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

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

(Tuesday the 15th day of December, 2020)

**APPEAL No.569/2019**
(Old No.955(7)2012)

Appellant : M/s.Malabar Kodungallur
Sona Bazar (P) Ltd
Kodungallur
Thrissur - 680664

By Menon & Pai

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

By Adv.Thomas Mathew Nellimoottil

This case coming up for final hearing on 17.11.2020 and this Tribunal-cum-Labour Court on 15.12.2020 passed the following:

**O R D E R**

Present appeal is filed from order no.KR/KC/24106/ENF-2(3)/2012/8987 dt. 27.09.2012 assessing dues U/s 7A of the EPF & MP Act, 1952 (hereinafter referred to as 'the Act') against non enrolled employees for the period from

06/2009 to 03/2012 and evasion of wages from 07/2011 to 03/2012. The total dues assessed is Rs.10,32,845/-.

2. The appellant is engaged in the business of sale of jewellery and allied products. The appellant establishment was complying regularly from the date of coverage in 2007. The appellant is engaging some trainees and is imparting training in making, handling, purchase and billing etc. The appellant being new, it is imperative that the persons who are engaged have adequate training in various fields associated with the business. The respondent initiated an enquiry U/s 7A of the Act and it was brought to the notice of the respondent that the trainees are being engaged on the basis of a certified standing order and therefore they cannot be treated as employees for the purpose of assessing dues under the Act. From the Annexure A2 inspection report, it is clear that the contribution was not paid on the stipend paid to the trainees and on the allowances which do not attract provident fund contribution. As per U/s 2(f) of the Act, apprentices or trainees engaged under standing orders will not come within the definition of employee. Even without standing orders the model standing orders are applicable U/s 12A of the Industrial Employment (Standing Orders) Act. As per the model standing orders an apprentice is a leaner who is paid an allowance during the period of training. Being a statutory authority the respondent has a duty to act within the frame work of the statue. The

respondent could not have questioned the authority of certification of standing orders and the engagement of trainees in terms of standing orders. The trainees are engaged for a period of six months and if they are found to be good, they will be absorbed into the regular employment. The respondent ought to have conducted an enquiry under Para 26B of the EPF Scheme to decide the eligibility of the trainees to be enrolled to the provident fund. After completion of one year training, majority of the trainees are absorbed by the appellant into the regular employment and they are covered under the provisions of the Act from the first date of employment. The findings of the respondent that CCA and education allowance will attract provident fund contribution is against the provisions of the Act and also various decisions by High courts and also the Hon'ble Supreme Court.

3. The respondent filed counter denying the above allegations. The appellant is an establishment covered under the schedule head "trading and commercial" and is engaged in trading and commercial activities and registered under Kerala Shops and Establishments Act, 1960. An Enforcement Officer of the respondent during her routine inspection of the appellant establishment reported that the compliance position of the appellant is not satisfactory since the appellant failed to enrolled all the eligible employees and also reported that there is evasion of remittance of provident fund contribution by splitting of

wages. Hence an enquiry U/s 7A was initiated for assessing the dues for the period from 06/2007 to 05/2009. The respondent came to conclusion that the Industrial Employment (Standing Orders) Act is not applicable to the appellant establishment and therefore the non-enrolled employees cannot be treated as trainees or apprentices as they will squarely falling under the definition of 'employee'. The appellant filed an appeal no.ATA 201(7)2010 before EPF Appellate Tribunal, New Delhi and the appeal was dismissed by the Tribunal vide order dt.02.04.2013 holding that Sec 2(f) of the Act defines an employee to include an apprentice, but excluding an apprentice engaged under Apprentice Act and the standing orders of the establishment. The EPF Appellate Tribunal also held that the certified standing orders were not certified at the relevant point of time. A true copy of the order of the EPF Appellate Tribunal dt.02.04.2013 is produced and marked as Exbt.R1. The respondent initiated a further enquiry to assess the dues in respect of non enrolled employees for the period from 06/2009 to 03/2012. A representative of the appellant appeared in the enquiry and contented that the trainees cannot be treated as employees as defined U/s 2(f) of the Act. The representative also produced muster roll, stipend details, ledger towards the payment and the certified standing orders. Para 26 of EPF Scheme provides that every employee employed in connection with the work of the establishment to

which EPF Scheme applies, other than the excluded employees, shall be entitled and required to become a member of provident fund from the date of joining the establishment. As per Sec 2(f) of the Act, an employee means any person who is employed for wages in any kind of work manual or otherwise in or in connection with the work of the establishment and who gets its wages directly or indirectly from the employer and includes any person engaged as an apprentice not being and apprentice engaged under Apprentice Act, 1961 or under the standing orders of the establishment. The term 'employee' covers any individual or person engaged in or in connection with the work of the establishment and who gets its wages directly or indirectly from the employer and also includes apprentices except those engaged under the Apprentices Act, 1961 or under the certified standing orders of the establishment. The appellant has no case that the trainees are engaged under Apprentices Act, 1961. The EPF Act mandates that exclusion envisages under this provision is meant only to apprentices who are engaged by those establishments to which Industrial Employment (Standing Orders) Act are applicable. No exclusion has been allowed for trainees under the Act. The appellant establishment is not an industry notified under the Apprentices Act and therefore the appellant establishment is not statutorily eligible to deploy apprentices. The appellant establishment is engaged in trading and commercial activities and is registered

under Kerala Shops and Establishments Act. The appellant establishment will not come within the definition U/s 2(e) of the Industrial Employment (Standing Orders) Act and therefore Industrial Employment (Standing Orders) Act is not applicable to the appellant. As per Sec 2(e) of the Industrial Employment (Standing Orders) Act, an "industrial establishment" means:-

a) An industrial establishment as defined in Clause (II) of Section 2 of the Payment of Wages Act, 1936 or
b) A factory as defined in Clause (m) of Section 2 of the Factories Act, 1948 or
c) A railway as defined in Clause (4) of Section 2 of the Indian Railways Act, 1890 or
d) The establishment of a person who, for the purpose of fulfilling a contract with the owner of any industrial establishment, employs workmen.

It is admitted that the appellant establishment did not have a factory license under the Factories Act and is registered under Kerala Shops and Establishments Act. It is very clear that the provisions of Industrial Employment (Standing Orders) Act is not applicable to employees of shops and establishments registered under Kerala Shops and Commercial Establishments Act, 1960. Since the pre-dominant activity of the appellant establishment will not form under

any of the above 4 categories, the Industrial Employment (Standing Orders) Act is not applicable to the appellant establishment. This issue was considered by the Division Bench of the Hon'ble High Court of Delhi in **Indraprastha Medical Corporation Ltd Vs NCT of Delhi and others**, 2006 (2) LLJ 231. The Hon'ble High Court held that to determine whether an establishment is covered by the provisions of the Act, we have to see what is the main activity and not the incidental activity, which is being conducted by the establishment. The Hon'ble High Court also examined the provisions of the Industrial Employment (Standing Orders) Act and held that the provisions of the Act will be applicable only if the establishment comes within the definition of Sec 2(e) of the Industrial Employment (Standing Orders) Act. In **Cosmopolitan Hospital Pvt Ltd Vs RPFC**, W.P.(C) 5301/2005 the Hon'ble High Court of Kerala held that the provisions of the Industrial Employment (Standing Orders) Act is applicable only to industrial establishment defined in Clause (2) of Sec 2 of Payments of Wages Act, in Clause (m) of Sec 2 of the Factories Act, in Clause (4) of Sec 2 of Indian Railway Act or any establishment of a person who for the purpose of fulfilling a contract with the owner of any industrial establishment employs workmen. In **Commonwealth Trust India Ltd Vs Labour Commissioner and others**, OP no.24276/2001 the Hon'ble High Court of Kerala held that Industrial Employment (Standing Orders) Act is not applicable to an establishment

registered under Kerala Shops and Commercial Establishments Act, 1960. The Hon'ble High Court also clarified that when an establishment is not an industrial establishment and defined under the Industrial Employment (Standing Orders) Act, the establishment and employees of that establishment cannot be held to be covered under the said Act.

4. The appellant is liable to pay contribution on wages paid to its employees excluding the allowances provided U/s 2(b) of the Act. It is clear from the definition of basic wages U/s 2(b) that the 'basic wages' means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms of contract of employment and which are paid or payable in cash. In **Gujarat Cypromet Limited Vs APFC,** 2004(103) FLR 908 the Hon'ble High Court of Gujarat held that the term 'basic wages' as defined U/s 2(b) of the Act includes all emoluments/benefits received by the employees and all such emoluments are to be considered for the purpose of calculating provident fund contribution. In **Whirlpool India Ltd Vs RPFC**, W.P.(C) 7729/1999 the Hon'ble High Court of Delhi held that canteen allowance, cannot be construed as 'any other allowance' payable to the employees in respect of his employment and the said allowance is a cash payment earned by the employees. According to the Hon'ble High Court the employees have a right to

demand and receive some additional benefits under the terms of a binding settlement, and such benefits will form part of basic wages.

5. The appellant has challenged the impugned order in this appeal on two grounds. The first ground taken by the appellant is that they are entitled to engage trainees under the Industrial Employment (Standing Orders) Act and since they are already having a certified standing order, they are entitled to engage trainees which is excluded U/s 2(f) of the Act. The other ground pleaded by the appellant is with regard to certain allowances such as education allowance and CCA paid to the employees and their contention that these allowances will not attract provident fund deduction. According to the learned Counsel for the respondent, the first issue regarding trainees was taken up before the EPF Appellate Tribunal in ATA no.201(7)2010 by the appellant and vide order dt.02.04.2013 the EPF Appellate Tribunal concluded that " the standing orders of the appellant were neither certified under the Industrial Employment (Standing Orders) Act, 1946 nor the appellant establishment is declared an industrial establishment for the purpose of Industrial Employment (Standing Orders) Act, 1946. Accordingly the appellant cannot take shelter to escape its liability under the EPF Act ". That decision of the Appellate Tribunal is not challenged and it has become final. However according to the learned Counsel for the appellant the standing orders are certified by the competent

authority and to that extend the earlier decision is not binding on the appellant. The learned Counsel for the respondent however pressed on the second finding of the EPF Appellate Tribunal that the appellant establishment is not a notified industry under Industrial Employment (Standing Orders) Act. The learned Counsel for the respondent has taken this Tribunal through the provisions of Industrial Employment (Standing Orders) Act, particularly Sec 2(e) of the Act to argue that the appellant establishment will not come within the purview of the said Act. According to the learned Counsel, the appellant is engaged in the business of sale of jewellery and taking into account the nature of business, certain degree of training is required to be imparted to the employees before they are taken into the rolls of the establishment. The respondent was also aware that the non-enrolled persons are trainees and they were only being paid stipend. Under the provisions of EPF Act, apprentices engaged under the Standing Orders Act need not be enrolled to provident fund. Even if, there is no certified standing orders, U/s 12A of the Industrial Employment (Standing Orders) Act, the model standing orders are applicable. In **Bharat Petroleum Corporation Ltd Vs Maharashtra Kamgar Union**, 1999 (1) LLJ 352 SC the Hon'ble Supreme Court held that model standing orders will be applicable to an industrial establishment during the period commencing on the date on which **the Act becomes applicable to that establishment** and the date on which the

standing orders are finally certified under the Act comes into operation. In **Central Arecanut and Coco Marketing and Processing Co-operative Ltd, Mangalore Vs RPFC,** 2006 (3) SCC 381 the Hon'ble Supreme Court held that model standing orders are applicable to an industrial establishment even if the standing orders are not certified by the competent authority. Similar view was taken by the Division Bench of the Hon'ble High Court of Kerala in **Employees Provident Fund Organization Vs Malabar Business Centre Pvt Ltd**, W.A no. 746/2014. In **M/s Gehana Gold Palace Pvt Ltd Vs EPF Appellate Tribunal**, W.P.(C) no. 16126/2014 the Hon'ble High Court of Kerala observed, following the decision of the Hon'ble Supreme Court in **Central Arecanut and Coco Marketing and Processing Co-operative Ltd** (Supra) that model standing orders will be applicable even when the standing orders are not certified by competent authority.

6. There is a clear distinction between the decisions cited by the learned Counsel for the appellant and the facts of the present case. In all the above cases cited, there was no dispute that the Industrial Employment (Standing Orders) Act is not applicable to the establishment. In this particular case the basic contention of the learned Counsel for the respondent is that the appellant establishment will not come with in the definition of "industrial establishment" U/s 2(e) of the Industrial Employment (Standing Orders) Act. The learned

Counsel for the respondent has taken this Tribunal through the provisions of the Act to establish that the appellant establishment will not come within the definition of an industrial establishment in the Industrial Employment (Standing Orders) Act. Even in the decision of the Hon'ble High Court of Kerala in **Malabar Business Centre Pvt Ltd Vs EPF Appellate Tribunal and another**, W.P.(C) no.9419/2011 the finding of the Hon'ble High Court is that " the private limited company herein, who manufactures jewellery and have a workshop for such manufacture wherein ornaments are manufactured for the purpose of sale, definitely would be an industrial or other establishments as defined under the Payment of Wages Act and hence would fall within the ambit of the Standing Orders Act ". In this particular case the appellant has no case that they manufacture jewellery and they have got a workshop which will come under the provisions of the Standing Orders Act. Therefore the dictum laid down in the above decision cannot be extended to the appellant. In this particular case the findings of the respondent authority is that the Industrial Employment (Standing Orders) Act is not applicable to the appellant establishment. However it is seen that the appellant got the standing orders certified by the competent authority. The argument of the learned Counsel for the respondent is that this is done with the aim of excluding the social security benefits to vast number of persons working in the appellant establishment.

Hence the issue involved in this case is whether a standing order certified by a competent authority can be taken into account when the Act is itself is not applicable to the appellant establishment. The nearest possible finding regarding the above issue is by the Hon'ble High Court of Kerala in **Muthoot Pappachan Consultancy Vs Labour Commissioner**, 2008 (2) LLJ 420 Ker. In this case the certifying authority under the Industrial Employment (Standing Orders) Act granted certification to the standing orders presented by the Muthoot Pappachan Consultancy. The certification was later withdrawn by the Appellate authority on the ground that the number of employees were below 50 which was challenged before the Hon'ble High Court of Kerala. The Hon'ble High Court of Kerala held that the petitioner in that case was employing more than 50 employees including the regular employees, probationers and contracted experts. In that context the Hon'ble High Court observes that "even otherwise, even though the Act is would be compulsorily applicable only to establishments employing 50 or more workmen, there is nothing in the Act which would prohibit an establishment from getting its standing orders certified under the Act, if both the employer and workmen desires it. It has to be so since the object of the Act is to require employees in industrial establishments to define with sufficient precision the conditions of employment under them and to make said conditions known to workman employed by them. It is always desirable for

every industrial establishment to have standing orders approved by a statutory authority after obtaining the views of the workmen also, so that the management and workmen would be aware of their rights and duties with precision and they can arrange their conduct and affairs accordingly, which would in turn promote industrial harmony ". The Hon'ble High Court made the above observation in the interest of workmen and to promote industrial harmony. In this case the question is whether an observation made in that background can be used to deny the benefits of social security to a huge number of persons deployed by the management on the ground that they are trainees under the certified standing orders. If such a logic is adopted, there is every possibility that all the major establishments will get their standing orders certified and claim exclusion of vast number of persons employed by them for the benefits of PF Act which will be detrimental to the interest of the workers. In this back ground, I accept the finding of the respondent authority that Industrial Employment (Standing Orders) Act is not applicable to the appellant establishment. However the respondent authority ought to have examined whether these so called trainees are really learners who can claim exclusion under the EPF & MP Act. For that purpose the respondent ought to have examined the training scheme, if any, available with the appellant, whether the trainees are given any training as claimed by the appellant, whether the

trainees are doing the regular work of the employees of the appellant, the length of the training period, the nature of stipend/wages in comparison to the wages paid to the regular employees of the appellant and also the proportion of the number of trainees to that of the number of regular employees employed by the appellant establishment. In the absence of any such data, it is rather difficult to decide whether the so called trainees deployed by the appellant are actually learners.

7. The second issue raised by the appellant is with regard to the allowances paid by the appellant to its employees. According to the learned Counsel, the appellant establishment is not giving CCA and education allowance to all its employees. CCA is provided to an employee to compensate the employees against the higher cost of living in a large city. The primary criterion for providing CCA is the cost of living index in a particular city. CCA is paid as a fixed amount and not a percentage of basic wages. Education allowance is an allowance to assist an employee in meeting the extraordinary and necessary expenses incurred by an employee by reason of service in a different area for providing adequate elementary and secondary education for dependent children. The learned Counsel for the appellant claimed that these allowances are not paid universally to all employees. However the learned Counsel for the respondent pointed out that the respondent authority came to the conclusion

that these allowances are paid universally to all employees after verifying the records produced by the appellant before the authority. Hence the appellant cannot dispute the findings of the authority that these allowances are being paid to all employees of the appellant establishment. If the appellant is having any such claim, he should have disputed and proved it before the authority under Section 7A.

8. 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.

In view of the above, I have no hesitation in holding that the CCA and the education allowance being paid to the employees by the appellant will form part of basic wages and will therefore attract provident fund deduction.

9. Considering the facts, circumstances, pleadings and evidence, I am of the considered view that the question whether the trainees engaged by the appellant will come within the definition of employees under the Act is to be re-examine in the light of observation made in the preceding paras. However the finding of the respondent authority that the allowances paid by the appellant to its employees will form part of basic wages and will attract provident fund deduction is required to be upheld.

Hence the appeal is partially allowed, the assessment with regard to the trainees is set-aside, and the matter is remitted back to the respondent to re-decide the matter within a period of 3 months after issuing notice to the appellant. The assessment with regard to the allowances paid to the employees by the appellant is upheld.

Sd/-

(V. Vijaya Kumar)
Presiding Officer