



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

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

(Thursday the 27th day of January, 2022)

APPEAL No.285/2018
(Old No. ATA-1334(7)/2014)

Appellant St.Aloysious Senior Secondary School
Punnapra,
Alappuzha - 688004

By Adv. R. Sankaran Kutty Nair

Respondent The Assistant PF Commissioner
EPFO, Sub Regional Office
Kaloor,
Kochi -682017.

By Adv. S. Prasanth

This case coming up for final hearing on 01/10/2021 and
this Tribunal-cum-Labour Court on 27/01/2022 passed the
following:

ORDER

Present appeal is filed from order No. KR/KC/
19697/ Enf -II (5)/2014/9300 dt.21/11/2014 assessing dues
U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the
Act'.) on evaded wages and non-enrolled employees for the

period from 10/2008 to 08/2013. The total dues assessed is Rs.18,85,476/-.

2. The appellant is an education institution covered under the provisions of the Act. The appellant was regular in remittance of contribution with regard to the regular employees on basic wages. Due to an inadvertent omission contribution payable on DA portion on monthly wages were not paid for the period from October 2008. The appellant was under the wrong impression that contribution is not payable on DA, HRA and other allowances. On 15/10/2013 an Enforcement Officer of the respondent inspected the appellant establishment verified the records and issued inspection report with its Annexures. The inspection report along with the Annexures are produced and marked as Annexure A1 series. An amount of Rs.7,25,170/- was shown as dues on omitted wages and Rs.11,60,294/- was shown as dues in respect of non-enrolled employees for the period 10/2008 to 08/2013. The respondent initiated an enquiry U/s 7A of the Act vide summons dt. 26/2/2014. A copy of the summons is produced and marked as Annexure A2. The appellant appeared before

the respondent authority and filed a detailed written statement. Copy of the written statement is produced and marked as Annexure A3. After conducting the enquiry, the respondent issued order dt. 21/11/2014 which is produced and marked as Annexure A4. The respondent authority ought to have come to an independent decision regarding the dues without relying the report of the Enforcement Officer. The respondent has taken the HRA paid to the employees also as basic wages subject to the wage limit of Rs. 6500/-. As per Sec 2 (b) basic wages does not include DA, HRA Bonus and other similar allowances. As per Para 29B of EPF Scheme the contribution shall be calculated on basic wages, DA including cash value of food concessions and retaining allowances. So it is very clear that HRA or other allowances need not be taken for calculation of contribution. According to the acquittance roll, the total amount of DA paid to 56 staff for the period 10/2008 to 08/2013 would be Rs.14,94,462/-. Six employees left the service on superannuation and closed their provident fund account. A statement showing details of DA payment made for the period 10/2008 to 08/2013 is produced and marked as

Annexure A5. The respondent assessed an amount of Rs.11,60,305/- in respect of 107 non- enrolled persons. It is submitted that majority of them left the service after short period of temporary service. The identity and whereabouts of those left employees are not known to the appellant. Identification of employees is held to be a must before effecting recovery of contribution as per the decision of Hon'ble High Court of Bombay, in the decision reported in 2014 LLJ 539.

3. The respondent filed counter denying the above allegations. The appellant failed to deposit the legitimate dues of the employees. The respondent therefore initiated an enquiry U/s 7A of the Act. The Enforcement Officer who conducted the inspection of the appellant establishment reported that there was large scale non-enrollment of eligible and entitled employees under the Scheme and the appellant resorted to gross underreporting wages to the detriment of the beneficiaries. It was reported that 107 temporary employees engaged by the appellant establishment, though eligible, were not enrolled to the fund. The Enforcement Officer also submitted a list of non enrolled employees showing their names

and the emoluments paid to them. The list of non enrolled employees was certified by the appellant accepting their liability. It was also reported that the appellant has not paid dues on actual wages. A copy of the inspection report was also served on the appellant. A representative of the appellant attended the hearing and submitted a letter stating that HRA be excluded along with non-enrolled employees who left service of the appellant establishment. The enquiry was adjourned to various dates on the request of the representative of the appellant. The appellant produced cash book, ledger, attendance and wage register for primary and higher secondary employees and also produced the vouchers. From the attendance register and the voucher it was clear that the appellant failed to enroll 107 employees. It is also seen that the appellant establishment remitted contribution only on basic and no contribution is paid on allowances such as DA and HRA. As per Para 26 of EPF Scheme every employee employed in connection with the work of the establishment to which EPF Scheme applied, other than excluded employee, shall be entitled and required to become members of provident fund

from the date of joining the establishment. The claim of the appellant that the dues in respect of eligible employees were determined without identifying the employees is not correct. The attendance register, salary register and the vouchers produced by the appellant during the course of 7A enquiry along with the report of the Enforcement Officer clearly identifies the 107 employees not enrolled to the fund. The term 'employee' as defined U/s 2(f) of the Act subsumes in its definition any person engaged in or in connection with the work of the establishment and who gets his wages directly or indirectly from the employer. Sec 2 (b) defines basic wages according to which basic wages means all emoluments which are earned by an employee in accordance with the terms of the contract with employment which are paid or payable in cash. The Hon'ble High Court of Gujarat in **Gujarat Cympromet Ltd Vs APFC**, 2004(103) FLR 908 held that the term basic wages as defined U/s 2(b) of the Act includes all emoluments received by the employees. According to the said judgment except House Rent Allowance all other allowances are covered under the term, emoluments and therefore form part of basic wages.

4. An Enforcement Officer of the respondent organization during the routine inspection found that the appellant establishment has not enrolled 107 employees to provident fund membership. The Enforcement Officer also found that the appellant establishment is remitting contribution only on basic pay and allowances such as DA and HRA are excluded from contribution. The Enforcement Officer gave a detailed report to the appellant directing them to comply as per the directions in the inspection report. Since the appellant failed to comply the respondent initiated an enquiry U/s 7A of the Act. In the 7A enquiry the appellant took a view that many of the non-enrolled employees left the service of the appellant establishment and some of the employees settled their provident fund and therefore they may be allowed to remit the contribution in respect of the employees who continue to be in the service of the appellant establishment. The appellant also took a view that the employees who left the appellant establishment are not identifiable. With regard to the contribution on allowances, the appellant took a view that the contribution may be assessed on DA in respect of employees

who continues to be in service and HRA may be excluded from the assessment. The respondent authority issued the impugned order, assessing the dues in respect of 107 non-enrolled employees and also all allowances including HRA.

5. In this appeal the two issues that are required to be answered.

- i) The assessment of dues 107 non-enrolled employees and
- ii) The dues in respect of evaded wages on all allowances including HRA.

With regard to the 1st issue The learned Counsel for the appellant submitted that many of the employees who are not enrolled to the fund left the services of the appellant establishment and their identity is not known to the appellant establishment and therefore they may be excluded from the assessment of dues. According to the learned Counsel for the respondent all those employees are clearly identified through the salary and the wage register and vouchers produced during the course of enquiry and also the report of the Enforcement Officer. The appellant establishment is required to maintain the

details of all the employees at the time of employment under Para 34 of EPF Scheme. Having violated this statutory provisions under Para 34, the appellant cannot plead that the non-enrolled employees are not identifiable. It is a well settled principle of common law that a wrong doer cannot take advantage of his own wrong. In this case it is clear that the appellant violated Para 34 by not maintaining the service records of the employees and therefore cannot take advantage of the violation. The Hon'ble Supreme Court of India in **ESIC Vs Harrison's Malayalam Ltd**, 1993 (4) SCC 361 held that an employer, merely because there are no identifiable employees and the employment does not exist anymore, would not be absolved from making contribution. In **Regional Director, ESIC Corporation Vs Kerala State Drugs and Pharmaceuticals Ltd**, 1995 Supp.3 SCC 148 the Hon'ble SC held that “ the contribution which had become payable for the relevant period has to be paid even if the employees concerned are no longer in employment. Whether the employees are identifiable today or not, is therefore, irrelevant so long as the contribution was

liable to be paid on their behalf when they were in employment.

6. Considering the legal position as explained above, I have no hesitation in holding that the appellant is liable to remit contribution in respect of all the 107 non-enrolled employees as quantified by the respondent authority.

7. The next issue is with regard to under reporting of wages for remittance of provident fund contribution. According to the learned Counsel for the appellant, the appellant establishment failed to remit contribution on DA by oversight and admitted its liability to remit the same. However he pointed out that some of the employees left service and settled their provident fund account and therefore they may be excluded from assessment of dues in respect of DA paid to them. The learned Counsel for the respondent opposed the claim stating that the appellant cannot escape the liability of paying contribution on DA only on the ground that they settled provident fund claim. A member of provident fund continues to be a member till he attains the age of 58 and takes full settlement as per Para 2(f) of the EPF Scheme. As per Para 26A

a member of the fund shall continue to be a member until he withdraws under Para 69 the amount standing to his credit in the fund. In view of the above legal position the appellant is liable to remit the contribution on the DA component of wages to all the employees. The learned Counsel for the appellant submitted that HRA is an excluded allowances U/s 2(b) of the Act and therefore the respondent authority cannot claim dues on HRA paid by the appellant to its employees. It is settled legal position that certain allowances which are specifically excluded U/s 2 (b)(2) and not included as per Sec 6 of the Act cannot be taken as basic wages for assessment of provident fund dues. As per sec 2 (b) (2), HRA is specifically excluded from the definition of basic wages and therefore the assessment of dues by the respondent on HRA cannot be legally sustained.

8. Considering the facts, circumstances and evidence in this appeal, I am inclined to hold that assessment of dues in respect of 107 non-enrolled employees is legally correct. The assessment of dues on dearness allowance is also upheld. However the assessment of dues on HRA cannot be upheld for the reasons stated above.

Hence the appeal is partially allowed rejecting the assessment of dues on HRA paid to its employees by the appellant. The assessment of dues in respect of 107 non-enrolled employees and dearness allowance is upheld. The matter is remitted back to the respondent to reassess the dues on allowances within a period of 6 months after issuing notice to the appellant.

Sd/-

(V. Vijaya Kumar)
Presiding Officer