



सत्यमेव जयते

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

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

(Thursday the 11th day of November, 2021)

APPEAL No.428/2018

(Old no.563(7)2011)

Appellant : M/s.Pearson Education Services Pvt Ltd
Sai Krishna, Sankar Road
Sasthamangalam
Trivandrum – 695010

By Adv.Hammurabi &
Adv.Solomon

Respondent : The Assistant PF Commissioner
EPFO, Regional Office, Pattom
Trivandrum - 695004

By Adv.Nita N.S.

This case coming up for final hearing on 04.08.2021 and this Industrial Tribunal-cum-Labour Court on 11.11.2021 passed the following:

ORDER

Present appeal is filed from order no.KR/26184/ENF-1(4)/2011/3287 dt.06.06.2011 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on evaded wages, non enrolled employees and short

remittance for the period from 08/2009 to 12/2010. The total dues assessed is Rs.11,36,853/-.

2. The appellant is an educational institution covered under the provisions of the Act and the appellant was regular in compliance. While so, an Enforcement Officer of the respondent authority inspected the appellant establishment on 21.01.2011 and submitted a report to the respondent. The Enforcement Officer reported that there was evasion of provident fund dues, on account of splitting of salary from 08/2009 to 12/2019 and 8 employees who were entitled to be enrolled under the EPF Scheme were not enrolled by the appellant. The respondent initiated an enquiry U/s 7A on the basis of the report. The appellant attended the hearing. It was contended that the contributions were paid strictly in accordance with legal requirements under the provisions of the Act and Schemes. With regard to the non enrolled employees, it was pointed out that all those employees were above the age of 58 years and they come under the excluded category. Ledger extract, salary statement of the employees etc. for the relevant period were produced before the respondent authority. Without considering any of the contentions of the appellant, the respondent issued the impugned order which is produced as Exbt.A1. The respondent authority found that the employers and employees are liable to pay contribution at least on minimum wages prescribed by the

competent authority or on Rs.6500/- (which ever is higher) the wage limit under the Act. The respondent also found that minimum wages is applicable to the appellant establishment. Further the respondent found that payment of various allowances to the employees is a subterfuge to minimise the liability of the appellant and his employees. The respondent authority ought to have seen that there is no mention regarding minimum wages under the provisions of the Act. Further it is pointed out that Minimum Wages Act is not applicable to the appellant establishment. A copy of the clarification dt.11.01.2011 furnished by the Additional Labour Commissioner is produced and marked as Exbt.A2. The appellant is employing around 120 employees and 50% of them are only eligible to be enrolled to the fund. However the appellant is paying contribution in respect of all the employees. The decisions cited by the respondent authority are not applicable to the facts of the present case as those judgments are against establishments where minimum wages are prescribed by the statute. Sec 2(b) and Sec 6 clearly excluded all allowances other than DA and retaining allowance for the purpose of payment of contribution. HRA is specifically excluded. If the intention of legislature was to include the entire emoluments, there was no need for it to provide a large exclusion clause in the definition of basic wages. The respondent failed to consider the fact that various allowances like HRA, travelling allowance,

medical allowance, communication development allowance, professional development allowance, leave travel allowance and lunch allowance are specifically excluded from the definition of basic wages as provided under the Act and no contribution is payable on such allowances.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act w.e.f. 01.08.2009. An Enforcement Officer of the respondent inspected the appellant establishment and submitted a report stating that

1. 8 employees who were entitled to be enrolled were not enrolled to the fund
2. There is evasion of provident fund on account of splitting of wages
3. It was reported that there is short remittance of regular dues for the period from 08/2009 to 02/2010 and short remittance in administrative charges.

4. With regard to the 1st issue, the Enforcement Officer reported the name of the employees who are not enrolled, their date of joining and the salary drawn by them. The appellant took a contention that all these 8 employees are beyond the age of 58 and therefore not eligible to be enrolled to the fund. However during the course of enquiry, the appellant admitted

that these 8 employees can be enrolled to the fund. With regard to the 2nd issue, regarding the splitting of wages, the Enforcement Officer reported that the salary is divided into many components such as basic, basic arrears, HRA, HRA arrears, conveyance, other allowance, other allowance arrears, medical allowance, performance allowance, performance allowance arrears, food coupons etc. Provident fund is deducted and paid only on the basic pay. There is no DA in the wage structure. It is clear that the salary structure is devised for the purpose of evading provident fund. The respondent authority examined the splitting of salary by the appellant for 12/2000 in respect of randomly selected employees. In the case of one Mr.Divakaran Nair the gross salary paid is Rs.11,118/- whereas the provident fund deducted is Rs.378/- only on a basic pay of Rs.3149/-. The employee is paid Rs.1260/- as HRA, Rs.800/- as conveyance and Rs.5622/- as other allowance and Rs.287/- as performance allowance. Similarly in the case of Sri.Prasanth who is getting a gross pay of Rs.7005/- the provident fund contribution is only made Rs.300/- i.e. on a basic pay of Rs.2500/-. He is getting an HRA of Rs.1000/-, conveyance allowance of Rs.800/-, other allowance of Rs.2522/- and performance allowance of Rs.183/-. This is exactly the pattern of all the cases analysed in the impugned order. The respondent analysed all similar cases and came to the conclusion that the allowances except HRA will attract provident fund deduction. In **Group 4**

Security Guardings Ltd Vs RPFC, the Hon'ble High Court of Karnataka held that the Provident Fund Commissioner can examine the pay structure to determine whether splitting of wages is a subterfuge adopted with a view of avoiding compliance in the provisions of the Act. In **Hindustan Lever Employees Union Vs RPFC**, 1995 LAB IC 775 the Hon'ble High Court of Bombay held that basic wages as defined U/s 2(b) of the Act includes all allowances except those allowances which are specifically excluded. The Hon'ble High Court of Madhya Pradesh in **M/s.Montage Enterprises Pvt Ltd Vs EPFO**, 2012 1 LLJ 371 (MP) held that on a combined reading of Sec 2(b) and Sec 6 of EPF Act, wages which are universally, necessarily and ordinarily paid to all employees across the board were basic wages. In **Gujarat Cypromet Ltd Vs EPFC**, 2012 LAB IC 422 the Hon'ble High Court of Gujarat held that Sec 2(b) of the Act includes allowances such as medical allowance, lunch allowance and conveyance allowance within the definition of basic wages. The appellant is providing the similar wage structure to all class of employees irrespective of quantum of their salary. Hence it is clear that the other allowances comes under the definition of basic wages since it is not excluded from the definition and therefore that component is taken for the purpose of calculation of provident fund dues. Similarly performance allowance and conveyance allowance are also not included in the

exclusion clause of basic wages and they are also taken for the purpose of calculation subject to the upper wage division on Rs.6500/-.

5. The learned Counsel for the appellant in his argument note pointed out that during the course of these proceedings the appellant company had merged with Tutor Vista Global Pvt Ltd along with another companies by virtue of the order dt.28.08.2014 passed by the Hon'ble Madras High Court in Company Petition no.240/2014. Further the name of Tutor Vista Global Pvt Ltd has been changed to Pearson India Education Ltd w.e.f. 30.09.2014. A copy of judgment of Hon'ble High Court of Madras in Company Petition no.240/2014 is produced in this appeal.

6. An Enforcement Officer of the respondent organisation conducted an inspection of the appellant establishment and submitted a report alleging, that

1. There is non enrollment of 8 employees
2. The wages are splitted, there by evading provident fund contribution
3. There are some short remittances.

With regard to issue no.1 i.e. non enrolment of 8 employees, though the appellant pleaded during the course of 7A proceedings that those employees were not enrolled to the fund since they cross the age limit of 58 years. The

respondent authority probably convinced the representative of the appellant that there is no age limit for enrollment to the fund and therefore they agreed to enroll all the non enrolled employees from the due date of eligibility and remit the contribution. Hence no serious dispute has raised regarding the same.

7. The 2nd issued raised by the appellant is with regard to the splitting of wages and consequent evasion of provident fund liability. The learned Counsel for the appellant pointed out that the Minimum Wages Act is not applicable to the appellant establishment and therefore the assumption of the respondent authority that the Minimum Wages Act is applicable and therefore the appellant is liable to remit the contribution on minimum wages is not correct. For the sake of brevity, it is pointed out that the respondent authority is not the competent authority to decide whether Minimum Wages Act is applicable to a particular establishment or not. The respondent authority also cannot decide the wage structure of any establishment. It is the prerogative of the employer to decide wage structure of its employees. However, as rightly pointed out by the respondent, it is within the powers of the respondent authority U/s 7A of the Act to lift the veil and decide whether the allowances paid are a subterfuge to reduce the provident fund liability of the employers and whether the allowances paid will form part of basic wages.

8. The relevant provisions of the Act to decide the issue whether the conveyance allowance and other allowance paid to the employees by the appellant will attract provident fund deduction are Sec 2(b) and Sec 6 of EPF & MP Act.

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 Govt, 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.

The confusion regarding the exclusion of certain allowances from the definition of basic wages and inclusion of some of those allowances in Sec 6 of the Act was considered by the Hon'ble Supreme Court in **Bridge & Roof Company Ltd Vs**

UOI, (1963) 3 SCR 978. After elaborately considering all the issues involved, the Hon'ble Supreme Court held that on a combined reading of Sec 2(b) and Sec 6 where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages. Where the payment is available to be specially paid to those who avail the opportunity is not basic wages. The above dictum laid down by the Hon'ble Supreme Court was followed in **Manipal Academy of Higher Education Vs RPFC**, 2008 (5) SCC 428. In a recent decision in **RPFC, West Bengal Vs Vivekananda Vidya Mandir & Others**, AIR 2019 SC 1240 the Hon'ble Supreme Court reiterated the dictum laid down by the Hon'ble Supreme Court in **Bridge & Roof Company Ltd** case (Supra). In this case the Hon'ble Supreme Court was considering various appeals challenging the orders whether special allowance, travelling allowance, canteen allowance, lunch incentive and special allowance will form part of basic wages. The Hon'ble Supreme Court dismissed the challenge holding that the " wage structure and 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 basic wages camouflaged as part of an allowances so as to avoid deduction and contribution accordingly to the provident fund accounts of the employees. There is no

occasion for us to interfere with the concurrent conclusion of facts. The appeal by the establishments are therefore merit no interference “ .

9. In **Montage Enterprises Pvt Ltd Vs EPFO, Indoor**, 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 Calcutta High Court held that the special allowance paid to the employees will form part of basic wages particularly because no dearness allowance is paid to its employees. This decision 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 (Karnat.HC) the Hon’ble High Court of Karnataka held that the 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 **Damodarvalley Corporation, Bokaro Vs UOI**, 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. 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. The Hon'ble High Court held that

“ This makes it clear that uniform allowance, washing allowance, food allowance and travelling allowance forms the integral part of basic wages and as such, the amount paid by way of these allowances 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 “.

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, depending on facts and circumstances of each case.

10. In this case, the respondent authority has elaborately considered why he felt that the wage structure of the appellant establishment is a subterfuge to reduce the liability of the appellant establishment. He has cited

the cases of 10 employees from the payroll for the month of 12/2010 to explain why it is a clear case of subterfuge. In the case of Sri.Divakaran Nair N who is drawing a gross salary of Rs.11,118/- the basic is Rs.3149/- and the provident fund contribution paid is only Rs.378/-. In this case the “other allowance” component is Rs.5622/-. Similarly in the case of Sri.Sebastian M. the gross salary is Rs.15,118/- and his basic is Rs.3149/-. The provident fund contribution is restricted to the basic and the contribution paid is Rs.378/-. The other allowance component is Rs.9522/-. In other cases such as Sri.Sreekantan Nair, Smt.Lathakumari, Sri.Anil Kumar, Sri. Radhakrishnan, Sri.Sasiprasad, Sri.Prasanth, Sri.Sunithakumari and Sri.Jyothis K. the basic wages Rs.2500/- though their gross salary varies from Rs.10,004/- to Rs.3755/- the provident fund contribution is only Rs.300/- and the other allowance component varies from employee to employee. In the absence of a proper explanation or clarification with regard to the “other allowances” the respondent authority found that other allowances will form part of basic wages. He excluded the HRA component and rightly so. However he included the conveyance allowance and also performance allowance as part of definition of basic wages. Hence it can be seen that the other allowances, conveyance allowance and performance allowance forms substantial part of the gross salary whereas the basic is restricted to the minimum and provident fund

contribution is being paid only on that basic wages. It is the responsibility of the appellant to explain why a particular allowance will not form part of basic wages. The Division Bench of the Hon'ble High Court of Rajasthan in **M/s. DCM Sreeram Consolidate Ltd Vs RPFC**, 2004 3 LLJ 396 held that the burden was on the firm to satisfy the Commissioner that the allowance, in this case, the good work reward, was not part of basic wages which it has failed to do. It is clear from the impugned order that the assessment is restricted to the statutory limit of Rs.6500/-.

11. The appellant did not raise any serious dispute regarding the short remittances assessed by the respondent authority.

12. 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