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 September, 2021)

Appeal No.357/2019

(Old No. ATA.649 (7)/ 2015)

Appellant	M/s. Sree Sakthi Paper Mills Ltd (M/s. Cella Space Ltd) Sree Kailas, 39/2724 A Kochi – 682016. By Adv.P. Ramakrishnan & Adv.C. Anil Kumar
Respondent	The Regional PF Commissioner EPFO, Sub Regional Office Kaloor, Kochi – 682 017 By Adv. Sajeev Kumar K. Gopal

This case coming up for hearing on 30.03.2021 and this Industrial Tribunal-cum-Labour Court issued the following order on 02/09/2021 .

O R D E R

Present appeal is filed from order No. KR /KCH/24346/Enf.1(5)/2015/ RB No 242/1/745-D dt. 27/04/2015 issued U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') assessing dues on

evaded wages w.e.f 07/2011 to 06/2013 in respect of the factory at Edayar and for the period from 05/2011 to 04/2013 for the unit at chalakkudy. The dues assessed are Rs. 31,25,952/- and Rs. 2,91,528/- respectively.

2. The appellant is a public limited company engaged in the manufacture of craft paper. The appellant has factories at Edayar and Chalakkudy in the state of Kerala. The factory at Chalakkudy was closed w.e.f 15/12/2014 and all the employees left service after receiving compensation. The regular employees of the appellant establishment are covered under Annexure A1 & A2 settlement. The appellant entered into agreements with M/s Obak Human Resource Outsourcing Pvt. Ltd. They have service agreement. The true copies of the service agreement executed with M/s. Obak Human Resource Outsourcing Service Pvt. Ltd in respect of a factory at Edayar is produced and marked as Annexure A3. Service agreement for the services entered into between the appellant and M/s. Obak Human Resource dt. 01/05/2011 in respect of Chalakkudy factory is produced and marked as Annexure A4. Annexure A3 & A4 agreements would show that the contract entered into between the appellant and M/s. Obak Human

Resources is a principal to principal agreement. It was made very clear in the agreement that the employees engaged are the employees of M/s. Obak Human Resources only. It is the responsibility of M/s. Obak Human Resource to pay wages / salaries/ Provident Fund contribution etc to its employees. The payments made by the appellant to M/s. Obak Human Resources includes service charges and all other expenses met by M/s. Obak Human Resources. The appellant is not having any outstanding dues payable to M/s. Obak Human Resources. The appellant received a summons dt. 04/10/2012 issued by the respondent U/s 7A of the Act directing the appellant to attend the hearing on 18/10/2012. The appellant was designated as principal employer. An authorized representative of the appellant attended the hearing and pointed out that payments are made to M/s. Obak Human Resourcing on the basis of tonnage as stipulated in the agreement. Annexure A3 and A4 agreements were also produced before the respondent to prove that the appellant is not the principal employer. The respondent authority issued Annexure A5 order holding the appellant also liable jointly and severally under the Act and that the appellant is the principal employer U/s 8A of the

Act. In an earlier proceedings U/s 7A of the Act the respondent issued an order dt. 12/07/2013 from which the appellant filed an appeal as ATA No. 544(7) 2013 before the EPF Appellate Tribunal and the EPF Appellate Tribunal had stayed the impugned order and directed the respondent not to take any coercive action till the disposal of the appeal. A copy of the order is produced and marked as Annexure A6. As per Clause 6 of Annexure A3 & A4 the appellant establishment was liable to make lumpsum payments to the company which included service charges and all other expenses. The respondent authority has taken the lumpsum amount of Rs.1,60,000/- as the wages of the employees. Calculation of dues reckoning all allowances other than HRA and overtime paid to the employees is against the provisions of the Act and Schemes. The rates agreed as per the agreement was only Rs.335/- per metric ton for finished material products per month and Rs.96/- per metric ton of finished cutter products per month. Hence the appellant has no liability to pay contribution on the contract amount that was being paid to M/s Obak Human Resource Outsourcing Pvt. Ltd.

3. The respondent filed counter denying the above allegations. M/s. Obak Human Resource Outsourcing Pvt. Ltd is an establishment covered under the provisions of the Act. The establishment is a contractor engaged in providing manpower to various principal employee. The terms of contract are different with each principal employer. M/s. Obak Human Resource Outsourcing is providing manpower to the appellant establishment and is therefore treated as the principal employer. An Enforcement Officer during the inspection of M/s. Obak Human Resource Outsourcing noticed several discrepancies with regard to the compliance under the provisions of the Act. The liability regarding payment of provident fund was different for different principal employees. In majority of the cases contribution was being paid only on basic wages. It was clear that M/s. Obak Human Resource Outsourcing was resorting to this kind of activities with the sole objective of evading provident fund liability. The Enforcement Officer after inspection submitted copies of wage register as well as invoices. Accordingly an enquiry was initiated U/s 7A of the Act and M/s. Obak Human Resource Outsourcing along with all the principal employers were summoned in the

enquiry. After verifying the records and hearing the appellant the respondent issued the impugned order holding the appellant as well as Obak Human Resource Outsourcing Pvt. Ltd jointly and severally liable to remit the contribution. On a perusal of Sec 8A of the Act and Para 30 of EPF Scheme would clearly show that the appellant is liable to pay contribution in respect of employees engaged through a contractor and the appellant can recover the money from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor. The contractor is under a statutory obligation to submit a statement showing recoveries of contribution in respect of contract employees within 7 days of close of every month. The Hon'ble High Court of Kerala in ***K. Rajendran Vs Assistant PF Commissioner,*** WPC No 25080/2008 observed that the Sec 8A of the Act read with Para 30 of EPF Scheme enabled the provident fund 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 provident fund organization is on the principal employer

with a liberty to recover such contribution from amount due to the contractor. The Hon'ble High Court also clarified that a separate code number to a contractor does not alter the situation with regard to the liability. As per the wage register, it is seen that total earnings are bifurcated into different components like basic, HRA, conveyance allowance, special allowance, incentive, overtime NH work amount, shift allowance and food allowance. Provident fund is deducted from basic and shift allowance only. It is seen that all these allowance will attract provident fund deduction except HRA and overtime allowance subject to the statutory limit of Rs.6500/-. In ***Kitex Garments Ltd Vs RPFC***, the Hon'ble High Court Kerala held that general allowance / special allowances which are paid in terms and conditions of an agreement to all employees as part of an obligation of the appellant company assumes all the basic characteristics of basic wages and therefore there if no ground to distinguish the amount paid as general allowance from the emoluments paid to the employees while on duty.

4. During the course of hearing of this learned Counsel for the appellant submitted that the appellant establishment is closed as per the order of the Kerala State

Pollution Control Board and also as per the direction of the Hon'ble High Court of Kerala. He also produced a complete set of 9 additional documents to substantiate their case regarding the closure of the appellant establishment w.e.f 27/06/2016.

5. The learned Counsel for the appellant also filed an IA stating that the name of an appellant establishment ie M/s. Sreesakthi Paper Mills Ltd is changed to M/s Cella Space Ltd, pleading that the name of the appellant in the appeal also may be changed to M/s. Cella Space Ltd as approved by the Registrar of Companies. The IA is allowed and the change of name is incorporated in cause title of the appeal.

6. There are 2 issues raised by the learned Counsel for the appellant in this appeal. The first issue is with regard to the liability of the appellant to remit the provident fund contribution in respect of the employees engaged by an independent service contractor. The 2nd issue is with regard to the liability to provident fund contribution on various allowances paid by the contractor.

7. According to the learned Counsel for the appellant, the appellant establishment is not liable to pay contribution in respect of the employees engaged by an independent contractor on the basis of a service agreement. Annexure A3 & A4 are the copies of the agreement signed between the appellant and M/s. Obak Human Resource. The case of the appellant is that as per the terms of the agreement the appellant is liable to pay a lumpsum amount per month and the contractor is liable to deploy a specified number of the employees to handle the work. The contractor is liable to pay the wages of its employees and also the contribution to provident fund and ESIC. According to the learned Counsel for the respondent Sec 8A of the Act Para 30 of EPF Scheme mandates that in the event of default by the contractor, the amounts can be recovered from the appellant and the appellant can recover the amount from the contract from any amount due or as a debt payable by the contractor.

Section 8A : – Recovery of moneys by employers and contractors.

(1) The amount of contribution that is to say, the employer's contribution as well as the employee's

contribution in pursuance of any Scheme and the employer's contribution in pursuance of the Insurance Scheme and any charges for meeting the cost of administering the Fund paid or 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 to the contractor under any contract or as a debt payable by the contractor.

(2) A contractor from whom the amounts mentioned in sub- section 1 may be recovered in respect of any employee employed by or through him, may recover from such employee the employee's contribution under any Scheme by deduction from the basic wages, dearness allowance and retaining allowance if any payable to such employee.

(3) Notwithstanding any contract to the contrary, no contractor shall be entitled to deduct the employer's contribution or the charges referred to in sub Section 1 from the basic wages, dearness allowance , and retaining allowance if any payable to an employee

employed by or through him or otherwise to recover such contribution or charges from such employee.

Explanation : In this section, the expressions " dearness allowance " and " retaining allowance " shall have the same meanings as in Sec 6.

8. On a perusal of the above provision it is clear that the provident fund liability of a contractor can be recovered from the appellant and the appellant can recover the same from the contractor from any amount due or as a debt payable by the contractor. It is not an issue whether the appellant is treated as a principal employer in such cases. It is a provision incorporated for the recovery of the outstanding amount from the contractors. Hence the appellant cannot escape the liability to pay the amount in case the contractor fails to remit the contribution in respect of the employees deployed by the contractor. According to the learned Counsel for the appellant the terms of the agreement clearly states that the liability of remitting provident fund contribution is with the contractor. The responsibility of remitting contribution in respect of contract employees of an independent contractor is that of the contractor himself. However the respondent can invoke Sec

8A of the Act and Para 30 of the Scheme to recover the dues from appellant in the event of default by the contractor and the appellant in turn can recover the amount from any amount outstanding or as a debt payable by the contractor. On a perusal of Exbt A3 and A4, it can be seen that the service contract is only a subterfuge,as these agreements specify the number of employees to be deployed in the appellant establishment. If it is a genuine service contract, there is no need to specify the number of employees to be deployed by the contractor and it is the responsibility of the contractor to decide the number of employees to execute the work as per the agreement. Hence the appellant cannot completely escape the liability in respect of the contract employees.

9. The next issue is with regard to the liability of an employer to remit contribution on various allowances paid by them to their employees. Though the learned Counsel for the appellant relied on Annexure 1& 2 settlements between the management and the trade union representing the employees, it can be seen that the settlements are not relevant in the present case. Annexure A1 & A2 settlement are specifically with regard to the regular employees of the

appellant establishment and is not applicable to contract employees engaged by them. It is seen that the contractor M/s. Obak Human Resource were paying HRA, conveyance allowance, special allowance, incentive OT, NH work allowance, shift allowance, food allowance etc to its employees. Only basic and shift allowance were considered for calculating the provident fund contribution. The respondent authority excluded HRA and overtime allowance from the assessment and held that all other allowances will attract provident fund deduction subject the statutory limit of Rs. 6500/-.

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 there 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.

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.

10. In the present case it is seen that the contractor is using various nomenclatures for various allowances thereby excluding the allowances from the liability to pay contribution. The respondent authority U/s 7A has rightly excluded the HRA and overtime allowance from the assessment being allowances excluded U/s 2(b)(2) of the Act. Since the liability is fixed at the statutory limit of Rs. 6500/-, I don't find any scope to interfere with the impugned order.

11. Considering the facts circumstances and pleadings in the appeal I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed. However it is clarified that the liability to remit the contribution is with the contractor and liability of the appellant is limited as per Sec 8A of the Act.

Sd/-

(V. Vijaya Kumar)
Presiding Officer