant is also a principal employer in respect of contract employees engaged through M/s. Obak Human Resources Outsourcing Pvt. Ltd. During the course of inspection it was noticed that there were so many anomalies committed by the contract. One of the major problems noticed is with regard to splitting of wages into various allowances and remitting contribution only on the basic pay to its employees. The contractor was also not paying dearness allowance to its employees. After detailed analysis it was reported that all the allowance other than HRA and OTA will attract provident fund deduction. This

is particularly so since no dearness allowance is paid by the contractor to its employees. The Hon'ble High Court of Calcutta in **RPFC Vs Vivekananda Vidyamandir**, 2005(2) LLJ 721 held that the special allowance paid by employers shall form part of basic wages specifically in cases where no dearness allowance is paid by the employers. In **Gujarat Cympromet Vs RPFC**, 2004 (3) CLR 485 the Hon'ble High Court of Gujarat held that allowances such as lunch, medical and conveyance allowance are covered within the definition of basic wages. As per section 8A of the Act the employer and employees' share of contribution payable by an employer in respect of an employee employed by or through a contractor may be recovered by such employer from the contractor either by deduction from any amount payable by the contract under any contract or as a debt payable by the contractor. As per Para 30(3) of EPF Scheme it shall be the responsibility of principal employer to pay both the contribution payable by him in respect of employees directly employed by him and in respect of employees employed by or through a contractor along with the administrative charges. The above statutory

provisions makes it clear that the principal employer cannot shirk the responsibility of paying contribution in respect of contract employees engaged through a contractor. It is a settled legal position that Sec 8A of the Act read with Para 30 of EPF Scheme enabled the organization to recover contribution relating to contract employees in the first instance from the principal employer and that the primary liability to recover contribution from the contractor and pay the same to the respondent organization is that of the principal employer. The documents produced by the appellant for the period from 01/07/2010 to 30/06/2011 would show four different slabs for male & female employees. It is seen that as per the wage register, provident fund contribution is paid only on basic and no contribution is paid on conveyance allowance, food allowance and washing allowance.

4. When the appeal was taken up for hearing Shri. S. Rajendran, Resolution Professional through his Advocate filed a written submission on behalf of the appellant. According to the written submission after filing this appeal, proceedings under Insolvency and

Bankruptcy Code was initiated against the appellant company before the Hon'ble National Company Law Tribunal, Chennai. In the proceedings, the NCLT has approved the resolution plan of M/s. SNJ Distilleries Pvt. Ltd on 20/01/2020 and the management operations of the appellant company have been taken over by the new management. According to the learned Counsel for the Resolution Professional in view of regulation 12 of IBVI (IRPCP) Regulations 2016, the respondent ought to have filed their claim with the Resolution Professional on or before 06/02/2019. The respondent did not submit any claim before the Resolution Professional. In view of the above the learned Counsel for the Resolution Professional pleaded that the respondent has no claim with the appellants as the claims in the dispute pertains to the period prior to CIRP of the Corporate Debtor. It was also pleaded that the impugned order may be set aside as non-enforceable under the circumstance of this case. This Tribunal considered the above submissions in detail and passed an order dt. 13/01/2021, holding that as long as the dues are not treated as part of the liquidation estate, the provisions of the IB Code will not

be applicable for realization of provident fund dues from the assets of the corporate debtor. It was also pointed out that as per the impugned order the respondent has fixed the liability jointly and severally on the appellant as well as on the contractor. It was also ordered that there is no prohibition as per the provision of IB Code 2016 in continuing the present proceedings.

5. The appellant establishment was engaging employees through a contractor by name M/s Obak Human Resources Outsourcing Private Limited. During the course of inspection of the contract establishment, it was noticed that the employees deployed by the contractor to various principal employers were paid wages according to different contracts and there was clear suppression of wages when it comes to remittance of provident fund contribution. Hence the respondent initiated proceedings U/s 7A of the Act for assessing the dues on evaded wages. All the principal employers were also summoned in the enquiry. The appellant being a principal employer was also summoned by the respondent. The appellant was represented in the enquiry. The representative of the appellant also

produced the relevant documents for the period from 01/07/2010 to 30/06/2011. The respondent found that the contractor was paying conveyance allowance, food allowance, and washing allowance to the employees deployed with the appellant. It was also noticed from the records that no dearness allowance is paid to the employees. Hence one of the issues for consideration in this appeal is whether the conveyance, food and washing being paid by the contractor to its employees deployed at the appellant establishment will come within definition of basic wages and therefore will attract provident fund deduction.

Section 2(b) : “basic wages” means all emoluments which are earned by an employee while on duty or (on leave or holidays with wages in either case) in accordance with the terms of contract of employment and which are paid or payable in cash to him, but does not include :

1. cash value of any food concession.
2. Any Dearness Allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living)

HRA, overtime allowance, bonus, commission or any other similar allowances payable to the employee in respect of his employment or of work done in such employment.

3. Any present made by the employer.

Section 6: Contributions and matters which may be provided for in Schemes. The contribution which shall be paid by the employer to the funds shall be 10% of the basic wages, Dearness Allowance and retaining allowances if any, for the time being payable to each of the employee whether employed by him directly or by or through a contractor and the employees contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding 10% of his basic wages, Dearness Allowance, and retaining allowance if any, subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Section.

Provided that in its application to any establishment or class of establishment which the Central Government, after making such enquiry as it deems fit, may, by

notification in the official gazette specified, this Section shall be subject to the modification that for the words 10%, at both the places where they occur, the word 12% shall be substituted.

Provided further that 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.

6. It can be seen that some of the allowances such as DA, excluded U/s 2b (ii) of the Act are included in Sec 6 of the Act. The confusion created by the above two Sections was a subject matter of litigation before various High Courts in the country. The Hon'ble Supreme Court of India in **Bridge & Roof Company Ltd Vs Union of India** , 1963 (3) SCR 978 considered the conflicting provisions in detail and finally evolved the tests to decide which are the components of wages which will form part

of basic wages. According to the Hon'ble Supreme Court of India,

(a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.

(b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages.

The Hon'ble Supreme Court of India ratified the above position in **Manipal Academy of Higher Education Vs PF Commission**, 2008(5)SCC 428. The above tests was against reiterated by the Hon'ble Supreme Court in **Kichha Sugar Company Limited Vs. Tarai Chini Mill Majzoor Union** 2014 (4) SCC 37. The Hon'ble Supreme Court of India examined all the above cases in **RPFC Vs Vivekananda Vidya Mandir and Others**, 2019 KHC 6257. In this case the Hon'ble Supreme Court considered whether travel allowance, canteen allowance, lunch incentive, special allowance, washing allowance, management allowance etc will form part of basic wages attracting PF deduction. After examining all the earlier decisions and also the facts of these cases the Hon'ble

Supreme Court held that “ the wage structure and the components of salary have been examined on facts, both by the authority and the Appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wages camouflage as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. There is no occasion for us to interfere with the concurrent conclusion of the facts. The appeals by the establishments therefore merit no interference.” The Hon’ble High Court of Kerala in a recent decision rendered on 15/10/2020 in the case of **EPF Organization Vs MS Raven Beck Solutions (India) Ltd**, WPC No. 1750/2016, examined Sec 2(b) and 6 of the Act and also the decisions of the Hon’ble Supreme Court to conclude that

“ this makes it clear that uniform allowance, washing allowance, food allowance and travelling allowance, forms an integral part of basic wages and as such the amount paid by way of these allowance to the employees by the respondent establishment were liable

to be included in basic wages for the purpose of assessment and deduction towards contribution to the provident fund. Splitting of the pay of its employees by the respondent establishment by classifying it as payable for uniform allowance, washing allowance, food allowance and travelling allowance certainly amounts to subterfuge intended to avoid payment of provident fund contribution by the respondent establishment”.

In **Montage Enterprises Pvt Ltd Vs EPFO**, 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 Hon’ble High Court of Calcutta held that special allowance paid to the employees will form part of basic wages . This decision of the Hon’ble High Court of Calcutta 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

(Kart.HC) the Hon'ble High Court of Karnataka held that 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 **Damodar Valley Corporation Bokaro Vs. Union of India**, 2015 LIC 3524 (Jharkhand HC) the Hon'ble High Court of Jharkhand held that special allowance paid to the employees will form part of basic wages. In view of the above finding it is clear that the conveyance allowance paid by the appellant will attract provident fund deduction.

7. From the above discussion it is very clear that the conveyance, food and washing allowances being universally paid by the contractor to its employees deployed at the appellant establishment will come within definition of basic wages and therefore will attract provident fund deduction.

8. Another issue raised by the learned Counsel for the appellant is with regard to the liability of appellant to pay the contribution in respect of employees deployed by the contractor. According to the learned Counsel for the respondent the liability to pay contribution in respect of the employees deployed by the

contractor is ordered to be joint and several. Besides as the principal employer the appellant cannot completely escape the liability as the statute mandates the principal employer to ensure the statutory contribution in respect of the employees deployed by a contractor. Sec 6 of the Act mandates that the principal employer is liable to remit contribution in respect of the employees engaged through a contractor. As per section 8A the principal employer is required to remit the contribution in respect of the contract employees and the same can be recovered from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor. Para 30 and 36 (b) of the EPF Scheme also provides that the principal employer is liable to pay the contribution in respect of the contract employees deployed by a contractor. Hence viewed from any angle it is clear that the appellant cannot totally escape the liability of paying contribution in respect of the contract employees deployed by a contractor. Hence the appellant and the contractor is jointly and severally liable for contribution payable for the employees deployed by the contractor.

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

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer