

**CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL -CUM- LABOUR COURT,
ASANSOL**

PRESENT: Justice Ananda Kumar Mukherjee (Retd.),
Presiding Officer,
C.G.I.T-cum-L.C., Asansol

EPFA No. 05 of 2016
[ATA 855(15) of 2016]

M/s. Gagan Ferrotech Limited, Ikrah, Burdwan Appellant.
Vs.
Assistant Provident Fund Commissioner, Durgapur Respondent.

O R D E R

Dated: 06.02.2024

Mr. Soumitra Sengupta, Adv. for the Appellant.
Mrs. Mousumi Ganguli, Adv. for the Respondent.

1. This appeal under Section 7-I of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as EPF Act) has been preferred against the impugned order dated 31.05.2016 passed by the respondent authority in a proceeding under Section 7-A of the EPF Act against the appellant for levying additional amount of Rs. 7,70,769/- (Rupees seven lakh seventy thousand seven hundred and sixty-nine only) as Provident Fund dues, allegedly evaded by the appellant for the period from 02/2008 to 03/2013 and further liable to pay interest under Section 7-Q of the EPF Act for the period from the date of passing of the order till the date of remittance of the said amount.

2. Details apart, the fact of the case leading to this appeal is that M/s. Gagan Ferrotech Limited is covered under the EPF Act and has been allotted with a Provident Fund Code No. WB/42974. The establishment remitted their Provident Fund dues in respect of its employees for the period from 02/2008 to 03/2013 but the Provident Fund authority issued Summons No. ENF/SRO/DGP/WB/42974/562/6121 dated 25.07.2013 and initiated a proceeding under Section 7-A of the EPF Act for non-payment of additional Provident Fund dues on account of Special Allowance paid with wages for the period from 02/2008 to 03/2013. Proceeding commenced from 22.08.2013. The case was adjourned to 22.10.2013, 26.11.2013, 20.01.2014, 11.02.2014, 25.03.2014, 22.04.2014, 08.07.2014, 12.08.2014, 02.09.2014, 14.10.2014, 25.11.2014, 18.12.2014, 20.01.2015, 19.02.2015, 05.03.2015, 14.05.2015, 04.06.2015, 16.07.2015, 20.08.2015, 01.09.2015, 10.09.2015, 24.09.2015, 08.10.2015, 29.10.2015, 19.11.2015, and finally the Assistant Provident Fund Commissioner, Durgapur passed the impugned order on 31.05.2016.

3. During the pendency of the proceeding under Section 7-A of the EPF Act the representative of appellant establishment submitted dues and payment statement for the year 2008-09 to 2010-11 and 2012-13, F/6A®, Challan for 2008-09 to 2011-12, Photocopy of Attendance cum Salary Wages Register for the notice period, but the management failed to submit Dues and Payment statement for the period from 02/2008 to 03/2008 and 2011-12. After several accommodation given to the establishment to produce the documents relating to payments and their Income Tax statement, Balance Sheet, Ledger, Cash Book, and Salary & Wages Register, on 02.09.2014, a Commission was constituted headed by Mr. S. N. Sahay, Enforcement Officer along with Mr. S. Halder, Enforcement Officer for verification of all relevant records of the case period and submit a report. The Enforcement Officers took several accommodations and finally submitted their report on 04.06.2015. Copy of the same was served upon

the representative of the establishment and a representation was submitted against the report of the Enforcement Officer.

4. The Provident Fund authority after considering the report and additional report of the two Enforcement Officers as well as the submission of Mr. Soumitra Sengupta, authorized representative and Mr. Ananta Singh, Accountant appearing on behalf of the establishment was of the view that the Special Allowance which were paid to the employees of the establishment and shown by the establishment in the Salary / Wages statement was actually a part of the Basic Pay. For the purpose of safe guard of the social security and benefit of the bona fide employees the said Special Allowance was considered to calculate the additional Provident Fund dues under Section 7-A of the EPF Act. The respondent authority came to a conclusion that the establishment evaded additional dues to the extent of Rs. 7,70,769/- for the period from 02/2008 to 03/2013 and further made the establishment liable to pay the interest under Section 7-Q on the said sum from the date of passing of order till the date of payment.

5. The appeal has been filed within the extended period of limitation and the same was admitted conditionally on pre-deposit of 30% of the assessed amount within a period of one month. Subject to fulfilment of such condition the impugned order was stayed by my predecessor at Employees' Provident Fund Appellate Tribunal, New Delhi. The appeal was transferred to the Central Government Industrial Tribunal -cum- Labour Court, Asansol on 19.09.2018.

6. In the Memorandum of Appeal, it has been stated that M/s. Gagan Ferrotech Limited, a registered company has its office at 4/19, Suhatta Complex, City Centre, Durgapur – 16. The establishment is covered under the EPF Act. The establishment has remitted the Provident Fund contribution of the eligible

employees regularly as per provision of Sections 2(b) and 6 of the EPF Act read with paragraphs 2(f) and 29 of Employees' Provident Funds Scheme, 1952 (hereinafter referred to as EPFS). It is urged that the appellant establishment is not liable to pay Provident Fund contribution beyond the statutory limit as well as for the excluded employees as defined under paragraph 2(f) of EPFS. Controverting the case of the respondent, it has been asserted that the wage structure has to be devised only by the employer and the Regional Provident Fund Commissioner or the Assistant Provident Fund Commissioner cannot intervein with the right of the employer. The appellant establishment is required to remit the Provident Fund contribution on the basis of Basic Wages as defined under Section 2(b) of the EPF Act read with Section 6 of the EPF Act. Furthermore, without any complaint of any employee or without having any valid reason, the respondent ought not have issued Summons for proceeding under Section 7-A of the EPF Act on alleged evading of Provident Fund dues for the period from 02/2008 to 03/2013. The respondent did not serve any such copy of complaint upon the representative of the establishment. Furthermore, during enquiry under Section 7-A of the EPF Act the Enforcement Officers were unable to substantiate the reason for starting a proceeding under Section 7-A of the EPF Act against the establishment. The Enforcement Officers after examination of the documents stated that the establishment has been remitting Provident Fund contribution as per Section 6 of the EPF Act and complied paragraph 38 of EPFS regularly and no default of remittance of Provident Fund contribution was detected by the Enforcement Officers but it concluded that the establishment violated the administrative guidelines in Circular No. C-III/110001/4/3(72)14/Circular/Hqrs./6693 dated 06.03.2014 which provided that the Basic Wage defined in Section 2(b) of the EPF Act includes all emoluments which are earned by an employee while on duty but excludes cash value of food concession, Dearness Allowance, House Rent Allowance, Overtime Allowance, Bonus, Commission or any other similar allowance payable to the

employee and any present given by the employer. It was further indicated that many employers split the total wages payable to their employees into several allowances in such a way that the said allowance are covered under the category of exclusion provided under Section 2(b) of the EPF Act and thereby encouraging the subterfuge of splitting of wages to exclude the Provident Fund liability. Instances were noticed where total wages of employees were split up by the employer to the extent that the Provident Fund liability is reduced up to 50% of the total wages. A Circular directed all the Officers in charge of the Field Offices to inspect establishment where the Provident Fund contribution were deducted on 50% or less of the total wages and to complete the exercise by 31.08.2014 and report in the pro forma to the Head Office by 07.09.2014. It is the case of the appellant that the Enforcement Officer's report in Annexure A3 and the representation of the establishment against the report has been produced as Annexure A4 as part of the Memorandum of Appeal. According to the appellant the respondent has passed the impugned order without application of mind and considering the facts on merit as well as the written representation submitted by the appellant dated 16.07.2016. The impugned order has been challenged on the ground that no default in payment of Provident Fund has occurred during the period under consideration and that Provident Fund deduction have been made on basic wages and not other allowances which have been specifically excluded. It is urged that no opportunity of cross-examination of the Enforcement Officer was provided and that the Administrative Circular has no application to the present case. The appellant accordingly prayed for setting aside the impugned order and passing any other order as may be deemed fit and proper.

7. Respondent contested the appeal by filing a reply. According to the Provident Fund authority the impugned order under Section 7-A is a reasoned order and needs no interference. It is their case that the definition of "Basic wages" include all emoluments which are earned by an employee while on duty

or on leave or on holidays with wages are payable to the employee in cash and the contribution under Section 6 of the EPF Act which the employer shall make to the fund should be 10% of the Basic Wages, (Dearness Allowance and Retaining Allowance (if any)), payable to each of the employees directly or through a contractor. It is their case that as per paragraph 29 of EPFS, the contribution payable by the employer under the scheme shall be 10% of the Basic Wages, Dearness Allowance and Retaining Allowances (if any) payable to each employee to whom the Scheme applies. The respondent in support of their contention relied upon a decision of the Hon'ble Supreme Court of India in the case of **Bridge & Roof Co. (India) Ltd vs Union of India [AIR 1963 SC 1474]**, where the Hon'ble Supreme Court of India held that whatever is payable in all concern and is earned by all permanent employees is included for the purpose of contribution. Dearness allowance is payable in all concern either as an addition to Basic Wages or as a part of consolidated wages where a concern does not have separate Dearness Allowance and Basic Wage. Furthermore, the respondent relied upon another decision of the Hon'ble Supreme Court of India in the case of **Manipal Academy of Higher Education vs Provident Fund Commissioner [2008 (5) SCC 428]**, where relying upon the decision in the Bridge & Roof case, the Hon'ble Court and laid down 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 especially paid to those who avail of the opportunity is not basic wages. (c) Conversely, any payment by way of a special incentive or work is not basic wages. According to the respondent once payment is held to be emolument the same becomes part of the Basic Wages of the employee by the virtue of definition of term "Basic Wages" under Section 2(b) of the EPF Act. Learned advocate for the respondent drew support from decision of the Hon'ble Supreme Court of India in the case of **Regional Provident Fund Commissioner (II) West Bengal vs Vivekananda Vidyamandir and Others [C.A. No. 6221 of 2011] along with four other cases.**

8. According to the respondent the assessment of additional Provident Fund dues have been made treating the Special Allowance as a part of the emoluments, which is an integral part of the basic wages. The Provident Fund authority cannot discount the appellant from payment of such Provident Fund dues. There is no merit in the appeal and the same is liable to be dismissed.

9. Learned advocate for the appellant advancing his argument submitted that Provident Fund contribution under Section 6 of the EPF Act has already been made for the period from 02/2008 to 03/2013 and no objection was raised by the authority at the relevant time. It is argued that the appellant is not liable to pay any additional amount which has been assessed as Provident Fund dues in the proceeding under Section 7-A of the EPF Act for the period from 02/2008 to 03/2013 by treating the Special Allowance, which is Production Bonus as a part of the Basic Wages. It is their primary contention that the Enforcement Officer did not submit any final report after verification of records and in the report submitted on 04.06.2015 observed that the EPF and pension benefits were not given in the true sense of Section 2(b) of the EPF Act and relying upon the administrative guidelines in Circular No. C-III/110001/4/3(72)14/Circular/Hqrs./6693 dated 06.08.2014, respondent wrongly treated Special Allowance as Wages contrary to the provisions of Section 2(b) and Section 6 of the EPF Act. It is argued that despite representation made before the Enforcement Officer that Production Bonus has been described as Special Allowance the same was not considered. It is argued that Special Allowance being variable amount related to production, the Provident Fund authority committed an error by treating the Special Allowance as evaded salary which was not paid to all employees. The other thrust area of argument advanced by learned advocate for the appellant is that in the Section 7-A proceeding the respondent has passed the impugned order based upon the report of Enforcement Officers without examining the Enforcement Officers on oath nor

any evidence was received on affidavit and no opportunity was granted to the appellant establishment under Section 7-A(2) of the EPF Act to cross-examine the Enforcement Officers who concluded that Special Allowance is a part of evaded salary. It is contended that the impugned order is bad in law and is liable to be set aside and 30% of the assessed amount which has been pre-deposited by the establishment may be returned.

10. Learned advocate for the respondent argued that the appeal has no merit and the same requires to be dismissed. It is the case of the respondent that the appellant had camouflaged its pay structure by paying a portion of the salary as Special Allowance in order to avoid making Provident Fund contribution in respect of such excluded sum. Referring to a Circular bearing No. C-III/110001/4/3(72)14/Circular/Hqrs./6693 dated 06.08.2014 it is submitted that the Additional Central Provident Fund Commissioner -I (Compliance) pointed out that "*....many employers split the total wages payable to their employees into several allowances in such a way that the said allowance are covered under the category of exclusions provided under Section 2(b) of the Act as explained above thereby encouraging the subterfuge of splitting of wages to exclude the PF liability. Instances.*" It is argued that total wages of employees are split up by the employer to the extent that the Provident Fund liability is reduced up to 50% of total wages. Taking recourse to the directive in the Circular, it is pointed out that those establishments where the employers have deducted Provident Fund contribution on 50% (or less) of total wages paid to their employees have to be inspected. Bearing such administrative decision in mind the appellant establishment was asked to submit their documents for verification. It was discovered by the Enforcement Officers that the appellant establishment had been paying certain sum of money as "Special Allowance" to its employees and no evidence was produced by them to establish that such Special Allowance was in anyway related to the Production Bonus. In support of

his argument learned advocate relied upon a decision in the case of **Regional Provident Fund Commissioner (II) West Bengal vs Vivekananda Vidyamandir and Others** [C.A. No. 6221 of 2011] with **Surya Roshni Limited vs Employees' Provident Fund & Others** [C.A. No. 3965-3966 of 2013], **Montage Enterprises Private Limited vs Employees' Provident Fund and Another** [C.A. No. 3967-3968 of 2013], **U-Flex Limited vs Employees' Provident Fund and Another** [C.A. No. 3969-3970 of 2013], and **Saint-Gobain Glass India Limited vs The Regional Provident Fund Commissioner** [Transfer Case (C) No. 19 of 2019], wherein the Hon'ble Supreme Court of India in paragraph 14 held that :

“ Applying the aforesaid tests to the facts of the present appeals, no material has been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. There is no data available on record to show what were the norms of work prescribed for those workmen during the relevant period. It is therefore not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen. The wage structure and the 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 the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees.....”

11. Learned advocate argued that in the instant case the appellant establishment did not place any material to show that the special allowance was linked with any production to term it as Production Bonus or the amount is variable in nature. Therefore, the Special Allowance is essentially a party of the Basic Wages which has been camouflaged as Special Allowance for the purpose of avoiding payment of Provident Fund to the employees. Respondent urged that the appeal is fit to be dismissed.

12. The point for consideration at this stage is that whether the impugned order is consistent with the tenets of law or the same suffers from any illegality or impropriety, calling for interference. I have perused the Memorandum of Appeal, reply filed by the respondent, impugned order and report of Enforcement Officers dated 04.06.2015. Also considered the arguments advanced by the learned advocates of appellant and respondent and the principle of law laid down in the decisions referred by the parties. The impugned order dated 31.06.2016 passed in a proceeding under Section 7-A against the appellant establishment was for the period from 02/2008 to 03/2013. The appellant establishment was covered under the EPF Act, bearing Code No. WB/42974. In course of proceeding the establishment submitted Balance Sheet for the year 2002-03 to 2003-04. A commission was constituted comprising Mr. S. N. Sahay and Mr. S. Halder, Enforcement Officers to verify the documents and submit their report. The proceeding started on 22.08.2013 and the impugned order was passed on 31.05.2016, after giving several opportunities to the parties. The commission submitted their report on 04.06.2015 in respect of sixty-nine (69) employees who are said to have been affected and deprived from getting their legitimate benefit under the EPF Act. It has been observed that the Enforcement Officers have gone through Wage Register / Salary Register and found that EPF and pension benefits were not given in terms of Section 2(b) of the EPF Act and the guidelines in Circular No. C-III/110001/4/3(72)14/Circular/Hqrs./6693 dated 06.08.2014 which provided that EPF contribution should not be less than at

least half of total salary paid. It is submitted that the establishment evaded contribution of Provident Fund to the extent of Rs. 7,70,769/- for the said period. The report indicates that it has considered the salary disbursed for the month of March, 2011 and came to a conclusion without taking into account any other salary statements. The assessed amount of Provident Fund in the impugned order is based on the report submitted. It is not ascertainable from this report if Special Allowance has been paid to the said 69 employees of the appellant establishment on previous months at the same rate across the board to all the employees or the said amount is variable depending upon the production of the unit. It is also evident that the respondent did not comply the provisions of Section 7-A(2) of the EPF Act and no evidence has been adduced by way of affidavit or on examination on oath and no opportunity of cross-examination was given to the appellant establishment to dislodge the findings of the Enforcement Officers, according to whom the Special Allowance constituted Basic Wages under Section 2(b) of the EPF Act.

13. 'Basic Wages' has been defined in Section 2(b) of the EPF Act as:

“ “basic wages” means all emoluments which are earned by an employee while on duty or [on leave or on holidays with wages in either case] in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include-

- (i) the cash value of any food concession;*
- (ii) 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), house-rent allowance, 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;*
- (iii) any presents made by the employer.”*

14. Section 6 of the EPF Act provides the components of Provident Fund contributions as follows :

“ The contribution which shall be paid by the employer to the Fund shall be ten per cent 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 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 ten per cent. 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 this section:

Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words “ten per cent.”, at both the places where they occur, the words “twelve per cent.” shall be substituted:

Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupees, the Scheme may provide for the rounding off of such fraction to the nearest rupee, half of a rupee or quarter of a rupee.

Explanation 1.- For the purposes of this section, dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

Explanation 2.- For the purposes of this section, “retaining allowance” means an allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services.”

15. In the impugned order I find no reference if any deduction of Provident Fund was made by the employer from the Special Allowance paid to employees.

Accordingly, contribution to the extent of 10% of such sum have not made by the employees during the said period. The Enforcement Officers have failed to report whether the said amounts were fluctuating and variable in nature or they were paid to all employees on regular basis, so as to bring them under the fold of Basic Wages or Retaining Allowance. The respondent could not have reached such conclusion on the basis of pay statement for only one month that is March 2011 and there is nothing to indicate that the amount which has been paid as Special Allowance were regular and consistent features in their pay. The Provident Fund dues for the said period (02/2008 to 03/2013) has been paid earlier but respondent did not point out any irregularity at that time. On a comparison of the amounts of Special Allowance with the Basic Wages of 69 employees, it appears to me that the said amounts vary from person to person and had not been paid at the same rate. This simple test leads me to conclude that such Special Allowance are variable and they cannot be treated as Basic Wages, camouflaged as part of any allowance. Applying the guiding principles laid down by the Hon'ble Supreme Court of India in the case of **Regional Provident Fund Commissioner (II) West Bengal vs Vivekananda Vidyamandir and Others [C.A. No. 6221 of 2011] along with Four Others (Supra.)**, I am of the considered view that the Special Allowance in question is not a part of the Basic Wages of the employees of the appellant establishment. The amount though appearing for only one month's salary i.e. March, 2011, is a variable amount and has not been paid across the board. The very element of variability excludes such part of the emolument of workmen from the connotation of Basic Wages.

16. In of the light of my above discussion, I hold that the impugned order suffers from illegality. It is not tenable under the law and the same is liable to be

set aside. The appeal is therefore allowed on contest against the respondent. The impugned order dated 31.05.2016 passed in a proceeding under Section 7-A of the EPF Act is set aside. The pre-deposit amount of 30% of the assessed sum, if made by the appellant, be returned to him within one month from the date of communication of this order.

Hence,

O R D E R E D

that the appeal under Section 7-I of the EPF Act is allowed on contest against respondent. Impugned order dated 31.05.2016 passed against the appellant in a proceeding under Section 7-A of the EPF Act for remitting additional amount of Rs. 7,70,769/- is set aside. The pre-deposit amount of 30% of the assessed sum, if made by the appellant be returned to him within one month from the date of communication of the order. Let copies of the Order be communicated to the parties under Rule 20 of the Tribunal (Procedure) Rules, 1997.

Sd/-

(ANANDA KUMAR MUKHERJEE)

Presiding Officer,
C.G.I.T.-cum-L.C., Asansol.