



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

सत्यमेव जयते

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

(Tuesday the 08th day of December, 2020)

Appeal No.115/2018

(Old No.A/KL-75/2016)

Appellant

M/s. Krishna Marine Engineering
40/7818-A, Anjali, T.D. Road
Kochi, Kerala – 682 035

By Adv. C.B. Mukundan

Respondent

The Assistant PF Commissioner
EPFO, Sub Regional Office
Kaloor
Kochi – 682017

By Adv. S. Prasanth

This case coming up for hearing on 05.11.2020 and this Industrial Tribunal-cum-Labour Court issued the following order on 08/12/2020 .

ORDER

Present appeal is filed from order No. KR/KC/1067207/ENF 5 (2) 2016/6006 dt. 14/07/2016 assessing the dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') for the period from

08/2014 to 02/2015. The total dues assessed is Rs.1,99,460/-.

2. The appellant is a proprietary concern covered under the provision of the Act, engaged in the business of repair and maintenance of vessels and ships. The appellant was regular in compliance. While so the respondent issued a notice dt. 28/05/2015 U/s 7A of the Act. The appellant appeared before the respondent. According to the respondent HRA, washing allowance and other allowances will be included in assessment. The pleading of the appellant that the appellant remitted contribution on basic and dearness allowance as provided by Sec 6 of EPF Act was ignored by the respondent. The appellant was paying HRA, washing allowance, conveyance allowance, travelling allowance and education allowance etc to the employees and it was specifically pointed out to respondent that these allowances will not form part of basic wages, hence shall be excluded from the assessment. HRA and other allowances were paid as reimbursement of expenses incurred by the employees towards their accommodation and journey.

3. The respondent filed counter denying the above allegation. It was noticed that the appellant was paying contribution and filing statutory returns only on a small portion of the actual wages paid to the employees. The Enforcement Officer who conducted the inspection reported that the wages paid to employees are split into basic, dearness allowance, washing allowances and other allowance. He also found that the appellant is remitting contribution on less than 50% of the wages paid to its employees. Hence proceedings U/s 7A of the Act was initiated. Notice was issued to the appellant along with a copy of the inspection report. An authorized representative of the appellant attended the hearing and produced wage register and attendance register of the establishment for 2013-14 and 2014-15. After hearing the appellant respondent issued the impugned order holding that the allowances paid to its employees will form part of basic wages and therefore the contribution will have to be paid on the total wages to its employees. Though the HRA falls under category of exclusion, it is seen that it is not as per terms of contract of employer and the HRA paid is exorbitantly high. "Any similar allowance" mentioned in

Clause (ii) of Sec 2(b) of the Act takes its color from the expression “commission” because the said expression uses the words ‘similar allowance’. There is no similarity in nature of allowances mentioned in clause (ii). DA is linked to the rise of cost of living , HRA allowance is provide to meet housing needs to the employee, overtime time allowance is payable for the over time putting by the employee and the bonus is production, profit and commission is linked to turnover generated by an employee. Hence it is not possible to club these allowance using the word ‘similar allowances’ in Sec 2(b)(ii) of the Act.

4. The sections relevant for deciding the issue involved in this appeal are Sec 2 (b) and Sec 6 of the Act.

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 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.

5. 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”.

6. From the above discussion, it is clear that the appellant is liable to pay contribution on allowances such washing allowance, other allowances etc. 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.

7. The appellant has no case that the above allowances were not paid uniformly to all the employees. Hence all the above allowance will form part of basic wages and will attract provident fund deduction. It was argued by the learned Counsel for the appellant that even HRA is included in the assessment by the respondent holding that HRA will also form part of basic wages. According to the learned Counsel for the respondent, the HRA component though is under excluded category under the Act, in this particular case the appellant is paying a huge portion of the wages as HRA to avoid the liability of provident fund contribution. I am not in a position to agree with the argument of the learned Counsel for the respondent. HRA is

specifically excluded from definition of basic wages U/s 2b(ii) of the Act. When the respondent decided to include HRA also as part of basic wages he ought to have given his reasons for doing so. In one example cited in the impugned order, it is seen that one of the employee Shri B.S. Sajeev was drawing Basic + DA of Rs.2710/- and HRA of Rs.1123/- and the gross salary of the employee is 4792/-. It can be seen that the HRA component is not that exorbitant to say that it is deliberate split up to avoid provident fund deduction. In view of the above the HRA component, of the gross salary will have to be excluded from the assessment of provident fund dues.

8. Considering the facts, pleading evidence and arguments, I am inclined to hold that the appellant is liable to pay provident fund contribution on washing allowance and other allowances. However, no contribution can be assessed on HRA as discussed above.

Hence the appeal is partially allowed, holding that the appellant is liable to remit provident fund contribution on

washing allowance and other allowances. But the appellant is not liable to remit PF contribution on HRA. Hence the impugned order is set aside to that extent and matter is remitted back to the respondent to reassess the dues on the basis of the above observations within a period of three months after issuing notice to the appellant.

Sd/-

(V. Vijaya Kumar)
Presiding Officer