# THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT/EPF APPELLATE TRIBUNAL, JABALPUR

**NO. CGIT/LC/EPFA-35/2018**

**PRESENT: P.K.SRIVASTAVA**
**H.J.S.(Retd.)**

**M/S Rajeev Gandhi Memorial Schoo1,**
**District Sheopur**

**APPELLANT**

**Versus**

**The Assistant Provident Fund Commissioner**
**Gwalior(M.P.)**

**RESPONDENT**

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**Shri Praveen Namdeo : Learned Counsel for Appellant.**

**Shri J.K.Pillai :Learned Counsel for Respondent.**

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**(J U D G M E N T)**

**(Passed on this 11th day of January-2022 )**

*1.* This appeal is directed against the order of the Respondent Authority dated 29-7-2015 whereby the Respondent Authority has held that certain allowances as mentioned in the impugned order were also the part of the basic wages and has directed the Appellant Establishment to deposit the employees provident fund dues of Rs..5,30,941 as arrears of employees provident fund dues between the period March-2006 to February-2011.

*2.* Facts connected, in brief, are mainly that the Appellant Establishment M/s Rajeev Gandhi Memorial School is an establishment covered under the provisions of Section 1(3)(b) of the Employees Provident Fund And Misc. Provisions Act,1952, herein

after referred to the word Act", since 1-7-2009 and has been paying the employees provident fund dues of its employees covered under the Act regularly. The Appellant Establishment also has submitted annual return in Form 6A and 3A for the period 2009-2010 and 2011-2012 but without verifying the records and returns, the Respondent Authority initiated the proceedings under Section7A of the Act for the period March-2006 to February-2011. A notice was issued by the Respondent Authority to the Appellant Establishment covering the period of **March-2011** also dues of which was to be deposited up to **15th of March** according to para 38.1 of Employees Providing Fund Scheme 1952. The Appellant Establishment responded to the notice and produced its records in form of salary sheet, ledger and cash book, balance sheet and statutory monthly returns. The Respondent Authority obtained a report from Enforcement Officer which was filed by the Enforcement Officer on 13-7-2015. Balance of employees provident fund dues of Rs.5,30,941/- was reported as recoverable from the Appellant Establishment in this report. The Respondent Authority relied on this report and without applying his mind and without examining the records passed the impugned order, holding the Appellant Establishment liable to pay balance of employees provident fund dues of Rs.5,30,941/- for the said period which is against law.

*3.* The grounds of appeal as stated in the Memo of Appeal are mainly that the impugned order is illegal, arbitrary, and unjust and against law, passed by the Respondent Authority solely relying on the report of the Enforcement Officer without applying his mind and examining the records and returns produced by the Appellant Establishment before the Authority. Hence bad in law. The notice was itself bad in law because it covered the month of **March-2011** also in employees provident fund dues which were to be deposited till **15th March-2011** as per Rule 38(1) of the Employees Provident Fund Scheme,1952, hence the whole proceedings are bad in law. The Enforcement Officer wrongly reported that the house rent

allowance, medical allowance, conveyance allowance paid to the employees by the Appellant Establishment were part of the basic wages which is against law, particularly against Section 2(b)(2) of the Act and the Central Government Notification No.GSR201 dated 8-2-1961. Also it has been stated that the impugned order is bad in law because persons drawing salary above Rs.6500/- are excluded employees within the meaning of Rule 2f (2) of the Employees Provident Fund Scheme 1952. The Respondent Authority committed illegality in holding such employees also eligible for employees provident fund deductions by the Appellant Establishment. Furthermore the impugned order is unreasoned and non-speaking order and accordingly bad in law. The Appellant Establishment has prayed that the appeal be allowed.

*4.* In its counter/reply to the appeal, the case of the respondent is that on examining the records produced by the appellant it was found that by bifurcating the basic salary/wages of employees into various allowances, lesser provident fund contribution has been made. It is a tact employed by the Appellant Establishment to avoid his liability to pay employees provident fund dues by awarding more amount in the name of allowances and lesser amount in the name of basic wages. On the examination of records, the Enforcement Officer submitted its report according to which provident fund contribution was made on the salary amount of Rs.2500/- or 3500/- out of which 1000/- or 1200/- have been taken as basic salary and remaining amount has been treated as allowance for evasion of provident fund liability. This report was supplied to the appellant establishment and did not file any representation against this report and accordingly the impugned order was passed holding that splitting up of the pay in the case in hand as has been made by the Appellant Establishment only as a subterfuge with an intent to avoid payment of employees provident fund dues. Also it has been stated that statement with regard to exempted employees was filed on separate form by Enforcement Officer which has not been

considered in passing the impugned order. Also the point of non-application of Minimum Wages Act while examining the basic structure of wages are denied by the Respondent Authority in its reply. Accordingly it has been pressed that the appeal be dismissed.

*5.* The Appellant Establishment has filed its rejoinder, wherein it has mainly reiterated its case taken earlier.

*6.* I have heard arguments of Shri Praveen Namdeo, counsel for the appellant and Shri J.K.Pillai, learned counsel for the Respond net. The Appellant Establishment has preferred written arguments also which is part of the record. I have gone through the record as well.

*7.* Perusal of the record in the light of the rival arguments, makes out the following points for determination in the appeal:-

**(1)Whether the finding of the Respondent Authority that the allowance such as house rent allowance, conveyance allowance and medical allowance are part of the basic wages and the Appellant Establishment is under legal obligation to pay employees provident fund dues on this is justified in law and fact?**

**(2)Whether the Appellant Establishment is entitled to any relief?"**

***8.*** **<u>PONT FOR DETERMIANTION NO.1:-</u>**

As the perusal of the impugned order reveals, the Respondent Authority has held that the allowances namely medical allowance, house rant allowance and conveyance allowance were paid to all the employees across the Board. Also that the amount awarded in these allowances is unreasonably higher than the basic salary awarded, hence it is a subterfuge adopted by the Appellant Establishment to

evade the employees provident fund dues which requires to be done away and these allowances require to be taken as basic wages for deduction of employees provident fund dues. The Respondent Authority has relied on the report of the Enforcement Office dated 13-7-2015 which has highlighted these facts. Also it comes out from the record that a copy of this report was supplied to the Appellant Establishment as it is mentioned in the impugned order itself, also not disputed by the Appellant Establishment. But the Appellant Establishment did not dispute the findings of the Enforcement Officer, since the report of the Enforcement Officer was not challenged by Appellant Establishment the Respondent Authority cannot be held to have committed any error in law in relying on such uncontroverted report . In the light of this finding the argument of Appellant Establishment that the Respondent Authority was required to make an inquiry independently of Enforcement officer has no leg to stand because in the case in hand, the report of the Enforcement Officer was uncontroverted.

*9.* Another argument has been made from the side of the Appellant establishment that the Respondent Authority has committed illegality in considering the allowances as part of basic wages. Before entering into merits of this argument, certain provisions required to be produced here:-

(1)**Section 2(b) of Employees Provident Fund and Misc. Provisions Act,1952.**

> **(b) "Basic wages" means all emoluments which are earned by an employee while on duty or 3[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 employees 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;**

(2) **Section 6 of Employees Provident Fund and Misc. Provisions Act,1952:**

**3[6.] Contributions and matters which may be provided for in Scheme. - The contribution which shall be paid by the employer to the fund shall be 4[ten per cent.] of the basic wages, 5[dearness allowance and retaining allowance (if any)] for the time being payable to each of the employees 6[(whether employed by him directly or by or through a contactor)], and the employee's contribution shall be equal to the contribution payable by the employer in respect of him and may, 7[if any employee so desires, be an amount exceeding 4[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]:**
**7[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 "4[ten per cent.]", at both the places where they occur, the words 8["12 per cent. "] 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.**

**1[Explanation I.]- For the purposes of this 2[section] dearness allowances shall be deemed to include also the cash value of any food concession allowed to the employee.**

**3[Explanation II. - For the purposes of this 2[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.]**

(3)**Rule 38(1) of Employees Provident Fund Scheme 1952:**

**38. Mode of payment of contributions (1) The employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable, deduct the employee's contribution from his wages which together with his own contribution as well as an administrative charge of such percentage [of the pay (basic wages, www.epfindia.gov.in 48 dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than excluded employee and in respect of which provident fund contribution payable, as the Central Government may fix. He shall within fifteen days of the close of every month pay the same to the fund [electronic through internet banking of the State Bank of India or any other Nationalized Bank] [or through PayGov platform or through scheduled banks in India including private sector banks authorized for collection on account of contributions and administrative charge: Provided that the Central Provident Fund Commissioner may for reasons to be recorded in writing, allow any employer or class of employer to deposit the contributions by any other mode other than internet banking. (2) The employer shall forward to the Commissioner, within twenty-five days of the close of the month, a monthly abstract in such form as the Commissioner may specify showing the aggregate amount of recoveries made from the wages of all the members and the aggregate amount contributed by the employer in respect of all such members for the month: Provided that an employer shall send a Nil return, if no such recoveries have been made from the employees : Provided further that in the case of any such employee who has become a member of the pension fund under the Employees' Pension Scheme, 1995, the aforesaid form shall also contain such particulars as are necessary to comply with the requirements of that Scheme. (3) The employer shall send to the Commissioner within one month of the close of the period of currency, a consolidated annual Contribution Statement in Form 6- A, showing the total amount of recoveries made during the period of currency from the wages of each member and the total amount contributed by the employer in respect of each such member for the said period. The employer shall maintain on his record duplicate copies of the aforesaid monthly abstract and consolidated annual contribution statement for production at the time of inspection by the Inspector. [Provided that the employer shall send to the Commissioner returns or details as required under sub-paragraph (2) and (3) above, in electronic format also, in such form and manner as may be specified by the Commissioner].**

**<u>(4) Rule 29(1) of the Employees provident Fund Scheme,1952:</u>**

**29. Contributions (1) The contributions payable by the employer under the Scheme shall be at the rate of [ten per cent] of the [basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any)] payable to each employee to whom the Scheme applies: Provided that the above rate of contribution shall be [twelve] per cent in respect of any establishment or class of establishments which the Central Government may specify in the Official Gazette from time to time under the first proviso to sub-section (1) of section 6 of the Act.**

*10.* The Respondent side has referred to following case laws wherein the Hon'ble the Apex Court has laid down the following law:-

(1) **Bridge & Roof Co. (India) Ltd vs Union Of India** (AIR) 1963 SC 1474.

(2) **Jay Engineering Works Ltd And ... vs The Union Of India And Others** (AIR) 1963 SC 1480.

(3) **Ti Cycles Of India, Amattur vs M.K.Gurumani & Ors** (2001) 7 SCC 204.

*11.* The principle of law laid down by Hon'ble the Apex Court has been relied by Hon'ble the Division Bench of Hon'ble High Court of M.P., Gwalior Bench in its decision in Writ petition No.1891/2011. This judgement of Hon'ble High Court of Madhya Pradesh has been affirmed by Hon'ble the Apex Court in the case of **RPFC West Bengal & Others Vs. Vivekanand Vidya Mandir & Ors** (2019) SCC online SC 291. The relevant paragraph of the judgment are 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 6-¼ 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* v. *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"…"**

**In *Manipal Academy of Higher Education* v. *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."**

**12. 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* v. *Tarai Chini Mill Majdoor Union, Uttarakhand*, (2014) 4 SCC 37, it was observed as follows:**

**"9. According to http://www.merriam-webster.com (Merriam Webster Dictionary) 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* v. *The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh*, (1998) 8 SCC 90."**

*12.* In the case in hand , from the statement of salary filed by the Appellant Establishment itself if a copy of report of Enforcement Officer which is **Annexure-2** to the memo of Appeal. This shows that the allowance which are conveyance allowance, medical allowance and house rent allowance, have been given to the employees of the Appellant Establishment across the board. It is not that these allowances are subject to certain conditions fulfilled by the employees, hence the finding of the Respondent Authority that these allowance should be covered as part of basic wages cannot be said to be unjustified in law or fact. Accordingly this finding is confirmed, brushing aside the argument of Appellant Establishment in this respect.

*13.* Though a feeble point has been raised from the side of the Appellant Establishment regarding application of Minimum Wages Act and inclusion of exempted employees for the purposes of employees provident fund dues, they have been specifically rebutted by the Respondent authority in its counter. In absence of any material on record to support these facts, the arguments of Appellant Establishment on this point also cannot be accepted. **Point for determination No.1 is answered accordingly**.

*14.* **POINT FOR DETERMIANTION NO.2-**

In the light of the findings recorded in point for determination no.1, the appeal sans merit and is liable to be dismissed.

**ORDER**

**The Appeal sans merit and is dismissed.**

**(P.K.SRIVASTAVA)**

**PRESIDING OFFICER**

**JUDGMENT SIGNED , DATED AND PRONOUNCED**

**(P.K.SRIVASTAVA)**

**PRESIDING OFFICER**

**Date:11-1-2022**