CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL/EMPLOYEES PROVIDENT FUND APPELLATE TRIBUNAL, JABALPUR

EPF Appeal No.- 32/2021
Present – P.K. Srivastava
H.J.S. (Retd.)

Force Motors Limited
Plot No.3, Sector-1,
Industrial Area,
Pithampur – 454 775,
District Dhar,
Madhya Pradesh.

Appellant

Vs.

The Regional Provident Fund Commissioner – I
Employees' Provident Fund Organization,
Ministry of Labour & Employment,
Government of India,
Regional Office, Indore,
7, Race Course Road,
Indore – 452 003,
Madhya Pradesh.

Respondent

Shri S.A. Gundecha	**:**	**Learned Counsel for Appellant.**
Shri J.K. Pillai	**:**	**Learned Counsel for Respondent.**

JUDGMENT

This appeal is directed against order dated 20.10.2021 passed by the Respondent Authority by which holding the Appellant Establishment liable for payment of EPF dues of its employees under Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (in short the 'Act'), for the period April, 2018 to March, 2019 on Conveyance Allowance, City Compensatory Allowance Education Allowances, Washing Allowances, Medical Allowances And House Rent Allowance above 40% of basic pay and DA and has directed the Appellant Establishment to pay Rs. 25,29,729/, as assessed

The facts connected, in brief, are mainly that according to the Appellant Establishment, they are a Company within the meaning of Section 2(20) of Companies Act, 2013 having its registered office at Mumbai, Pune Road, in Maharashtra. They have established a factory in District Dhar, Madhya Pradesh. They are registered as Employer under the Act from 1967 having their own Provident Fund Trust namely 'Bajaj Tempo Limited Provident Fund', which is a recognized Provident Fund within the meaning of Section 2(38) of Income Tax Act, 1961. For the Pithampura Unit, the appellant has been granted separate EPF Code 'MP-7480' by Employees Provident Fund Organization, and have been depositing the EPF dues according to the Employees Provident Fund Scheme, 1952 (in short the "Scheme"). There was an inspection carried on by a audit team from the Respondent Authority, in which many issues were raised and settled between the parties. In the Inspection/Audit report submitted by the Audit Team, on 01/07/2020, point with respect to coverage of Trainees/Apprentices as under the Act and House Rent Allowances to be included in Basic Wages under Section 2(B) read with Section 6 of the Act along-with Para-29 of the Scheme and contribution with respect to EPF dues of Apprentices/Trainees were raised and the Appellant Establishment was issued a Demand Notice of contribution with respect to EPF dues of Apprentices/Trainees and on amount received by Employees as HRs was raised by Respondent Authority by way of notice which was replied by the Appellant Establishment on 18/08/2020 and 24/09/2020. The Enforcement Officer submitted his written response on behalf of the organization/employees. This response was replied by the Appellant Establishment by way of written submissions. The Respondent Authority recorded a finding that the Appellant Establishment had employed 828 trainees on 31.03.2019 against total workforce of 2281 which is 36% of Workforce hence, in-fact, these so called Trainees should be treated as Employees so, the Appellant Establishment was liable to pay EPF dues of these Trainees and Apprentices as well that the Conveyance Allowance, City Compensatory Allowance Education Allowances, Washing Allowances, Medical Allowances And House Rent Allowance above 40% of basic pay and DA House Rent allowances as well because these allowances were part of Wages under the Act. Hence, the Appellant Establishment was liable to pay EPF dues on Conveyance Allowance, City Compensatory Allowance Education Allowances, Washing Allowances, Medical Allowances And House Rent Allowance above 40% of basic pay and DA and assessed the amount for the period April 2018 to March 2019 at Rs.

25,29,729/-. The Respondent Authority directed the Appellant Establishment to deposit this amount. Hence, this appeal.

Grounds of Appeals, taken in the memo of Appeal, are mainly that the impugned order has been passed by the Respondent Authority without following established procedure and in violation of principles of Natural Justice, the findings recorded are incorrect in law and facts, hence arbitrary. The Respondent Authority has wrongly held and has wrongly recorded a finding that Appellant Establishment is under obligation to pay EPF dues on HRA as well other allowances by way of treating as basic wages which is illegal, arbitrary and unjust.

In its counter to the appeal, the Respondent Authority has taken a case that the Act is the legislation for providing Social Security to the Employees as well Pensionary Benefits and Insurances to them, which is paid by the Respondent Organization from the contributions in EPF and interest earned thereon. There was information that the Appellant Establishment was committing default in deposits of EPF dues of to its Employees and had adopted tactics to avoid the liability. A Compliance Audit of the Appellant Establishment for the year 2018-19 was carried out by a Squad Officers. The Squad submitted its Compliance Audit Report dated 01.07.2020 alleging non deposit of EPF dues with respect to the Trainees engaged. Also, it was reported that the Appellant Establishment was paying HRA in excess of 100% of the basic wages to many of its employees and had categorized employees' Salaries under various heads to reduce its liability, which was considered a subterfuge to avoid payment of EPF dues. hence, show cause notice dated 14.08.2020 was issued to Appellant Establishment with copy of the Compliance Audit Report (CAR). The Appellant Establishment submitted its reply dated 18.08.2020 which was not satisfactory proceedings under Section 7A of the Act were initiated. The Enquiry was kept restricted only to determination of dues on various allowances and Employees being named as Trainees/Apprentices just to avoid liability. The Respondent Authority has defended the findings and assessment in their counter on the ground that the Authority has acted in law in lifting the veil to find that the Appellant Establishment was paying allowances mentioned in the Impugned Order, uniformly to all of its Employees which were in excess and disproportionate to the Basic Salary and holding that these allowances were in fact the part of the Basic Salary.

I have heard argument of Learned Counsel for Appellant Establishment Mr. S.A. Gundecha and Mr. J.K. Pillai who appeared for the Respondent Authority. The Appellant Establishment has also filed Written Arguments which are part of record. I have gone through the Written Arguments as well the record.

It comes out from the perusal of Impugned Order that the Respondent Authority has made two points for determination they are:

1. ***Whether the Trainees engaged by the Establishment are Employees as per Section 299(f) of the Act and Hence, the Establishment is liable to remit EPF dues in respect of the Trainees and***

2. Whether there is subterfuge of wages and whether the Establishment is liable to remit EPF dues on certain allowances being paid as part of basic Wages by the department also on HRA in cases of 40% of Basic Wages.

It also comes out on perusal of Impugned Order that, the objection of Establishment with regard to Trainees/Apprentices was that, earlier also this issue was decided by the Respondent Authority and the matter is still pending before the Hon'ble Supreme Court. According to the Respondent Authority, it was the matter of record that issue of payment of EPF dues with respect to Trainees/Apprentices was decided by them vide order dated 16.02.2015 which was set-aside by this Tribunal in appeal vide its judgment and order dated 26.07.2016. The Writ Petition No. 6207/2016 filed by the Authority was also dismissed by the Hon'ble High Court of M.P. Indore Bench and the matter is pending before the Hon'ble Supreme Court in SLP No. SLA(C) 412/2018 filed by the Respondent Authority. Hence, the Respondent Authority observed that demand of the Organization with respect to EPF dues of Trainees assessed at Rs. 2,73,82,759/- for the period from April 2018 to March 2019 will be subject to outcome of the special leave petition pending before Hon'ble Supreme Court.

In the light of aforesaid facts and observations the only point of determination which arises for consideration is following:

1. ***Whether, the finding of the Respondent Authority that Conveyance Allowance, City Compensatory Allowance Education Allowances, Washing Allowances, Medical Allowances And House Rent Allowance are in fact part of basic wages and the Appellant Establishment is thus***

liable to deposit EPF dues on these allowances as well the assessment has been recorded correctly in law and fact.

According to the impugned order, the Respondent Authority has recorded the finding that, the Appellant Establishment has paid HRA and other allowances like CCA, Education Allowances, Washing Allowances, Medical Allowances, by way of subterfuge just to avoid its liability to pay EPF dues, hence these are particular part of basic wages has defined in the Act and held the Appellant Establishment liable to deposit EPF dues and these allowances include HRA in cases of 40% of Basic Salary.

The Respondent Authority has referred to some provisions in this respect which are being reproduced as follows:

1. Section 2(b) Basic Wages-"*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;

***Section 6: Contributions and matters which may be provided for in Schemes**. – The contribution which shall be paid by the employer to the Fund shall be **ten percent. 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 percent 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 11and 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 percent", at both the places where they occur, the words "12 percent" 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 of such fraction to the nearest rupee, half of a rupee, or quarter of a rupee.*

Explanation I *– 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 II. *– For the purposes of this section, "retaining allowance" means 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."*

The basis of the finding is that **firstly** on the basis of Law declared by Hon'ble the Supreme Court in the case of ***Bridge and Roof Companies V.s. Union of India AIR 1962, SC 1474*** and the ***Regional Provident Fund Commissioner V.s. Vivekanand Vidya Mandir(2020)17SCC64***, in which it has been held that If the amount is universally, necessarily and ordinarily paid to all across his Board, such emoluments are basic wages and the Authority is within its powers to lift the veil in case its findings that the Employee has adopted payment name of allowances as a subterfuge to avoid its liability. **Secondly**, that with regards to HRA its 100% or more than 100% of Basic pay in some cases hence, adopting the analogy of **Section 10 (13A) of Income Tax**, were HRA which is more than 60% is not exempted under the Tax Act 1961 as well **the Code of Social Security 2020** which also provides that if all the allowances put together is in excess of 50% shall be treated as wages for the benefit of the Court and held that HRA to the cases of 40% of Basic Pay could

be included in Basic Wages under the Act. Furthermore, like other allowances as mentioned above, the Respondent Authority has recorded the finding that, since these allowances are paid to all the employees across the Board hence, they should be part of the basic wages.

Learned Counsel for Appellant Establishment has attacked these findings with submissions that Section 2(b) of the Act specifically excludes allowances mentioned in different hence, finding of the Respondent Authority with respect to allowances has Basic Wages is against the statute and any submissions of the Learned Counsel is that the cases referred to by the Respondent Authority as a support to his finding did not apply in the case in any **Firstly**, because the Act does not provides and **Secondly,** these cases can be distinguished on facts. Recording the applicability of case of Vivekanand Vidya Mandir (supra) it has been submitted that rational of this case can be universally applied as pointing precedent because it is *sub-silentio*. The **third argument** of the Learned Counsel for Appellant is that seeking analogy from different institutes that is Income Tax Act, and Code of Social Security, 2020 which is not in force is also incorrect in law.

On the other hand Learned Counsel for Respondent Authority has submitted that the cases referred to above willfully apply as a pointing precedent and also that drawing analogy from other statutes is also not paid in law because it is no were provident.

The relevant part of the aforesaid judgment in Bridge and Roof case (supra) is being reproduced a follows:

The main question therefore that falls for decision is as to which of these two rival contentions is in consonance with s. 2(b). There is no doubt that "basic wages" as defined therein means all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash. If there were no exceptions to this definition, there would have been no difficulty in holding that production bonus whatever be its nature would be included within these terms. The difficulty, however, arises because the definition also provides that certain things will not be included in the term "basic wages", and these are contained in three clauses. The first clause mentions the cash value of any food concession while the third clause mentions that presents made by the employer. The fact that the exceptions contain even presents made by the employer shows that though the definition mentions all emoluments which are earned in accordance with the terms of the contract of employment, care was taken to exclude presents which would ordinarily not be earned in accordance with the terms of the contract of employment.

Similarly, though the definition includes "all emoluments" which are paid or payable in cash, the exception excludes the cash value of any food concession, which in any case was not payable in cash. The exceptions therefore do not seem to follow any logical pattern which would be in consonance with the main definition.

9. Then we come to clause (ii). It excludes dearness allowance, 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. This exception suggests that even though the main part of the definition includes all emoluments which are earned in accordance with the terms of the contract of employment, certain payments which are in fact the price of labour and earned in accordance with the terms of the contract of employment are excluded from the main part of the definition of "basic wages". It is undeniable that the exceptions contained in clause (ii) refer to payments which are earned by an employee in accordance with the terms of his contract of employment. It was admitted by counsel on both sides before us that it was difficult to find any one basis for the exceptions contained in the three clauses. It is clear however from clause (ii) that from the definition of the word "basic wages" certain earnings were excluded, though they must be earned by employees in accordance with the terms of the contract of employment. Having excluded "dearness allowance" from the definition of "basic wages", s. 6 then provides for inclusion of dearness allowance for purposes of contribution. But that is clearly the result of the specific provision in s. 6 which lays down that contribution shall be 6-1/4 per centum of the basic wages, dearness allowance and retaining allowance (if any). We must therefore try to discover some basis for the exclusion in clause (ii) as also the inclusion of dearness allowance and retaining allowance (for any) in s. 6. It seems that the basis of inclusion in s. 6 and exclusion in clause (ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose, of contribution under s. 6, but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution. Dearness allowance (for examples is payable in all concerns 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 wages. Similarly, retaining allowance is payable to all permanent employees in all seasonal factories like sugar factories and is therefore included in s. 6; but house-rent allowance is not paid in many concerns and sometimes in the same concern it is paid to some employees but not to others, for the theory is that house-rent is included in the payment of basic wages plus dearness allowance or consolidated wages. Therefore, house-rent allowance which may not be payable to all employees of a concern and which is certainly not paid by all concern is taken out of the definition of "basic wages", even though the basis of payment of house-rent allowance where it is paid is the contract of employment. Similarly, overtime allowance though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment; but because it may not be earned by all employees of a concern it is excluded

from "basic wages". Similarly, commission or any other similar allowance is excluded from the definition of "basic wages" for commission and other allowances are not necessarily to be found in all concerns; nor are they necessarily earned by all employees of the same concern, though where they exist they are earned in accordance with the terms of the contract of employment. It seems therefore that the basis for the exclusion in clause (ii) of the exceptions in s. 2(b) is that all that is not earned in all concerns or by all employees of concern is excluded from basic wages. To this the exclusion of dearness allowance in clause (ii) is an exception. But that exception has been corrected by including dearness allowance in s. 6 for the purpose of contribution. Dearness allowance which is an exception in the definition of "basic wages", is included for the propose of contribution by s. 6 and the real exceptions therefore in clause (ii) are the other exceptions beside dearness allowance, which has been included through s. 6.

10. This brings us to the consideration of the question of bonus, which is, also an exception in clause (ii). Now the word "bonus" has been used in this clause without any qualification. Therefore, it would not be improper to infer that when the word "bonus" was used without any qualification in the clause, the legislature had in mind every kind of bonus that may be payable to an employee. It is not disputed on behalf of the respondents that bonuses other than profit bonus were in force and well-known before the Act came to be passed in 1952. For example, the Coal Mines Provident Fund and Bonus Schemes Act, No. 46 of 1948, provided for payment of bonus depending on attendance of employees during any period. Besides the attendance-bonus, four other kinds of bonus had been evolved under industrial law even before 1952 and were in force in various concerns in various industries. There was first production bonus, which was in force in some concerns long before 1952 (see Messrs. Titaghur Paper Mills Co. Limited v. Its Workmen) ([1959] Supp. 2 S.C.R. 1012.). Then there was festival or puja bonus which was in force as an implied term of employment long before 1952 (see Messrs. Ispahani Limited Calcutta v. Ispahani Employees' Union) . Then there was customary bonus in connection with some festival (see The Graham Trading Co. (India) Limited v. Its Workmen) . And lastly, there was profit bonus the principles underlying which and the determination of whose quantum were evolved by the Labour Appellate Tribunal in the Millowners' Association v. The Rashtriya Mill Mazdoor Sangh, Bombay ([1950] L.L.J. 1247.). The legislature therefore could not have been unaware that these different kinds of bonus were being paid by different concerns in different industries, when it passed the Act in 1952. Therefore, unless the contention on behalf of the respondents that bonus when it was used without qualification can only mean profit bonus is sound, it must be held that when the legislature used the term "bonus" without any qualification in clause (ii) of the exception in s. 2(b), it must be referring to every kind of bonus which was prevalent in the industrial field before 1952. The contention therefore of the respondents that when the term "bonus" was used in industrial law before 1952 without any qualifying term it meant only profit bonus and nothing else, requires careful consideration." We do not think however that this contention is well founded. It is true, as will appear from the terms of

reference in various cases of profit bonus that the word "profit" was not used as a qualifying word before the word "bonus" in such cases. It may also be that in many cases where a particular type of bonus was in dispute, say, attendance or "puja bonus", the qualifying word "attendance" or "puja" was use in references. But it appears that where a reference was in connection with profit bonus, the usual practice was to make the reference after qualifying the word "bonus" by the year for which the profit bonus was claimed. For example, we may refer to the case of Millowners' Association Bombay v. The Rashtriya Mill Mazdoor Sangh ((1950) L.L.J. 1247.). Therein para 16 at p. 1252, we find the term of reference in Reference No. 1 of 1948 (Millowners' Association Bombay v. The Employees in the Cotton Textile Mills Bombay) in these terms -

"Re : Bonus for the year 1947"

11. It seems therefore that when reference was with respect to profit bonus, the term "bonus" though not qualified by the word "profit" had always been limited by specifying the year for which the bonus was being claimed. Though, therefore, it may be true that the literally speaking, the word "profit" was not used to qualify the word "bonus" when references were made with respect to profit bonus, the matter was put beyond controversy that the use of the word "bonus" without any qualification was with reference to profit bonus by adding the year for which the bonus was being claimed. It would therefore be not right to say that in industrial adjudications before 1952, bonus without any qualifying word meant profit bonus and nothing else. Further though the word "profit" was not used to qualify the word "bonus", the intention was made quite clear when profit bonus was meant by using the words "for the year so and so" after the word "bonus". We are therefore not prepared to accept that where the word "bonus" is used without any qualification it only means profit bonus and nothing else. On the other hand, it seems to us that the use of the word "bonus" without any qualifying word before it or without any limitation as to year after it must refer to bonus of all kinds known to industrial law and industrial adjudication before 1952. The reason for the exclusion of all kinds of bonus is also in our opinion the same which led to the exclusion of house-rent allowance, overtime allowance, commission and any other similar allowance, namely, that payment of bonus may not occur in all industrial concerns or it may not be made to all employees of an industrial concern (as, for example, attendance bonus) and that is why bonus of all kinds was also excluded from the definition of the term "basic wages". The Act is an All-India Act applicable to all industries mentioned in Sch. I and to all concerns engaged in those industries; and the intention behind, the exclusion seems to be to make the incidence of provident fund the same in all industrial concerns, which are covered by the Act so that it was necessary to exclude from the wide definition of "basic wages" given in the opening part, all such payments which would not be common to all industries or to all employees in the same concern. We have already pointed out that to this principle, only dearness allowance in clause (ii) is an exception; but that exception has been corrected by the inclusion of dearness allowance in s. 6. We are therefore of opinion

that there is no reason why when the word "bonus" is used in clause (ii) without any qualifying word, it should not be interpreted to include all kinds of bonus which were known to industrial adjudication before 1952 and which must therefore be deemed to be within the knowledge of the legislature.

12. This brings us to the consideration of the contention raised on behalf of the respondents that wages are the price for labour and arise out of contract, and that whatever is the price for labour and arises out of contract, was intended to be included in the definition of "basic wages" in s. 2(b), and that only those things were excluded which were a reward for labour not arising out of the contract of employment but depending on various other considerations like profit or attendance. It may be, as we have pointed out earlier, that if there were no exceptions to the main part of the definition in s. 2(b), whatever was payable in cash as price for labour and arose out of contract would be included in the term "basic wages", and that reward for labour which did not arise out of contract might not be included in the definition. But the main part of the definition is subject to exceptions in clause (ii), and those exceptions clearly show that they include even the price for labour. It is therefore not possible to accept the contention on behalf of the respondents that whatever is price for labour and arises out of contract is included in the definition of "basic wages" and therefore production bonus which is a kind of incentive wage would be included.

13. This court had occasion to consider production bonus in Messrs. Titaghur Paper Mills Co. Ltd. v. Its Workmen ([1959] Supp. 2 S.C.R. 1012.). It was pointed out that "the payment of production bonus depends upon production and is in addition to wages. In effect, it is an incentive to higher production and is in the nature of an incentive wage". The straight piece-rate plan where payment is made according to each piece produced is the simplest of incentive wage plans. In a straight piece rate plan, payment is made according to each piece produced and there is no minimum and the worker is free to produce as much or as little as he likes, his payment depending upon the number of pieces produced. But in such a case payment for all that is produced would be basic wage as defined in s. 2(b) of the Act, even though the worker is working under an incentive wage plan. The difficulty arises where the straight piece rate system cannot work as when the finished product is the result of the co-operative effort of a large number of workers each doing a small part which contributes to the result. In such a case the system of production bonus by tonnage or by any other standard is introduced. The core of such a plan is that there is a base or a standard above which extra payment is earned for extra production in addition to the basic wages which is the payment for work upto the base or standard. Such a plan typically guarantees time wage upto the time represented by standard performance and gives workers a share in a savings represented by superior performance. The scheme in force in the Company is a typical scheme of production bonus of this kind with a base or standard upto which basic wages as time wages are paid and thereafter extra payments are made for superior performance. This extra payment may be called incentive wage and is also called production bonus. In all such cases however the workers are not

bound to produce anything beyond the base or standard that is set out. The performance may even fall below the base or standard but the minimum basic wages will have to be paid whether the base or standard is reached or not. When however the workers produce beyond the base or standard what they earn is not basic wages but production bonus or incentive wage. It is this production bonus which is outside the definition of "basic wages" in s. 2(b), for reasons which we have already given above. The production bonus in the present case is a typical production bonus scheme of this kind and whatever therefore is earned as production bonus is payable beyond a base or standard and it cannot form part of the definition of "basic wages" in s. 2(b) because of the exception of all kinds of bonus from that definition. We are therefore of opinion that production bonus of this type is excluded from the definition of "basic wages" in s. 2(b) and therefore the decision of the Central Government, which was presumably under s. 19A of the Act to remove the difficulty arising out of giving effect to the provisions of the Act, by which such a bonus has been included in the definition of "basic wages" is incorrect. In view of this decision, it is unnecessary to consider the effect of the Art. 14 in the present case.

14. We therefore allow the petition and hold that production bonus of the typical kind in force in the Company is excepted from the term "basic wages" and therefore the decision of the Central Government communicated to the Company on March 7, 1962, that provident fund contributions must also be made on the production bonus earned by the employees in this Company, must be set aside. As this petition was heard along with petition No. 64 of 1962 and the main arguments were in that petition

Likewise, the relevant part of the judgment in ***Vivekanand Vidya Mandir case (Supra***) is also being reproduced as follows:

"***Basic wage, under the Act, has been defined as all emoluments paid in cash to an employee in accordance with the terms of his contract of employment. But it carves out certain exceptions which would not fall within the definition of basic wage and which includes dearness allowance apart from other allowances mentioned therein. But this exclusion of dearness allowance finds inclusion in Section 6. The test adopted to determine if any payment was to be excluded from basic wage is that the payment under the scheme must have a direct access and linkage to the payment of such special allowance as not being common to all. The crucial test is one of universality. The employer, under the Act, has a statutory obligation to deduct the specified percentage of the contribution from the employee's salary and make matching contribution. The entire amount is then required to be deposited in the fund within 15 days from the date of such collection. The aforesaid provisions fell for detailed consideration by this Court in Bridge & Roof (supra)***

when it was observed as follows:

"7. The main question therefore that falls for decision is as to which of these two rival contentions is in consonance with s. 2(b). There is no doubt that "basic wages" as defined therein means all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash. If there were no exceptions to this definition, there would have been no difficulty in holding that production bonus whatever be its nature would be included within these terms. The difficulty, however, arises because the definition also provides that certain things will not be included in the term "basic wages", and these are contained in three clauses. The first clause mentions the cash value of any food concession while the third clause mentions that presents made by the employer. The fact that the exceptions contain even presents made by the employer shows that though the definition mentions all emoluments which are earned in accordance with the terms of the contract of employment, care was taken to exclude presents which would ordinarily not be earned in accordance with the terms of the contract of employment. Similarly, though the definition includes "all emoluments" which are paid or payable in cash, the exception excludes the cash value of any food concession, which in any case was not payable in cash. The exceptions therefore do not seem to follow any logical pattern which would be in consonance with the main definition.

8. Then we come to clause (ii). It excludes dearness allowance, 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. This exception suggests that even though the main part of the definition includes all emoluments which are earned in accordance with the terms of the contract of employment, certain payments which are in fact the price of labour and earned in

accordance with the terms of the contract of employment are excluded from the main part of the definition of "basic wages". It is undeniable that the exceptions contained in clause (ii) refer to payments which are earned by an employee in accordance with the terms of his contract of employment. It was admitted by counsel on both sides before us that it was difficult to find any one basis for the exceptions contained in the three clauses. It is clear however from clause (ii) that from the definition of the word "basic wages" certain earnings were excluded, though they must be earned by employees in accordance with the terms of the contract of employment. Having excluded "dearness allowance" from the definition of "basic wages", s. 6 then provides for inclusion of dearness allowance for purposes of contribution. But that is clearly the result of the specific provision in s. 6 which lays down that contribution shall be 6-1/4 per centum of the basic wages, dearness allowance and retaining allowance (if any). We must therefore try to discover some basis for the exclusion in clause (ii) as also the inclusion of dearness allowance and retaining allowance (for any) in s. 6. It seems that the basis of inclusion in s. 6 and exclusion in clause (ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose, of contribution under s. 6, but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution. Dearness allowance (for examples is payable in all concerns 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 wages. Similarly, retaining allowance is payable to all permanent employees in all seasonal factories like sugar factories and is therefore included in s. 6; but house-rent allowance is not paid in many concerns and sometimes in the same concern it is paid to some employees but not to others, for the theory is that house-rent is included in the payment of basic

wages plus dearness allowance or consolidated wages. Therefore, house-rent allowance which may not be payable to all employees of a concern and which is certainly not paid by all concern is taken out of the definition of "basic wages", even though the basis of payment of house-rent allowance where it is paid is the contract of employment. Similarly, overtime allowance though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment; but because it may not be earned by all employees of a concern it is excluded from "basic wages". Similarly, commission or any other similar allowance is excluded from the definition of "basic wages" for commission and other allowances are not necessarily to be found in all concerns; nor are they necessarily earned by all employees of the same concern, though where they exist they are earned in accordance with the terms of the contract of employment. It seems therefore that the basis for the exclusion in clause (ii) of the exceptions in s. 2(b) is that all that is not earned in all concerns or by all employees of concern is excluded from basic wages. To this the exclusion of dearness allowance in clause (ii) is an exception. But that exception has been corrected by including dearness allowance in s. 6 for the purpose of contribution. Dearness allowance which is an exception in the definition of "basic wages", is included for the propose of contribution by s. 6 and the real exceptions therefore in clause (ii) are the other exceptions beside dearness allowance, which has been included through S. 6."

10. Any variable earning which may vary from individual to individual according to their efficiency and diligence will stand excluded from the term "basic wages" was considered in Muir Mills Co. Ltd., Kanpur Vs. Its Workmen, AIR 1960 SC 985 observing:

"11. Thus understood "basic wage" never includes the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production. The quantum

of earning in such bonuses varies from individual to individual according to their efficiency and diligence; it will vary sometimes from season to season with the variations of working conditions in the factory or other place where the work is done; it will vary also with variations in the rate of supplies of raw material or in the assistance obtainable from machinery. This very element of variation, excludes this part of workmen's emoluments from the connotation of "basic wages"…"

11. In Manipal Academy of Higher Education vs. Provident Fund Commissioner, (2008) 5 SCC 428, relying upon Bridge Roof's case it was observed:

"10. The basic principles as laid down in Bridge Roof's case (supra) on a combined reading of Sections 2(b) and 6 are as follows:

(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 the opportunity is not basic wages. By way of example it was held that overtime allowance, though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment but because it may not be earned by all employees of a concern, it is excluded from basic wages.

(c) Conversely, any payment by way of a special incentive or work is not basic wages."

. The term basic wage has not been defined under the Act. Adverting to the dictionary meaning of the same in Kichha Sugar Company Limited through General Manager vs. Tarai Chini Mill Majdoor Union, Uttarakhand, (2014) 4 SCC 37, it was observed as follows:

According to http://www.merriamwebster.com (Merriam Webster Dicti onary) the

word 'basic wage' means as follows:

1. A wage or salary based on the cost of living and used as a standard for calculating rates of pay

2. A rate of pay for a standard work period

exclusive of such additional payments as bonuses and overtime.

10. When an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning. In our opinion, those wages which are universally, necessarily and ordinarily paid to all the employees across the Board are basic wage. Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot be included in the basic wage. As for example, the overtime allowance, though it is generally enforced across the Board but not earned by all employees equally. Overtime wages or for that matter, leave encashment may be available to each workman but it may vary from one workman to other. The extra bonus depends upon the extra hour of work done by the workman whereas leave encashment shall depend upon the number of days of leave available to workman. Both are variable. In view of what we have observed above, we are of the opinion that the amount received as leave encashment and overtime wages is not fit to be included for calculating 15% of the Hill Development Allowance."

13. That the Act was a piece of beneficial social welfare legislation and must be interpreted as such was considered in The Daily Partap vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh, (1998) 8 SCC 90.

14. 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. There is no occasion for us to interfere with the concurrent conclusions of facts. The appeals by the establishments therefore merit no interference. Conversely, for the same reason the appeal preferred by the Regional Provident Fund Commissioner deserves to be allowed.

Respondent Authority has recorded a finding that the allowances in question have been granted to all the employees across the Board hence, they are part of basic wages. It has been submitted on behalf of Appellant Establishment that **firstly**, the appointment contracts of some of the employees filed before the Authority, show that these allowances were part of the service contract between the employer and employee and **secondly,** they have not been uniformly granted rather different amounts have been granted to different employees as per their service contracts. According to Learned Counsel for Appellant Establishment, it is between the employer and employee to settle their work contract. Though it is a fact, appearing from perusal of the employment contracts that the allowances have been granted to all the employees but they are different with respect to different class of employees. For example, House Rent Allowance, Conveyance Allowance, Washing and Education Allowance, has been granted to some employees on monthly basis and to some employees on daily rates. As mentioned earlier, the amounts are not one and same. Hence, the finding of the Respondent Authority only on the basis that the allowances have been granted to all employees cannot be held in law to have been recorded correctly. What was required on the part of the Respondent Authority was to see whether House Rent Allowance was given to those also who were allotted houses by the Employers or Conveyance Allowance was given to those also who were using vehicles provided by Employer or Education Allowance was given to those also who did not have children or whose children were not getting education or Washing Allowance was given to those also who were not required to observe a particular dress

code while working in the company. If answers to these questions was yes, only then finding of the Respondent Authority that the allowances were given to all the employees across the Board could be correct in law.

The Respondent Authority has further recorded a finding that HRA to the excess of 40% of Basic salary could be included in basic wages and the Appellant Establishment shall be liable to deposit EPF dues on this amount is based on the basis of an analogy drawn by him on the basis of Income Tax Act and Code of Social Security 2020. I am constrained to observe that this islike comparing apples with oranges, it is quite nonsensical because provisions of Income Tax Act are not applicable to the PF Act and **secondly**, the Code of |Social Security 2020 is not enforce till date. Hence, this finding of the Respondent Authority is also held incorrect in law.

Learned Counsel for Appellant Establishment has submitted the decision of Hon'ble The Supreme Court in the case of **Vivekananda Vidya Mandir (supra)** cannot be held to be a binding precedent because it was a decision sub-silentio. He has referred to Para 17 of Book On Jurisprudence by Salmond at Page 46 and in the light of the principle of Law laid down in the **cases State of U.P. V.s. Synthetics and Chemicals Ltd. (1991) 4 SCC 139, Union of India V.s. Amrit Lal Manchanda (2004) 3 SCC 75, and State of Orissa V.s. Mohd. Ilias (2006) 1 SCC 275** but I am not inclined to accept this argument.

Also, it comes out from perusal of the aforesaid decisions relied from the side of the Respondent Authority that there was concurrent finding of the fact that the allowances under question in the cases referred were a camouflage to avoid liabilities subterfuge to wages which Hon'ble The Supreme Court did not find any occasion to disagree, which is not in the case in hand. Hence, though there is no quarrel with the principle of Law laid down in these cases as binding precedent, they do not help the Respondent Authority in the case in hand.

No other point was pressed.

On the basis of above discussion, the finding of the Respondent Authority that , Conveyance Allowance, City Compensatory Allowance Education Allowances, Washing Allowances, Medical Allowances And House Rent Allowance are in fact part of basic wages and the Appellant Establishment is thus liable to deposit EPF dues on these allowances as well the assessment are held to has been recorded incorrectly in law and fact.

Consequently, the appeal deserves to be allowed.

ORDER

Appeal is allowed. Setting aside the finding and the impugned order dated 20.10.2021 passed by the Respondent Authority is directed to refund any amount recovered by it in pursuance of the order with interest @ 10% per annum with 60 days from the date of the judgment failing which interest @ 18% per annum from the date of judgment till recovery.

Cost easy.

Date:- 08/01/2025 **P.K. Srivastava**
(Presiding Officer)

Judgment Signed, dated and pronounced.

Date:- 08/01/2025 **P.K. Srivastava**
(Presiding Officer)