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W.P.No.6966 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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|---------------|------------|
| Reserved on | 19.10.2022 |
| Pronounced on | 02.01.2023 |

CORAM:

THE HONOURABLE MR.JUSTICE M.S.RAMESH

W.P.No.6966 of 2014

and

M.P.No.2 of 2014

The Management of Trident
Facility Services Private Limited,
No.5, 1st Floor, 4th Street,
Dr.Subburayan Nagar,
Kodambakkam,
Chennai – 600 024.
Rep. By its Director Umesh Fernando

...Petitioner

-Vs-

1.The Presiding Officer,
Employees Provident Fund
Appellate Tribunal,
New Delhi.

2.The Regional Provident Fund
Commissioner – II (C&R),
Employees Provident Fund Organisation,
Regional Office,
37, Royapettah High Road,
Chennai – 600 014.

...Respondents



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PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the records of the 1st respondent in ATA No.667(13) of 2013 and quash its order dated 08.01.2014 confirming the order of the 2nd respondent dated 13.08.2013 in proceedings No.CCII/27/TN/51421/Enf/Regl/2012-13.

For Petitioner : Mr.S.Ranjith Kumar

For Respondents : R1 – Court

Mr.V.Sundareswaran, SSC for R2

ORDER

The petitioner company is an establishment covered under Section 1(3)(b) of The Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as 'the EPF Act'). When the second respondent had alleged that the establishment had failed to remit the Provident Fund and insurance contribution dues for the period from May, 2010 to November, 2012, an enquiry was initiated under Section 7A of the EPF Act on 01.02.2012. In the enquiry, it was found that the establishment was remitting the Provident Fund contributions only on the basic component of the wages from 04/2010 and the wages have been split into Basic, House

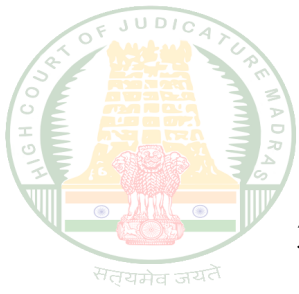


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Rent Allowance (HRA) and Over Time Allowance (OTA), which do not attract Employees Provident Fund (EPF) contributions.

2. Alleging that the establishment was avoiding liability towards the contributions by making contributions on splitting up the wages into Basic and HRA components, the second respondent herein had examined the rate of minimum wages for hospital, sweet making and confectioneries, nursing home, shop and commercial establishment, in which, the petitioners were deploying their manpower and by applying the minimum wages notified to such establishments, had determined the contributions payable by the establishment on the basis of the notified minimum wages and sought for payment of the balance of the EPF contributions, through the impugned order dated 13.08.2013. The appeal filed by the petitioner before the Employees' Provident Fund Appellate Tribunal was also rejected, through an order dated 08.01.2014, by holding that, splitting up of the minimum wages into Basic Wage, Dearness Allowance and OTA was invalid, since the State Government had notified the minimum wages for the concerned establishments. Challenging these orders, the present writ petition has been filed.

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3. The learned counsel for the petitioner submitted that the definition of Basic Wages under Section 2(b) read with Section 6 of the EPF Act does not include HRA and OTA and therefore, the second respondent herein had exceeded his jurisdiction in directing the petitioner to pay the contributions on such allowances also. He further submitted that placing reliance on the minimum wages notified by the Government to the establishments, where their manpower were engaged and deriving at the EPF contributions, is impermissible in the absence of any provisions. In support of such a claim, the learned counsel placed reliance on a judgement of the Division Bench of the High Court of Punjab and Haryana in the case of *Assistant Provident Fund Commissioner vs. M/s.G4S Security Services (India) Ltd. And another* reported in *2011 SCC OnLine P&H 8362*.

4. Per contra, the learned Senior Standing Counsel appearing for the second respondent submitted that the establishment has been remitting EPF contributions only on the basic component of wages, in order to avoid their liability towards contributions and therefore, the Enforcement Officer had examined the rate of minimum wages applicable to the establishments where the petitioner was deploying their manpower and arrived at the EPF

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contributions to be made. Since the establishment requires to comply with the

Labour Laws, including the Minimum Wages Act, there are no infirmities in

the order passed by the second respondent under Section 7A of the EPF Act,

as well as the order-in-appeal.

5. I have given careful consideration to the submissions made by the respective counsels.

6. Section 2(b) of the EPF Act defines the term “basic wages”, which contains exceptions and does not include such wages which are not earned in accordance with the term 'contract of employment'. The Hon'ble Supreme Court of India, in the case of ***Regional Provident Fund Commissioner (II), West Bengal vs. Vivekananda Vidyamandir and others*** reported in (2020) **17 SCC 643**, had dealt with the definition of “basic wages” in the following manner:-

“11. The common submission on behalf of the appellants in the remaining appeals was that basic wages defined under Section 2(b) contains exceptions and will not include what would ordinarily not be earned in accordance with the terms of the contract of



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employment. Even with regard to the payments earned by an employee in accordance with the terms of contract of employment, the basis of inclusion in Section 6 and exclusion in Section 2(b)(ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose of contribution under Section 6. But whatever is not payable by all concerns or may not be earned by all employees of a concern are excluded for the purposes of contribution. Dearness allowance was payable in all concerns either as an addition to basic wage or as part of consolidated wages. Retaining allowance was payable to all permanent employees in seasonal factories and was therefore included in Section 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, and would therefore stand excluded from basic wage. Likewise overtime allowance though in force in all concerns, is not earned by all employees and would again stand excluded from basic wage. It is only those emoluments earned by an employee in accordance with the terms of employment which would qualify as basic wage and discretionary allowances not earned in accordance with the terms of employment would not be covered by basic wage. The statute itself excludes



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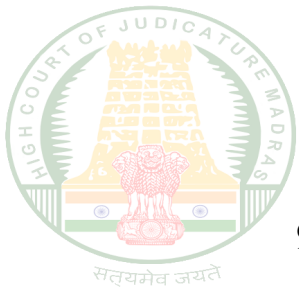


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certain allowance from the term basic wages. The exclusion of dearness allowance in Section 2(b)(ii) is an exception but that exception has been corrected by including dearness allowance in Section 6 for the purpose of contribution.”

7. On a plain reading of Section 2(b) of the EPF Act, the term basic wages will not include HRA and OTA and as such, the contributions made by the establishment on the basic pay including these allowances cannot be strictly found fault with.

8. In the enquiry conducted under Section 7A, the second respondent had adopted a novel method of increasing the contributions to be made by the establishment by taking into account the minimum wages notified by the State Government to such establishments where the petitioner had deployed their manpower. By stating that the notified minimum wages are required to be paid to such employees, the basic wages was calculated and the demand for the difference of the contributions has been made.

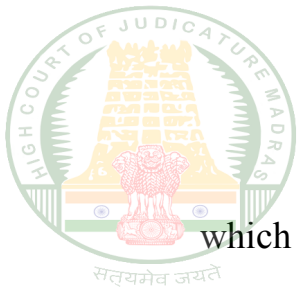


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9. There is no enabling power conferred on the Commissioner to adopt the minimum wages notified for the purpose of calculating the EPF contributions under the EPF Act. In the case of ***G4S Security Services (India) Ltd. (cited supra)***, the Hon'ble Division Bench of the High Court of Punjab and Haryana had specifically dealt with the powers of the authorities to adopt the minimum wage for the purpose of calculation of the EPF contributions, in the following manner:-

“6. We are unable to accept the submission. The statute having defined the term 'basic wage' which for the purposes of the Act could not be less than the minimum wage, there was no compulsion to hold that the definition of 'basic wage' should be equated to the definition of 'minimum wage' under the Minimum Wages Act, 1948. No doubt wage less than minimum wage in violation of law cannot be paid but it does not imply that for calculation of contribution for EPF Act, the employer could not follow statutory provisions of the said Act which permits contribution to be computed with reference to 'basic wage' as defined thereunder.”

10. The learned Senior Standing Counsel for the second respondent was also not in a position to place reliance on any case laws in this regard,



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which would authorize the Commissioner to adopt the notified minimum wages, for the purpose of determining the EPF contributions. Thus, in the absence of any specific provision under the EPF Act, the unconventional method adopted by the Commissioner, cannot be sustained.

11. The learned Senior Standing Counsel for the second respondent made a faint attempt to submit that the establishment was required to comply with all the Labour Laws, including the minimum wages, as per the agreement subsisting with their various clients and therefore, there is no infirmity on the part of the second respondent in adopting the minimum wages for the purpose of calculating the EPF contributions.

12. The Minimum Wages Act is a self contained Act, that provides for payment of minimum rates of wages under Section 12, as per the notified rates, without deductions, except as may be authorized. Likewise, Section 22 of the Minimum Wages Act takes care of the instances when an establishment contravenes the mandatory requirements of the payment of minimum wages and imposed penalties thereunder.



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13. When an establishment contravenes any of the provisions of the Minimum Wages Act, the consequence would be for a penalty under the Act, which the contravening establishment requires to face. But, failure to pay the minimum wages would not empower the EPF Commissioner to step into the shoes of the authorities under the Minimum Wages Act and determine the contributions, as per the notified minimum wages. In the absence of any enabling provisions under the EPF Act to do so, the entire exercise of the enquiry conducted under Section 7A of the EPF Act, is deemed to be without authority and jurisdiction and therefore, the consequential demand for payment of the difference of the contribution cannot be sustained.

14. The first respondent/Appellate Tribunal, in its cryptic order, has not dealt with any power vested on the Commissioner for this unconventional method adopted by the second respondent and therefore, the order-in-appeal also cannot be sustained.

15. In the result, the impugned order passed by the first respondent in ATA No.667(13) of 2013 dated 08.01.2014, confirming the order of the second respondent dated 13.08.2013, is quashed. Accordingly, the writ

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petition stands closed. No costs. Consequently, connected miscellaneous

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02.01.2023

Index:Yes
Internet:Yes
Speaking order
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To

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M.S.RAMESH,J.

hvk

**Pre-delivery order made in
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02.01.2023