सत्यमेव जयते

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

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

(Tuesday the 8th day of March, 2022)

Appeal No. 756/2019
(Old No.ATA-996(7)2012)

Appellant	:	M/s. Saino Polymers Pvt.Ltd Vandipetta, Thiruvaniyoor P.O Kochi – 682 308
		By Adv. C.N. Sreekumar
Respondent	:	The Assistant PF Commissioner EPFO, Sub Regional Office Kaloor, Kochi– 682017.
		By Adv. Sajeev Kumar K. Gopal

This case coming up for hearing on 13/10/2021 and this Industrial Tribunal-cum-Labour Court issued the following order on 08/03/2022.

ORDER

Present appeal is filed from order No. KR/KC/ 21611/ Enf-3(3)/2012/10563 dt. 5/11/2012 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on evaded

wages for the period from 11/2006 to 04/2011. The total dues assessed is Rs. 11,17,254/-.

2. Appellant is a company incorporated under Companies' Act 1956 and is engaged in the business of manufacture and sale of plastic ball, valves, taps etc. The establishment is covered under the provisions of the Act from 20/11/2006. The appellant has 156 employees on its rolls as on 31/12/2011. The appellant received a notice dt. 26/05/2011 from the respondent U/s 7A of the Act for the alleged defaulted payments of contribution for the period 11/2006 to 04/2011. A true copy of the notice dt. 26/05/2011 is produced and marked as Annexure A1. A representative of the appellant attended the hearing and filed a statement dt. 31/01/2012, a copy of which is produced and marked as Annexure A2. After hearing the appellant the respondent issued the impugned order, a copy of which is produced and marked as Annexure A3. The appellant has been remitting contribution on basic and DA from 11/2006 onwards without any default. Sec 2 (b) of the Act would show that allowances like HRA, Washing allowance, conveyance allowance, production bonus, shift allowance , ex- gratia paid by the appellant do not form part of basic wages. The respondent is wrong in placing reliance on the inspection report submitted by the

Enforcement Officer. The respondent failed to appreciate that HRA does not form part of basic wages. Conveyance allowance is paid to employees to defray the expenses incurred for coming to the factory. Washing allowance is given to employees since they are required to wear uniforms in the premises of the factory. Production bonus is paid to employees who achieving 50% of the target fixed for 8 hours of work. The factory worked in 3 shifts. Shift allowance is paid to employees who attend shift in rotation. Ex-gratia is paid on pro-rata basis to those employees who achieve more than 50% of the target fixed for 8 hours of work. None of these allowance will attract provident fund deduction.

3. The respondent filed counter denying the above allegations. The appellant is an establishment covered under the provisions of the Act. The appellant defaulted payment of contribution for the period 11/2006 to 04/2011. An enquiry U/s 7A of the Act was initiated to determine the dues. A representative of the appellant attended the hearing and filed a written statement stating that all the allowances paid by the appellant to its employees will not form part of basic wages and therefore no contribution is payable on the allowance. At the time of coverage of the appellant establishment on 11/2006 the wage structure of the appellant

establishment consisted only basic and no other allowance. From 01/2007 onwards salary was split into basic and DA and allowances like HRA, conveyance allowance, washing allowance, production bonus, shift allowance and ex-gratia payment. Though the salary was revised with effect from 01/2007 basic was kept constant and hike was reflected in allowance. The basic pay was kept constant even before and after 01/2007 up to 08/2008. A slight increase is given in basic from 09/2008. But there is no change in basic thereafter. The salary on which provident fund was determined was kept very low. It is very clear that there is a subterfuge in splitting up of wages particularly after coverage of the appellant establishment. The appellant is a chronic defaulter and has delayed the remittance of contribution by approaching various judicial forums. It is a settled legal position that all the allowances other than the excluded allowances U/s 2(b)(2) of the Act will attract provident fund contribution. The spurious way of provident fund salary calculation by the appellant establishment was with the sole objective of evading the wages to escape provident fund liability. The appellant establishment manipulated the salary structure and devised in such a way to exclude the maximum portion of the provident fund deductible salary. The appellant resorted to glaring subterfuge of wages in order to evade provident fund contribution.

Therefore the respondent found that all allowances except HRA subject to the limit of Rs.6500/-shown in the salary statement had to be considered as basic wages. The Hon'ble Supreme Court of India in **Rajasthan Prem Kishan Goods Transport Company Vs RPFC New Delhi and others**, 1996 (9) SCC 454 held that it is upto the Commissioner to lift the veil and read between the lines to find out the pay structure fixed by the employer to its employees and to decide the question whether splitting up of pay has been made only as a subterfuge to avoid its contribution to provident fund.

4. The appellant establishment defaulted in remittance of contribution for the period from 11/2006 to 04/2011 by splitting up its wages and remitting contribution on a frugal amount claiming the rest of the amounts as allowances. The respondent authority initiated an enquiry U/s 7A of the Act. In the enquiry the representative of the appellant took a view that in view of Sec 6, the appellant is liable to remit contribution only on basic and DA and the allowances such as HRA, conveyance, washing allowance and shift allowance and ex-gratia will not attract provident fund deduction. The respondent authority after examining the matter on the basis of the documents produced by the appellant came to the

conclusion the splitting up of wages is clear subterfuge to avoid remittance of provident fund contribution.

5. In this appeal the appellant reiterated its position before the respondent authority. According to the appellant HRA is already excluded as per Sec 2 (b) of the Act. Conveyance allowance and washing allowance are paid as reimbursement. Production bonus is paid to employees who achieve 50% of the target fixed for 8 hours and shift allowance is paid to employees who come to shift in rotation and ex-gratia payment is made to those employees who achieve more than 50% of the target fixed for 8 hours of work.

6. On a perusal of the impugned order it is seen that HRA is excluded from the assessment and the assessment is subjected to the salary sealing of Rs.6500/-. It is seen that the appellant establishment is covered under the provisions of the Act with effect from 20/11/2006. The appellant was having a salary structure with only basic as on the date of coverage. With effect from January 2007 the appellant introduce all these allowances excluding maximum component of wage as allowance from the basic wages. Till 08/2008 the basic was kept constant and increase was provided in allowances. In the month of September 2008 there was a slight change in basic. In the case of Smt. Ambika Sajayan the basic salary

as on 11/2006 was Rs.700/-and no other allowances. In 04/2011 her basic is increased to Rs. 840/- and her gross salary has increased from 700/- to Rs.2686/- but provident fund was being paid only on a salary of Rs.1400/- ie. for basic and DA. Similarly in the case of Shri.Ajayakumar his gross salary was Rs.4556/-, this included Rs.390/- paid as HRA Rs.390/-paid as conveyance Rs. 325/- paid as washing allowance and Rs.325/- paid as a production bonus and Rs.260/- paid as shift allowance and Rs.299/- paid as ex-gratia. The appellant remitted contribution on Rs.2167/- excluding the allowance component of Rs.1989/- According to the learned Counsel for the respondent the similar pay structure is followed in the case of other employees also. There is no basis for the claim of the appellant that conveyance and washing allowance are paid as re-imbursement. The appellant failed to substantiate their claim of production bonus and ex-gratia payment that they are related in any way to production incentive and is being paid uniformly and universally to all employees.

7. Sec 2 (b) of the Act defines the basic wages and Sec 6 of the Act provides for the contribution to be paid under the Schemes:

> **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 were 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.

8. 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 were again 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 travelling 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".

The Hon'ble High Court of Madras in **Universal Aviation Service Private Limited Vs Presiding Officer EPF Appellate Tribunal,** 2022 LLR 221 again examined this issue in a recent decision. The Hon'ble High Court of Madras observed that it is imperative to demonstrate that the allowances paid to the employees are either variable or linked to any incentive for production resulting in greater output by the employee. It was also found that when the amount is paid, being the basic wages, it requires to be established that the workmen concerned has become eligible to get extra amount beyond the normal work which he is otherwise required to put. The Hon'ble High Court held that

> "Para 9: The predominant ground raised by the petitioner before this Court is that other allowances and washing allowance will not

attract contributions. In view of the aforesaid discussions and law laid down by the Hon'ble Supreme Court in **Vivekananda Vidya Mandir case (supra)**, the petitioner claim cannot justified or sustained since "other allowance" and washing allowance have been brought under the purview of Sec 2 (b) read with Sec 6 of the Act".

9. As already pointed out that there is a clear subterfuge by the appellant establishment by splitting of wages after the appellant establishment is covered under the provisions of the Act. The action on the part of the appellant in keeping the basic wages constant and remitting contribution on basic wages only would clearly establish the fact that the appellant establishment resorted to evasion of wages to avoid remittance of provident fund contribution. The action on the part of the appellant is also hit by Sec 12 of the Act . As per Sec 12 .

" No employer in relation to an establishment to which any scheme or insurance scheme applies, applies shall, by reason only of his liability for payment of any contribution to the fund or the insurance fund or any

charges under this or the scheme or insurance scheme reduce whether directly or indirectly the wages of any employee to whom the scheme or the insurance Scheme applies or the total quantum of benefits in the nature of old age pension gratuity, provident fund or life insurance to which the employee is entitled under the terms of his employment express or imply"

10. In the present case it is very clear that by splitting up of wages immediately after the coverage of the appellant establishment under the provisions of the Act, the appellant establishment is trying to reduce the benefits in the nature of old age pension, provident fund and insurance benefits and therefore the appellant cannot be allow to do the same to the detriment of its employees. As already pointed out all the allowances are uniformly and universally paid to all the employees and the appellant failed to prove that none of the allowances are linked to any incentive for production resulting in greater output by an employee. In order that the amount goes beyond the basic wages it has to be shown that the employee concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. The respondent has already concluded on the basis of

evidence placed before him that the splitting up of wages immediately after coverage of the appellant establishment is only a subterfuge and none of the allowances are paid nor as an incentive for production. There is no other data produced by the appellant to contradict the above conclusion.

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

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer