



सत्यमेव जयते

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

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

(Friday the 19th day of March, 2021)

Appeal No.531/2019

(Old No.471(7)/2009)

Appellant : M/s. Detective & Security Services
Kochar Road,
Sasthamangalam,
Thiruvananthapuram-695010

By Adv. N. Anil Kumar

Respondent 1. The Assistant PF Commissioner
EPFO, Regional Office
Thiruvananthapuram – 695004.

By Adv. Nitha N.S

2. Shri. Krishnan Kutty
Representing Drivers & Security,
M/s. Lourdes Matha College of Science
and Technology,
Kuttichal P.O
Thiruvananthapuram.

3. Shri. M.J. Thomas,
(Vice President)
M/s. Lourdes Matha College of
Engineering and Technology,
Kuttichal P.O
Thiruvananthapuram.

4. Shri. B. Prabhakaran,
Workshop Superintendent
Representing M/s. Lourdes Matha College
of Engineering and Technology,
Kuttichal P.O
Thiruvananthapuram.

This case coming up for hearing on 16/02/2021 and this Industrial Tribunal-cum-Labour Court issued the following order on 19/03/2021 .

ORDER

Present appeal is filed from order No. KR / 16738 / Enf-1(2)2009/2186 dt. 04/06/2009 assessing the dues on U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') against non-enrolled employees and also on evaded wages for the period 03/2007 to 09/2008. The total dues assessed is Rs. 5,27,960.10/-.

2. The second respondent Shri. Krishnan Kutty representing the drivers and security guards remained absent and therefore declared ex-parte. Respondent No.3 & 4 also filed written statement but remained absent from the proceedings.

3. The appellant is a manpower agency supplying manpower to various establishments. The appellant introduced some drivers and security guards to M/s. Lourdes Matha College of Engineering and Technology, Kuttichira. The Enforcement Officer who conducted the inspection of M/s. Lourdes Matha College of Engineering and Technology found that many drivers

and security guards deployed in Matha College of Engineering are not enrolled to provident fund and for those who are enrolled the contribution paid is on a substantially low portion of the wages. The first respondent initiated an enquiry U/s 7A of the Act. The principal employer M/s. Lourdes Matha College management produced details of wages paid to the drivers and security guards during the period from 3/2007 upto 9/2008. According to college management, the appellant is responsible for remitting the provident fund contribution in respect of the employees engaged through the appellant. The appellant also submitted a detailed statement of workers employed by the college management through the appellant and also furnished the details of provident fund paid to the respective employees during the period 3/2007 to 9/2008. In the enquiry, the first respondent collected information from both 3rd and 4th respondents and appellant with regard to the employees deployed in the premises of the 3rd and 4th respondent along with monthly salary and dues payable. The 3rd and 4th management furnished another list of employees purported to have been engaged by the appellant. The respondent therefore issued an assessment orders in respect of 52 drivers and 22 security guards. The 1st respondent has taken the complete salary paid by the appellant for assessing the dues. The appellant produced a detailed statement dt.28/04/2009

before the first respondent. The copy of the statement dt.28/02/2009 is produced and marked as Annexure 3.

2. The consolidated statement of remittance of provident fund for drivers and security guards deployed at the premises of the 3rd and 4th respondent for the period 03/2007 to 09/2008 was also furnished at the time of enquiry. The copy of the consolidated statement is produced and marked as Annexure 3. The contribution cards in respect of the employees deployed by the appellant was also furnished to the first respondent. The copies of the contribution cards of each of the employee deployed during the above said period is produced and marked as Annexure 4 (1) to 4(28). The contribution cards issued to the employees for the period from 03/2008 to 02/2009 was also furnished by the appellant at the time of enquiry and same is produced and marked as Annexure 5 to 5(1). During the period 3/2007 to 2/2008 only 28 employees were deployed at the premises of 3rd and 4th respondents and 51 employees were deployed from 03/2008 to 2/2009. All these employees were introduced by the appellant to the 3rd & 4th respondent. In the enquiry Shri.Krishnan Kutty who represent the drivers failed to produce any evidence. The first respondent failed to notice that the appellant was not the employer of the drivers and security

guards who worked in the premises of Mary Matha Engineering and Technology. The first respondent ought to have found that there is no privity of contract between the appellant and college management. It is the primary duty of the 3rd and 4th respondent, college management, to deduct provident fund contribution and other statutory deductions from the wages of their employees. The appellant received only Rs. 400/- as service charges from each employee. The first respondent ought to have noticed that the college management was paying Rs.2000/- as different kind of allowances and Rs. 1200/- as salary. The college management has withheld a portion of the salary of the drivers and the security guards during the disputed period and the amount so withheld was about Rs. 1,00,000/-.

4. The first respondent filed counter denying the above allegations. The appellant was covered under provision of the Act U/s 2A w.e.f 16/01/2003. 3rd and 4th respondent, the college management, engaged 50 employees from the appellant establishment. The Enforcement Officer who conducted an inspection of M/s.Lourdes Matha College reported that these drivers and security guards deployed by the appellant were not extended the benefit of provident fund. In the meanwhile the first respondent also received a complaint from the drivers and

security guards deployed at M/s Lourdes Matha College alleging non-enrollment and also short remittance of provident fund contribution. Hence an enquiry U/s 7A was initiated. In the enquiry the appellant admitted that they are deploying security guards and drivers to 3rd and 4th respondent M/s. Lourdes Matha College. Hence the appellant was directed to produce the details of the employees, date of joining, monthly salary etc for the period from 3/2007 to 9/2008. The appellant was also directed to furnish the details of employees and also the remittance of provident fund in respect of their employees. 3rd and 4th respondent produced a list containing the name of contract employees and details of payment made to contract employees. It was also stated that provident fund remittance is made directly by the appellant as they are independently covered under the Act. The representative of the appellant produced the list of employees with salary details for the period from 3/2007 to 9/2008 copy of the same is produced and marked as Exbt R2. It is noticed during the course of enquiry that the appellant had not remitted the provident fund on full salary paid to the employees and the salary had been bifurcated into two components such as basic and other allowances and provident fund is remitted on basic wages only. The 2nd respondent, the representative of the security guards and drives submitted the

names of all the employees and the list of employees against whom no provident fund is remitted. The list of employees is produced and marked as Exbt R3. On verification it was noticed that the names of 24 employees were not included in the list provided by the appellant. One of the grievance of the 2nd respondent is that all the employees were not extended the benefit of the provident fund. After verifying the list submitted by the college management and the appellant, the first respondent could identify the employees who were not enrolled to provident fund. It was also noticed that the appellant was paying a salary of Rs. 3200/- to its employees and provident fund is deducted only on Rs. 1200/-. In **Group 4 Security Guarding Ltd Vs RPFC**, 2004(2) LLJ 1142 the Hon'ble High Court of Karnataka held that the PF Commissioner can examine the pay structure to determine whether splitting of wages under agreement was only a subterfuge adopted with an ulterior motive to avoid compliance with the provision of the Act. **In Rajastahn Prem Krishan Foods Vs RPFC**, 1996 (9) SCC 454 the Hon'ble Supreme Court held that the RPFC can pierce the veil and read between the lines to find out whether there is a subterfuge with regard to the splitting of wages done by the employers. The respondent 2, representative of the employees filed Exbt R3 complaint specifically alleging that many of the employees are not enrolled

to provident fund and also that provident fund is being paid only on a small portion of the salary. It was also noticed during the enquiry that the appellant failed to enroll many employees who left service by the time the enquiry was initiated. The claim of the appellant that they only introduced the employees to 3rd and 4th respondent is not supported by any evidence. All the materials produced by the appellant, the 2nd respondent and 3rd respondent were examined in detail to arrived at the actual number of employees and the actual contribution that is required to be paid by the appellant.

5. Respondent 3rd and 4th filed counter denying the allegations in the appeal memorandum. The allegation of the appellant that they only introduced the necessary manpower to the service of M/s. Lourdes Matha College is absolutely wrong. The appellant is an establishment independently covered under the provisions of the Act with code number KR/16730. A true copy of the coverage memo is produced and marked as Annexure R1 (a). The employees were engaged in the service of the 3rd respondent through the appellant and the management of 3rd respondent was regularly paying the contract amount to the appellant. A true copy of letter number DSS/Admin/07/08/ dt.09.6.2007 regarding a revision of

contract rate for security guards and drivers addressed to the Director of M/s. Lourdes Matha College is produced and marked as Annexure R2(a). The 3rd respondent produced details of wages paid to the outsourced drivers and security guards of the appellant for the period from 3/2007 to 3/2008. A true copy of the same is produced and marked as Annexure R3(a). The 3rd respondent has paid the wages in respect of the contract employees to the appellant and they are liable to remit the provident fund in respect of the employees engaged by them.

6. The appellant filed a replication the Annexure R2(a) letter produced by the 3rd respondent management would clearly show that 3rd respondent is the employer for the drivers and security guards and the appellant was getting only a meager service charges. The 3rd respondent management has not disputed the fact that an amount of Rs.1 lakh had been retained by them for remitting the provident fund contribution in respect of the security guards and the drivers. Annexure R1(a) furnished by the 3rd respondent relates to the regular employees of the appellant establishment wherein the appellant is the employer. The 3rd respondent cannot shift their responsibility on the appellant. The annexure R3(a)

document furnished by 3rd respondent would reveal the fact that only 58 employees worked under the 3rd respondent during the period 03/2007 to 02/2008 and 51 employees from 03/2008 to 2/2009. Annexure R3 (a) also reveals that most of the employees left their job after working for few days.

7. According to the learned Counsel for the appellant the appellant establishment is a manpower agency deploying manpower to various establishments. However when it comes to deployment of security guards and drivers to the 3rd respondent, the appellant has taken a stand that they only introduced these employees to the 3rd respondent and the 3rd respondent is the employer for all the security guards and drivers and it is their responsibility to remit provident fund contribution in respect of those employees. The 1st and 3rd respondent contested this claim. According to the 3rd respondent appellant is independently covered and they provide manpower to various establishments. On a perusal of the Exbt R2(a) letter dt. 09/06/2007 issued by the appellant to the third respondent that it is clear that there was an existing contract for supply of manpower for the last 3 years and the appellant wanted to revise the rates of the contract with effect from June 2007. The letter also states that after

paying provident fund contribution and ESI Contribution and Service Tax (EPF 13.61 %, ESI 4.75% and Service Tax 12%) the appellant will get a service charge 200 only. This will clearly show that the appellant establishment had deployed drivers and security guards to the third respondent and they are expected to pay the provident fund contribution of the employees deployed by them. Hence the first issue regarding the liability of the appellant to pay contribution in respect of the employees deployed by them to the premises of the third respondent is conclusively proved.

8. It is seen that the first respondent has taken all precautions to ensure that all the employees who were working with third respondent are included in the assessment. The first respondent received a complaint from the employees of the appellant deployed by the appellant establishment in the premises of the third respondent. This complaint which is marked as Exbt R3 is signed by 34 employees. It is specifically pointed out that provident fund benefits is not extended to all the divers and security guards deployed by the appellant establishment. The first respondent therefore collected a list of employees from the 2nd and 3rd respondent and also the appellant, compare all the statements and found that 24

contract employees who left the service were not paid provident fund and therefore included their names in the list and also assessed the dues. The first respondent has indeed taken care to ensure that no employee is left out of the social security net.

9. The next issue raised by the appellant is with regard to the wages on which provident fund contribution is being paid by the appellant. This is one of the allegations in Exbt R3 complaint of the employees that they were being paid Rs.3700/- as salary whereas the provident fund contribution paid only on Rs.1200/-. According to the appellant they are paying Rs.2500/- as special allowance which will not attract provident fund deduction. During the enquiry U/s 7A the appellant failed to explain a huge amounts being paid to their employees. However in this appeal the appellant taken a plea that the special allowance will not attract provident fund deduction.

10. 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 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.

11. 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”.

12. From the above discussion, it is clear that the appellant is liable to pay contribution on special allowances. 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 allowances paid to the employees will form part of basic wages.

13. From the above discussion it is very clear that the special allowance being paid to the employees by the appellant will come within the definition of basic wages and will attract provident fund deduction.

14. Considering all 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