



सत्यमेव जयते

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

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

(Monday the 5th day of April, 2021)

APPEAL No.69/2018
(Old no.Appeal(KL)44/2016)

Appellant : M/s.G4S Facility Services (India) Private Ltd
Tower A, Fifth Floor, Unitech World
(Cyber Park), Sector-39
Gurgoan
Haryana – 122001

Branch Officer at:

Nediyathara House
House No.32/1477
Kochapally Road
Palarivattom
Kochi - 682025

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 01.03.2021 and this Tribunal-cum-Labour Court on 05.04.2021 passed the following:

ORDER

Present appeal is filed from order no.KR/KC/19743/ENF-3(4)/2015/1873 dt.28.06.2016 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on evaded wages for the period from 08/2011 to 03/2014. The total dues assessed is Rs.23,82,281/-.

2. Appellant establishment is a company incorporated under the provisions of Companies Act, 1956. The appellant establishment was regular in compliance. The appellant is not liable to pay provident fund contribution above the statutory limit as well as for those excluded employees defined under Para 2(f) of the EPF Scheme. The appellant is also not liable to contribute on those allowances which are excluded U/s 2(b)(2) of the Act. The appellant establishment paid basic wages to the employees and also they are being paid HRA and conveyance allowance. The appellant is not paying any DA or retaining allowance to its employees. The respondent initiated action to assess the provident fund dues on evaded wages for the period from 08/2011 to 03/2014. The representative of the appellant appeared before the respondent and pointed out that there is no default on the side of the appellant establishment. It was brought to the notice of the respondent that the Hon'ble Punjab & Haryana High Court vide judgment dt.01.02.2011 in C.W.P

no.15343/2009 has already decided the dispute of splitting up of wages as alleged by the respondent. The appellant filed against the above judgment a L.P.A. no.1139/2011 (O&M) was also dismissed by the Division Bench of the Hon'ble High Court. The appellant also brought to the notice of the respondent a Circular dt.23.05.2011 according to which the splitting up of minimum wages for the purpose of provident fund contribution was kept in abeyance in view of the decision of the Hon'ble High Court of Punjab & Haryana. It was also pointed out that since the matter is pending before the Hon'ble Supreme Court the issue can be taken up after the final decision by the Hon'ble Supreme Court. In spite of the above the representative of the appellant produced all the documents required by the respondent. It was also informed to the respondent vide Annexure A4 letter dt.16.09.2014 that the Profit & Loss account and balance sheet for the company as a whole and it is not possible to produce a separate balance sheet for Cochin office alone. It was also pointed out to the respondent that HRA and similar allowances are excluded U/s 2(b)(2) of the Act. In spite of all the above submissions the respondent issued the impugned order assessing dues on evaded wages.

3. The respondent filed counter denying the above allegations. The appellant is an establishment covered U/s 2A of the Act w.e.f. 01.07.2003. It was reported that there was large scale of evasion of wages by the appellant in

computing EPF dues. Accordingly an enquiry U/s 7A was initiated vide summons dt.23.06.2014. A representative of the appellant attended the hearing but failed to produce any documents. On the next date of hearing the appellant produced the balance sheet and also wages register. The appellant was further directed to produce receipt & payment account, income & expenditure account and cash book in respect of various units of the appellant covered under the jurisdiction of the respondent's office. On 16.12.2014 the appellant produced income & expenditure statement for the year 2012-13 and 2013-14 and cash book for 2012-13 and 2013-14. On verification of the documents produced by the appellant, it is seen that the wages paid to the employees of the appellant are split into basic, conveyance allowance and HRA which varies from 50% to 110% of basic. The appellant is not paying any DA to its employees. The appellant is adopting the above splitting up only to save employer's contribution which will directly affect the employees when it comes to pension calculation. It is also seen that the HRA is being paid at the rate of 50% to 110 % of the basic. Hence it is decided to restrict the HRA to 20% of the basic. However the provident fund contribution is restricted to the statutory limit of Rs.6500/-. Sec 2(b) clearly lays down that the basic wages would not include DA, overtime allowance, bonus, commission, HRA and any other similar allowances. Allowances which are universally, regularly and ordinarily being paid will have

to be considered as part of basic wages as defined U/s 2(b) of the Act. In **Rajasthan Prem Kishan Goods Transport Co. Vs RPFC**, 1996 9 SCC 454 the Hon'ble Supreme Court held that the Commissioner U/s 7A of the Act has the power to lift the veil and read between 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 its contribution to the provident fund. In this particular case no report on the evasion was called for from the areas of the Enforcement Officer and hence there was no necessity to examine an Enforcement Officer in the enquiry. Further the contention of the appellant that the respondent only relied on the report of the Enforcement Officer is also not correct as no such report was available while assessing the dues U/s 7A of the Act. The case of the respondent is that at least contribution should be paid to the extent of wages which is equivalent to the minimum wages applicable to the particular industry in which the establishment is engaged. Article 43 of the Constitution specifically provides for social security to all workers, agricultural, industrial or otherwise, and also provides for a living wage to the employees. The right of minimum wages has been recognised as a fundamental right by the Hon'ble Supreme Court of India which has held non payment of minimum wages to be a violation of Article 23 of the Constitution. The respondent in this case took up the matter only when the

appellant reduced the contribution to below 50% of the wages paid to its employees. The Hon'ble Supreme Court in **Maharashtra State Co-operative Bank Ltd Vs APFC** 2009 10 SCC 123, held that the Act is a social welfare legislation intended to protect the interest of weaker section of the society ie., the workers employed in factories and other establishments and therefore it is imperative for the Courts to give a purposive interpretation to the provisions.

4. The main challenge in this appeal is whether the conveyance allowance and HRA paid by the appellant to its employees will attract provident fund deduction. Though the appellant raised many other issues it is not part of the impugned order and is therefore not considered in this appeal. The learned Counsel for the appellant pointed out that the conveyance allowance and HRA are allowances which are excluded from the definition of basic wages U/s 2(b)(2) of the Act. Therefore the respondent cannot, on the ground of minimum wages, allege that those allowances will come within the definition of basic wages and therefore the appellant is liable to pay contribution on the same. The learned Counsel for the respondent on the other hand argued that the minimum wages was not a consideration in the impugned order and the only point considered by the respondent authority is whether the appellant is liable to pay contribution on HRA and conveyance allowance being paid to all its employees. He further pointed out that the allowances paid varies from 50% to

110% and it is a deliberate attempt by the appellant to deny the social security benefits to its own employees. The learned Counsel for the respondent also argued that the HRA component, though excluded U/s 2(b)(2) of the Act, the HRA paid to the employees of the appellant is more than 100% of the basic pay being paid to the employees. Since no DA is paid by the appellant to its employees it is a clear subterfuge and therefore the appellant restricted the HRA component to 20%. Further the assessment of dues is also restricted to the statutory limit of Rs.6500/- and therefore there is no illegality in the Impugned order.

5. It is a consistent view of Courts and Tribunals that the respondent authority under the Act is not the competent authority to decide the question of minimum wages required to be paid to the employees under the Minimum Wages Act. In this case the respondent has not relied on the minimum wages payable to the employees as a basis for assessing the dues. However he was of the view that the appellant shall pay contribution atleast on wages equalent to that of minimum wages. It will be more appropriate to examine whether the allowances such as HRA and conveyance allowance will attract provident fund deduction as per the provisions of the Act as per the settled legal position.

6. The relevant provisions of the Act to decide the issue whether the conveyance allowance and special 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 " .

7. 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)(2) of the Act will form part of basic wages.

8. In view of the above discussion there is no dispute now that the conveyance allowance will form part of basic wages and will attract provident fund deduction. However HRA requires further analysis since HRA is specifically excluded U/s 2(b)(2) of the Act. As per the impugned order the HRA component varies from 50% to 110 % of the basic wages paid by the

appellant to its employees. The respondent has also narrated a specific case where a corporate staff was getting a basic wage of Rs.5271/- and the HRA being paid to him is Rs.7729/-. According to the respondent this pattern of calculating HRA is done in many cases. Hence it is felt that only on the basis of nomenclature allowing such subterfuge is against the basic principles of a social welfare legislation. Accordingly the respondent restricted the exclusion of HRA to 20% of the basic and the rest of the allowances is taken for assessment of provident fund dues subject to the statutory limit of Rs.6500/-. It is not clear from the cited example whether the same pattern is followed in all cases or the same is confined to a particular category of employees. This consideration becomes more relevant because HRA is specifically excluded U/s 2(b)(2) of the Act. Hence the respondent will have to examine whether the same percentage of HRA is being provided to all or majority of the staff before deciding or restricting the HRA component for exclusion from basic wages.

9. Considering all the facts, circumstances, pleadings and evidence in this case, I am inclined to hold that the conveyance allowance being paid to the employees will attract provident fund deduction. The respondent will have to examine in detail whether the HRA being paid to all or majority of employees are a clear subterfuge to avoid provident fund contribution to its employees.

Hence the appeal is partially allowed, the assessment of contribution on conveyance allowance is upheld. The assessment of dues on HRA above 20% is set aside and the matter is remitted back to the respondent to re-assess the dues on the basis of the above observations within a period of 6 months after issuing notice to the appellant.

Sd/-

(V. Vijaya Kumar)
Presiding Officer