BEFORE THE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT-II, ROUSE AVENUE, DISTRICT COURT COMPLEX, DELHI.

Present:

Smt. Pranita Mohanty,
Presiding Officer, C.G.I.T.-Cum-Labour
Court-II, New Delhi.

ATA No:- D-1/94/2019

M/s. Trackon Courier India Pvt. Ltd. Appellant

VS.

APFC, Delhi (North)
Respondent

ORDER DATED:-05/04/2022

Present:- Shri S.K Khanna, Ld. Counsel for the Appellant.
Shri S.N Mahanta, Ld. Counsel for the Respondent.

This appeal challenges the order dated 31.07.2019 passed by the RPFC Delhi North u/s 7A of the EPF and MP Act (herein after referred to as the Act) assessing Rs. 80,34,347/- payable by the appellant establishment as the unpaid EPF dues of its employees for the period August 2015 to March 2018.

The facts, briefly stated, leading to this appeal is that the appellant establishment is a Pvt. Ltd. company engaged in the business of courier service having its office at New Delhi. On 02.02.2017 a complaint was received from All India General Mazdoor Trade Union alleging that the establishment has omitted to enroll more than 100 eligible employees as the members under the Act and thereby avoided to make contribution under the EPF and MP Act in respect of those eligible employees. A squad was constituted for verification and during the inspection the squad found that in respect of two persons namely Ravinder Kumar and Mh. Naushad who left the job of the appellant, no PF contribution has been made on the amount paid towards full and final settlement. The squad also found that the establishment has kept away the conveyance allowance for computation of the basic wage.

11 security guards found employed by the appellant through a contractor and the said contractor has not deposited the PF contribution in respect of 3 security guards. The squad also found 9 of the employees having their basic wage less than 15000/- not enrolled and recommended inquiry. It was also found that conveyance allowance and performance incentive paid to some of the employees not taken into consideration for payment of EPF dues. On the report of the squad summon dated 18.07.2018 was served on the appellant establishment calling upon to participate in the inquiry u/s 7A of the Act. In the meantime another frivolous complaint was received by the respondent from the Delhi Plumber allied industrial workers Union alleging that the appellant has engaged more than 1500 workers who have not been extended the benefit of PF Act. The appellant establishment appeared before the commissioner and filed its written objection meeting all the points raised by the enforcement officer in his report. But the commissioner without considering the written objection of the appellant and the legal points raised there under and without summoning the complainants or making effort of identifying the beneficiaries passed an unreasonable order which is illegal and not sustainable in the eye of law. Thus, in the appeal the appellant has prayed to set aside the impugned order on the ground that the same is not based upon sound reasoning and proper appreciation of fact and law.

The respondent through its counsel filed written objection stating that the impugned order is a reasoned and speaking order and sufficient opportunity was granted to the appellant to set up its stand. All the documents including the written submission filed by the establishment were carefully examined and considered by the commissioner. It has also been stated that EO found that towards full and final settlement Rs. 25000/- was actually given to two of the ex-employee namely Ravinder Kumar and Mh. Naushad. Since the department failed to provide break-up of the amount, the said amount was quantified as wage and the establishment was found liable for not making EPF contribution on the same. With regard to the complaints received from the union it has been stated that the EO made a thorough investigation of the allegation. Though the

allegation was for nonpayment of PF dues to 100 employees, only two were found victimized. Thus, the EO made a report in respect of those two only. Similarly 9 employees having basic salary below 15000 and thus eligible employees were found not enrolled on the pretext that their gross salary exceeds 15000/-. The establishment could not justify this stand for non compliance in respect of the employees pointed out by the EO. So far as inclusion of allowances to basic wage, the respondent has stated that the judgment passed by the Apex Court in the case of Vivekanand Vidya Mandir is only a reiteration of the Principle laid down earlier in the case of Bridge and Roof. Thus, the stand of the establishment that for the allowances paid to the employees prior to the judgment of Vivekanand Vidya Mandir EPF is not payable has no leg to stand and liable to be rejected. He emphasized that the allowances as a part of the basic wage is inbuilt in the act itself and there is no cutoff date in respect of the same. Thus, the enforcement officer as well as the RPFC rightly observed that the establishment has omitted to compute the allowances paid to the employees towards the basic wage to avoid PF contribution. To support his stand the Ld. Counsel for the respondent placed reliance in the case of **Bridge and Roofs Co. Ltd. vs. Union of India** decided by the Hon'ble Supreme Court wherein it has been held that the allowances universally paid across the table are to be considered for calculation of PF Contribution. He also relied upon the judgment of Hon'ble Supreme Court in the case of **Manipal Academy of Higher Education vs. Provident Fund Commissioner** wherein it has also been held that the allowances ordinarily and universally paid shall be construed as basic wage u/s 2(B) of the Act. The respondent has thus taken a stand that the conveyance allowance uniformly and universally paid to all its employees at the rate of 33.33% is a part of the basic wage and the establishment is liable to remit PF contribution on the same. Referring to the expenditure under the head employees benefit, he submitted that no explanation could be furnished by the appellant in respect of 901958. Similarly for the period 01.04.2015 to 31.03.2016 Rs. 7,84,401/- has been described as exempted salary and wage, but no supportive document could be produced. Thus,

the claim of the establishment that Rs. 1703477/- as employees benefit expenses for the year 2015,2016 as shown in the balance sheet is not acceptable. Amount of 76,69,034/- was claimed as payment made to outsourced manpower through independently covered contractor. But the appellant failed to produced the relevant record in respect of Rs. 99259/- paid to other agencies. Thus, the said amount was taken into consideration for quantification of the PF dues. The respondent thereby submitted that the impugned order does not suffer from any infirmity and should not be interfered with.

During course of argument the Ld. Counsel for the appellant submitted that as per the summon and the impugned order the period of inquiry doesn't tally. The EO admitted in his report that a complaint was received in respect of more than 100 employees but that remained unfounded. In respect of 2 employees only the payment was made towards full and final settlement. But the said settled amount not being wage EPF is not payable. He also submitted that the department witness made a deposition basing on the report of the EO and the commissioner accepted the report of the EO without application of mind. He also submitted that had the commissioner applied the mind he would not have assessed the contribution in respect of the allowances giving retrospective effect to the judgment of Hon'ble Supreme Court in the case of Vivekanand Vidya Mandir. He also submitted that EPF deduction is not payable on employees benefit since, that amount shown in the balance sheet was in the nature of either expenses made for the benefit of the employees on the festivals etc or as a manner of help during marriage or other occasions in the family of the employees. That being not a wage earned by the employee PF contribution is not payable. Rather be help extended for marriage or on account of death in a family are recoverable like loans and not earning. He thereby submitted that the commissioner committed error in the assessment making the order liable to be set aside.

Perusal of the impugned order shows that the commissioner has assessed Rs. 80,34,347/- on different counts for the period 08/2015 to 03/2018. The EO submitted that the establishment

before commencement of the impugned inquiry was found in default of Rs. 4,54,838/- in respect of some of the persons who had raised a complaint through the union. The establishment made payment of some amount and still 40,353,/- was due to be paid. Similarly 24 employees were found drawing their basic wage less than 15000 per month and the establishment was not extending the benefit to them. The commissioner has also observed that the establishment in order to avoid EPF liability has intentionally bifurcated the salary into basic HRA, conveyance etc. The said allowances being paid universally EPF is payable on the same. The commissioner has relied upon the judgment of the Hon'ble Supreme Court in the case of M/s Bridge and Roof Co. Ltd. vs. Union of India to hold that EPF is payable on the allowances paid universally. The commissioner has further observed that in respect of some outsourced employees no EPF has been paid. The impugned order further reveals that the appellant /establishment disputed certain aspects of the department submission. The main objection is that Rs. 57,976,/- quantified in respect of 24 eligible employees was wrong and the establishment had never admitted the same. The Ld. Counsel for the appellant submitted that before 2008 EPF was payable on basic wage, Dearness allowance and house rent allowance only. But the Hon'ble Supreme Court by judgment dated 28.02.2019 held that conveyance allowance is a part of basic wage. Since, prior to that the appellant had no knowledge that conveyance allowance should be computed for calculation of EPF dues no liability can be fastened on the appellant for the same.

The commissioner in this order has observed that conveyance allowance being paid universally attracts the character of basic wage and thus EPF contribution on the same is payable. It is felt proper to observe that prior to the 2018 SC judgment in Vivekanand Vidya Mandir vs. RPFC the allowances other than DA and HRA was never considered as basic wage. Moreover, in this matter when the inquiry was for a period prior to 2018 judgment and when no deduction of employees share on that allowance was made, it would not be proper to compute the said allowance as basic wage. The order of the commissioner impugned in this appeal

with regard to conveyance allowance is patently illegal. The Ld. Counsel also submitted that 2 of their ex employees having name Ravinder Kumar and Mh. Naushad were paid Rs. 12,758/- each for severance of the relationship of employment with the appellant. The amount was so paid to them towards retrenchment compensation and notice pay. The said amount not being earned wage no PF is payable and the order in that regard is also illegal as the compensation paid cannot come under the definition of basic wage u/s 2(B) of the EPF Act.

The impugned order also shows that 11 security guards were engaged through a contractor who as per the Eo's report is independently covered under the Act. Out of those 11 guards the contractor has not extended the benefit to three of the persons. Thus, the commissioner has come to hold that Pf liability for those guards lies with the appellant. A conjoint reading of sec 6 of the EPF and MP Act and Para 30 of the EPF Scheme 1952 leads to a conclusion that the establishment as the Principal employer is obliged to deposit the PF contribution of its own employees and the employees employed through the contractor at the first instance and then to recover the same from the bill payable to the contractor. But the position changes when the contractor providing the manpower is allotted with a separate code No. by the EPFO for depositing the contribution. In that case the contractor being the Principal employer, the establishment can't be held liable for the PF contribution of the outsourced employees through the contractor. In this case the contractor who had supplied the manpower i.e the security guards having a separate code no. is the Principal employer and for any default made by the contractor, the liability can't be fastened on the appellant. The amount in respect of those outsourced employees fixing liability on the appellant is held to be illegal and not sustainable.

A careful perusal of the impugned order shows that the commissioner was basically guided by the judgment of the Hon'ble Supreme Court in the case of Bridge and roof referred supra to determine the liability on the conveyance allowance paid by the employer. This approach of the commissioner is found to be

incorrect since before passing of the Vivekanand Vidya Mandir judgment no Pf contribution was payable on the conveyance allowance. When the employer had not deducted the employees share on the same for the period of inquiry it cannot be held that the judgment of Vivekanand Vidyamandir has a retrospective effect and the appellant is liable for contribution of both employer and employee share on the same. In respect of the Employees Benefit Expenses an amount has been assessed which again appears to be wrong as the same was never paid to anybody as the earned wage but as a mode of assistance recoverable in installments and for the other expenses made during festival etc for the benefit of the employees.

Thus, on a careful analysis of the fact and the submissions made by the Ld. Counsels it is observed that the impugned order seriously lacks the reasoning behind the finding which makes the order not sustainable in the eye of law and liable to be set aside. Hence, ordered.

ORDER

The appeal be and the same is allowed. The impugned order passed u/s 7A of the EPF and MP Act is hereby set aside. The amount if any deposited by the appellant as a part of the assessed amount as per the impugned order either for compliance of the provisions of section 7O or otherwise shall be refunded by the EPFO to the appellant within 60 days from the date of the communication of the order.

Presiding Officer