



सत्यमेव जयते

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

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

(Wednesday the 1st day of September, 2021)

APPEAL No.522/2019
(Old no.667(7)2009)

Appellant : M/s.G4S Facility Services (India) Pvt Ltd
C-16, Community Centre
Behind Janak Cinema
Janakpuri
New Delhi - 110058

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

By Adv.S. Prasanth

This case coming up for final hearing on 29.07.2021 and this Tribunal-cum-Labour Court on 01.09.2021 passed the following:

ORDER

Present appeal is filed from order no.KR/KCH/19743/ENF/2009 dt.20.08.2009 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on evaded wages for the period from 07/2003 to 04/2008. The total dues assessed is Rs.1,37,24,289.35.

2. Appellant is an establishment engaged in the supply of manpower and security guards to various establishments. The appellant is covered under the provisions of the Act w.e.f. 01.07.2003. The appellant is paying its employees as per the contract of service with the basic wages, HRA and some other allowances which are not in the nature of remuneration earned by the employees. The respondent authority issued notice to the appellant stating that the appellant establishment failed to remit provident fund contribution on the basic wages payable by the appellant establishment for the period from 04/2005 to 06/2007. Subsequently vide letter dt.28.04.2008 the respondent authority decided to assess the dues in respect of the appellant establishment at Trivandrum covered under code no.KR/22096 as well as at Cochin covered under code no.KR/19743. Copy of the notice dt.28.04.2008 is annexed as Annexure A3. The appellant produced all the relevant records before the respondent authority and also filed a reply dt.27.05.2008 pointing out that the total wage package of the employees of the appellant consisted of basic wages at 50%, HRA at 25% and conveyance allowance at 25%. In view of the definition of basic wages U/s 2(b) of the Act, HRA and conveyance allowance are specifically excluded and U/s 6 and provident fund contribution is required to be paid only on basic wages paid to the employees. The reply dt.27.05.2008 filed by the

appellant before the respondent is produced and marked as Annexure A4. The respondent issued an order dt.25.06.2009 with regard to Trivandrum establishment having code no.KR/22096 holding that contribution is payable on the entire amount. Aggrieved by the said order the appellant filed appeal before the EPF Appellate Tribunal, New Delhi which is numbered as 444(7)2009. Subsequently the respondent passed the impugned order dt.20.08.2009 relating to the Cochin establishment covered under code no.KR/19743 reiterating its earlier stand. The respondent authority is a creation of EPF & MP Act, 1952 and it is not fair on the part of the authority to adjudicate on the provisions of Minimum Wages Act, 1948. It is not correct on the part of the respondent to hold that HRA and other allowances will form part of basic wages. It is left to the discretion of the appellant to decide whether DA is required to be paid to its employees or not. The respondent erred in ignoring the principles laid down by the Hon'ble Supreme Court in **Bridge & Roof Company (India) Ltd Vs Union of India**, AIR 1963 SCC 1474 and **Manipal Academy of Higher Education Vs RPFC**, 2008 (5) SC 1951. The decision of the Hon'ble High Court of Karnataka in **Group 4 Security Guards Vs RPFC**, 2004 (2) LLJ 1142 was without jurisdiction and contrary to the order of the Supreme Court in S.L.P no.12318/2004. There is no material placed on record before

the respondent authority to arrive at a bonafide conclusion that the allowance was in the nature of DA.

3. The respondent filed counter denying the above allegations. It is reported that the appellant establishment is paying contribution only on a fraction of the actual wages paid to the employees. The respondent found that there is a prima facie case of gross underreporting of wages and evasion of statutory liability under the Act. The appellant was paying only 50% of the salary as basic wages and the rest of the wages are classified as various allowances such as HRA, conveyance and other allowances. The Enforcement Officer who conducted the inspection submitted the consolidated wages statement for the period from 07/2003 to 04/2008 and also specimen of payslip issued to the employees. It was also reported that the appellant establishment was not remitting any contribution towards EDLI for the period from 07/2003 to 07/2007. From the tabular information furnished in the report, it is clear that the basic wages paid to the employees by the appellant is only 40 to 45% of the total emoluments and 20 to 25% is treated as HRA and another 20 to 25% is paid as conveyance and 3 to 13% is paid in the EANRI category. It is very clear from the tabular statement that the appellant establishment is evading contribution on wages of 55 to 60% in the name of allowances. Hence an enquiry U/s 7A

was initiated. The appellant was represented in the enquiry. After providing more than adequate opportunity the respondent issued the impugned order assessing the dues for the period 07/2003 to 04/2008. The Hon'ble High Court of Gujarat in **Gujarat Cypromet Limited Vs APFC**, 2004 (103) FLR 908 held that the term basic wages as defined U/s 2(b) of the Act includes all emoluments, benefits received by the employees under the heading of medical allowance, conveyance allowance, lunch allowance and these allowances are to be considered for the purpose of calculating provident fund contribution. It is admitted by the appellant establishment that they are not paying any DA to its employees. The respondent has taken a stand that contribution is required to be paid at least to the extent of wages which is equivalent to the minimum wages applicable to the particular industry in which the establishment is engaged. The decision of the Hon'ble Supreme Court in the case of **Rajasthan Prem Kishan Goods Transport Co. Ltd Vs RPFC**, 1996 9 SCC 454 supports the stand that the respondent Commissioners shall lift the veil and read between the lines to find out the pay structure fixed by the employer to its employees and to decide the question whether the splitting up of pay has been made only as a subterfuge to avoid contribution to the provident fund.

4. The case of the appellant is that the respondent has included all allowances including HRA, while assessing the provident fund contribution in the impugned order. It is also contended by the appellant that the respondent authority is not competent to decide the question of minimum wages payable by the appellant to its employees. It is true that the respondent authority is not the competent authority to decide the question of minimum wages. However in view of the authorities cited by the respondent, he is competent to examine whether the splitting up of wages is done with a purpose of avoiding provident fund contribution. Though it is upto the appellant establishment to decide what are the allowances payable to its employees, it is upto the respondent to decide whether such allowances will form part of basic wages and therefore will attract provident fund contribution. In this particular case the appellant was paying 45 to 50% of wages as basic wages and 25% of the wages split into HRA and another 25% is paid as conveyance allowance. It may be relevant in this context to examine Sec 2(b) and Sec 6 of the Act which are relevant for deciding the issue.

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 " .

5. 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 “.

In view of the above findings it is very clear that the allowances explained above will form part of basic wages and therefore will attract provident fund deduction.

6. It is seen that the respondent has included HRA also for the purpose of assessing the dues considering it as basic wages. The respondent has not given any specific reason other than the fact that the 25% of the total wages paid by the appellant to all its employees uniformly is far too excess. The impugned order has given the specific examples of how the salary paid to its employees are split up by the appellant establishment. Being a specifically excluded allowance it is not legally correct to treat HRA as basic wages as the same is specifically excluded U/s 2(b) of the Act. The authorities cited above also specifically excludes HRA from basic wages.

7. Considering the legal position as explained above I am not inclined to accept the finding of the respondent authority that HRA will also form part of basic wages and therefore is required to pay contribution on the same. However the appellant is liable to remit contribution on all other allowances like conveyance and other allowances and the assessment to that extent is upheld.

Hence the appeal is partially allowed, the allowances such as conveyance and other allowances being paid to the employees by the appellant will form part of basic wages and therefore will attract provident fund deduction. HRA being specifically excluded U/s 2(b) will not form part

of basic wages and therefore will not attract provident fund deduction. The respondent is therefore directed to re-assess the dues after issuing notice to the appellant excluding HRA from the assessment. The 7(O) deposited by the appellant as per the direction of EPF Appellate Tribunal will be adjusted after the amount is re-assessed as per the above directions.

Sd/-

(V. Vijaya Kumar)
Presiding Officer