



सत्यमेव जयते

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

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

(Tuesday the 17th day of November, 2020)

APPEAL No.19/2018
(Old No.EPFAT(B)/KL/03/2016)

Appellant : M/s.Tecpro Infra Projects Ltd
CRAN-91, Ponekkara Road
Edappally
Kochi - 682024

By Adv.C.B.Mukundan

Respondent : The Regional PF Commissioner
EPFO, Regional Office, Kaloor
Kochi – 682017

By Adv.S. Prasanth

This case coming up for final hearing on 27.10.2020 and this Tribunal-cum-Labour Court on 17.11.2020 passed the following:

ORDER

Present appeal is filed from order no.KR/KC/10168/ENF3(4)/2016/18411 dt.17.03.2016 assessing dues U/s 7A of EPF & MP Act on various allowances for the period from 05/2013 to 12/2013. The total dues assessed is Rs.5,44,098/-.

2. The appellant is an establishment engaged in civil construction activities and was awarded a mega contract for executing the LNG pipe line job

by M/s. Gas Authority of India Ltd. The project came to a halt because of stiff protest from the local people and also because of the intervention by Courts. The appellant incurred heavy loss during the period 2013-14. Because of these there was some delay in payment of provident fund contribution. One of the employees of the appellant, Sri. Manish Kumar Tiwari filed a complaint with EPF authorities that his provident fund contribution was not paid by the appellant. The respondent deputed one Enforcement Officer to investigate the complaint. The Enforcement Officer noticed that the contribution in respect of Sri. Manish Kumar Tiwari was not paid by the appellant. She also noticed that the appellant establishment was splitting its wages into various allowances such as conveyance allowance, education allowance and medical allowance to avoid paying provident fund contribution, to the detriment of the employees. On the basis of the report of the Enforcement Officer, the respondent initiated an enquiry U/s 7A of the Act. During the course of 7A, the appellant remitted the contribution in respect of Sri. M. K. Tiwari. However the enquiry continued and the respondent issued the impugned order assessing dues on total wages paid to its employees. The allowances such as conveyance allowance, education allowance and medical allowance will form part of any "other allowance" U/s 2(b) of the Act and therefore stand excluded from the definition of basic wages and therefore will not 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 w.e.f. 01.04.1999. The respondent received a complaint from Sri.Manish Tiwari, one of the ex-employees of the appellant stating that he worked in the establishment during the period from 08.05.2013 to 30.11.2013 and he was not given the statutory benefit under provident fund. The Enforcement Officer who was deputed to investigate, confirmed the non remittance and also pointed out that appellant is splitting the wages of its employees into various allowances such as conveyance allowance, education allowance and medical allowance. The respondent therefore initiated an enquiry U/s 7A of the Act. During the pendency of the enquiry, the appellant paid the contribution in respect of Mr.Manish Tiwari. The respondent also found that the splitting up of wages into various allowances is a clear subterfuge and these allowances will attract provident fund deduction and therefore issued the impugned order. In **RPFC Vs Cosmopolitan Hospital Pvt Ltd**, 2010 1 LLJ 14 the Hon'ble High Court of Kerala held that special allowance answers the definition of basic wages and will attract provident fund deduction. In **Kitex Garments Ltd Vs APFC**, W.P.(C) no.12265/2011 the Hon'ble High Court of Kerala held that general allowance, special allowance etc., will form part of basic wages and therefore there is no

ground to distinguish the amounts paid under heads of general allowance, special allowance etc., from the basic wages, paid to its employees.

4. The issue involved in this appeal is whether the conveyance allowance, education allowance and medical allowance being uniformly paid to all the employees will form part of basic wages attracting deduction of provident fund dues. The learned Counsel for the appellant pleaded that these allowances were paid on a reimbursement of expenses incurred by the employees towards their travelling to the workplace, towards medical expenses and towards the education expenses of their children. It is seen from the impugned order that the appellant afforded 20 opportunities from 13.02.2014 to 18.01.2016. If the allowances were paid for reimbursement of the actual expenses made by the employees, the appellant ought to have proved the same before the respondent. It is seen that no such attempt is made by the appellant and therefore it is not possible to accept the claim of the appellant that the allowances are being paid as reimbursement of actual expenses incurred by employees.

5. The two sections which are relevant to decide the question whether the above allowance will form part of basic wages and will attract provident fund deduction are Sec 2(b) and Sec 6 of the Act.

Sec 2(b) of the Act reads as follows;

“ **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 allowance 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 : Contribution and matters which may be provided for in Schemes.

The contribution which shall be paid by the employer to the fund shall be 10% of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable to each of the employees (whether employed by him directly or by or through a contractor) and the employee's 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 establishments which the Central Govt, after making such enquiry as it deems fit, may, by notification in the official gazette specify, this Section shall be subject to the modification that for the words "10%", at both the places where they occur, the words "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 off 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.

Sec 2(b) of the Act excludes certain allowances such as dearness allowance, house rent allowance, overtime allowance etc., from the definition of basic wages. However U/s 6, certain excluded allowances such as dearness allowance are included while determining the quantum of dues to be paid. This anomalous situation was resolved by the Hon'ble Supreme Court in **Bridge & Roof Company (India) Ltd Vs UOI**, 1963 AIR 1474 (SC) 1474. After a combined reading of Sec 2(b) and Sec 6 of the Act, the Hon'ble Supreme Court held that;

- 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 opportunity is not basic wages.

This dictum was subsequently followed by the Hon'ble Court in **Manipal Academy of Higher Education Vs RPFC**, 2008 (5) SCC 428. In a recent decision in **RPFC, West Bengal Vs Vivekananda Vidyamandir & Others**, 2019 KHC 6257 the Hon'ble Supreme Court considered the appeals from various decisions by High Courts that travelling allowance, canteen allowance, lunch incentive, special allowance, conveyance allowance etc., will form part of basic wages. The Hon'ble Court after examining all its earlier decisions held that;

“ The wage structure and the component of salary have been examined on facts, both by the authority and appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question are essentially a part of the basic wages camouflaged 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 of us to interfere with the concurrent conclusions of facts. The appeals by the establishments therefore merits no interference”.

The Hon'ble High Court of Kerala also examined the above issue in a recent decision dt.15.10.2020, in the case of **Employees Provident Fund Organisation Vs M.S.Raven Beck Solutions (India) Ltd**, W.P.(C) no.17507/2016. The Hon'ble High Court after examining the decisions of the Hon'ble Supreme Court on the subject held that the special allowances will form integral part of basic wages and as such the amount paid by way of these allowances to the employees by the establishment are liable to be included in basic wages for the purpose of deduction of provident fund. Hence the law is now settled that all special allowances paid to the employees excluding those allowances specifically mentioned in Sec 2(b)(ii) of the Act will form part of basic wages. However this is an issue to be examined in each case considering the facts and circumstances of the case.

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

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer