

(1991) 02 GUJ CK 0006

In the Gujarat High Court

Case No : Special Civil Application No's. 679 to 683 of 1979

Associated Cement Co. Ltd.

APPELLANT

Vs

R.M. Gandhi, Regional Provident Fund Commissioner and
Others

RESPONDENT

Date of Decision : 06-02-1991

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2

Citation : (1991) 2 GLR 1286 : (1995) 3 LLJ 368

Hon'ble Judges : M.S. Parikh, J;A.P. Ravani, J

Bench : Division Bench

Advocate : S.I. Nanavati, for the Appellant; B.B. Naik, for R-1 and B.B. Joshi, for R-2 in Spl. C.A. 679, 680 and 683/79, for the Respondent

Judgement

A.P. Ravani, J.—A common order dated January 20, 1979 passed by the Regional Provident Fund Commissioner, Gu-jarat State. Ahmedabad holding that the provident fund and other dues are required to be paid on the amount of Rs. 450/- paid to each employee pursuant to agreement dated May 7, 1975 is under challenge in all these petitions.

Facts in Brief:

2. In October, 1973, the Union Labour Minister passed an award in respect of scales of pay, service weightage and fitments, additional dearness allowance etc. payable to the employees engaged in the Cement Industry. Even thereafter some disputes persisted. The negotiations which took place between the parties had broken down on account of the disagreement on the question of: (i) the date from which the new pay scales, increments, fitments, etc. would be brought into effect and (ii) the quantum of house rent allowance. Mr. T.A. Pai. the then Minister for Industry and Civil Supplies was requested to use his good office to resolve the disputes. On May 6, 1975 in the presence of the Minister for Industries and Civil Supplies and Minister of State in the Ministry of Industry and Civil Supplies an agreement was arrived at between the parties. The agreement

has been signed by the representatives of all the Trade Unions and also by the authorised officers of the respective Cement Company.

3. The relevant part of the agreement reads as follows:

"(i) The notional date for bringing into effect the new pay scales, fitments weightage, increments, etc., already agreed upon between the two parties, will be the 15th September, 1973. However, actual payments in the revised wage structure which would include the annual increment due on 15.9.1974 will be with effect from the 1st May, 1975. Hereafter, annual increments will be given on 15th September of each year including 15th September, 1975.

(ii) In lieu of the payment of arrears for the period 15th September 1973 to 30th April 1975 as a result of the revised wage structure including the revised house rent allowance, each employee will be paid a lumpsum of Rs. 450. This will be in the nature of an ad hoc payment and will not count towards Provident Fund contribution. Bonus, Gratuity, ESI contribution, etc. The payment of the lumpsum to the workers who have joined service after 15th September 1973 will be pro rata, on the basis of length of service.

(iii) Actual payment of the lumpsum as well as of emoluments in the revised wage structure for May and June, 1975 will be made in July, 1975

(iv) The employees will be paid additional house rent of Rs. 7/- per month. Decisions regarding recovery of house rent will be taken at the unit level through mutual negotiations and agreements, according to the principles laid down by the 1st and 2nd Cement Wage Boards.

(v) This agreement will remain in force till the 1st March, 1977, coterminus with the award of the Labour Minister.

3.A. The Ministers agreed that, while granting escalation in the ex-works retention price of cement in July 1975, the Government will take into account the incidence of the revised wage structure as well as of the above decisions on the cost of labour for the production of cement."

4. Pursuant to the agreement, each employee was paid an amount of Rs. 450/- in lieu of the payment of arrears for the period commencing from September 15, 1973 to April 30, 1975. The Regional Provident Fund Commissioner, Gujarat State, Ahmedabad, felt that the provident fund deduction was required to be made from the amount of Rs. 450/-. Hence he initiated proceedings on September 15, 1976 u/s 7-A of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 (for short "The Act"). In the proceedings the Saurashtra Majoor Mahajan Sangh, respondent No. 2 herein was permitted to participate. The Regional Provident Fund Commissioner after hearing the parties came to the conclusion that the amount of Rs. 450/- paid to each employee formed part of basic wages and, therefore, the provident fund and other dues were required to be paid. He decided to proceed further to determine the amount due from the establishment on the aforesaid amount of Rs. 450/-. The order passed by the

Regional Provident Fund Commissioner is dated January 20, 1979 and is produced at Annexure-"B" to the petition. This order is under challenge in all these petitions

The Controversy:

5. According to the petitioners, the amount of Rs. 450/- to be paid to each employee pursuant to the agreement dated May 7, 1975 would not form part of "basic wages" as defined under the provisions of Section 2(b) of the Act. It is submitted that the phrase "in lieu of the payment of arrears does not mean "towards the arrears" nor it is a part of the amount of arrears. In "lieu of means "instead of the amount of arrears. It is a sort of other allowance or ex gratia lump sum payment. Such payments are excluded from the definition of basic wages. According to the petitioners, the decision of this Court in Spl. C.A No. 480 of 1975 decided on July 16, 1976 is not applicable to the facts of the case. On the other hand it is submitted that merely because the payment is made in lump sum and the same is accepted by the workmen, the payment does not lose the character of basic wages because it is in essence the price of the labour sold and it is earned by the workmen in pursuance of the contract of employment. Even if there be any agreement between the management and the workmen, such an agreement cannot override the provisions of law.

Relevant provisions of the Act and the Scheme:

6. There is no dispute with regard to the fact that the provisions of the Act and the provisions of the Employees' Provident Funds Scheme, 1952 (for short "the Scheme") are applicable to all the petitioner-Companies. The term "basic wages" is defined u/s 2(b) of the Act and the term "contribution" is defined u/s 2(c) of the Act. As provided u/s 6 of the Act read with para 29 of the Scheme, the employer and the employee are required to make contribution of the prescribed amount of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable by both the employer and the employee.

7. Definitions of "basic wages" and "contribution" read as follows:

"2(b) "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;

2(c) "contribution" means a contribution payable in respect of a member under a scheme (or the contribution payable in respect of an employee to whom the Insurance Scheme applies)."

8. It may be noted that the term "wages" is not defined in the Act. The phrase "basic wages" means all emoluments which are earned by an employee while on duty or in accordance with the terms of the contract of employment and which are paid or payable in cash. However, difficulty arises on account of the exceptions to this definition. Clause (i) of the definition excludes cash value of any food concessions and Clause (iii) of the definition excludes any presents made by the employer while Clause (ii) of the definition excludes dearness allowance. This causes difficulty because cash value of any food concession may be the earning of the workman in accordance with the terms of contract. As far as the exclusion of the dearness allowance is concerned, it is taken care of by including the same in Section 6 of the Act read with para 29(3) of the Scheme. Para 29(3) of the Scheme inter alia provides that contribution shall be calculated on the basis of the basic wages, dearness allowance including the cash value of any food concessions and retaining allowance, if any, drawn during the whole month whether paid weekly, fortnightly or monthly. Thus the examination of the provisions of the Act and the Scheme makes it clear that though certain payments may be made to the employee in accordance with the terms of contract of employment, they are not necessarily included in the definition of "basic wages" for the purpose of calculating the contribution to be made by the employer.

What is the basis for exclusion of certain items from the definition of "Basic wages"?

8-A. In the aforesaid background it will have to be found out as to what then is the basis for exclusion of certain items from the definition of basic wages? After finding out the basis for such exclusion, it will have to be considered as to whether the amount of Rs. 450/- paid in lieu of, i.e., instead of payment of arrears can be said to be something which could be excluded from the definition of basic wages.

9. In the case of *Bridge & Roofs Co. v. Union of India* reported in 1963 (2) LLJ 490 the phrase "basic wages" occurring in Section 2(b) of the Act came up for consideration. In that case, the company had two production bonus schemes, one for the hourly rated workers and other for the rest. The main feature of both the schemes was that the production bonus began to be paid on certain rates specified in the schemes when the output reach 5,000 tonnes per year of the goods manufactured by the Company (The company was engaged in the manufacture of engineering goods, structural fabrication and rolling stock). The scheme relating to the hourly rated workers was revised, according to. which the production bonus began to be paid when the output for the quarter reached 1,300 tonnes. The question arose as to whether the amount of bonus paid formed part of the "basic wages."

9-A. The Supreme Court after considering the provisions of the Act and the Scheme answered the question as follows:

"It seems that the basis of inclusion in Section 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 u/s 6 but whatever is not payable by all concerns or may not be earned by all employees of concern is excluded for the purposes of contribution." *

Thus after elucidating the definition of "basic wages" and the basis thereof, the Supreme Court discussed separate items like dearness allowance, retaining allowance, house rent allowance, overtime allowance, commission or any other similar allowance and thereafter further stated as follows:

"It seems, therefore, that the basis for the exclusion in Clause (ii) of the exceptions in Section 2(b) is that all that is not earned in all concerns or by all employees of a 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 Section 6 for the purpose of contribution."

Therefore, the phrase "basic wages" means all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the employment and which are paid or payable in cash. However, from these payments, whatever may not be earned in all concerns or by all employees of a concern could be excluded for the purpose of contribution.

Application of the test to the amount of Rs. 450/-

10. In light of the aforesaid position of law enunciated by the Supreme Court, the question arises - Was the amount of Rs. 450/- paid pursuant to the agreement, an amount payable by all concerns or was it an amount which may not be earned by all employees of a concern? The revised wage structure was made applicable from May 1, 1975. The dispute was with regard to the date from which the revised wage structure should be made applicable. It was agreed between the parties that the revised wage structure be applied from May 1, 1975. For the period commencing from September 15, 1973 to April 30, 1975 the parties agreed to forego the arrears flowing from the revised wage structure including the revised house rent allowance. Instead of the amount of the arrears flowing from the revised wage structure including the revised house rent allowance, it was agreed between the parties that an amount of Rs. 450/- be paid to each employee. This was to be in the nature of ad hoc payment. The parties to the agreement did not say that the amount of Rs. 450/- was towards the arrears. It may also be noted that this amount of Rs. 450/- also took into consideration the amount of revised house rent allowance. As per the definition of basic wages, the amount of house rent allowance is certainly excluded for the purpose of contribution. The parties never said that the amount of Rs. 450/- be considered as amount of wages payable by the employer. This amount was not necessarily

earned by all the employees of all the concerns in the Industry. It was agreed between the parties that in lieu of the arrears meaning thereby instead of the arrears flowing from the revised wage structure including the revised house rent allowance, an amount of Rs. 450/- was to be paid to each employee. The parties to the agreement were conscious about the provisions of relevant labour laws including the provisions of the Act and the Scheme. Therefore, to be within the frame of the law, by abundant caution, it was clarified that the payment of Rs. 450/- will not count towards the provident fund contribution, bonus, gratuity, ESI contribution etc.

11. Analysing clause 2(ii) of the agreement, it is clear that the amount of Rs. 450/- payable to each employee is linked with the length of service of the employee. It is not linked with the performance of duty during the period in question nor it is linked with the cadre in which the employee is working or the status of the employee. The lump sum amount of Rs. 450/- is payable to each and every employee irrespective of the category to which he belongs. Annexures-A & B to the agreement indicate that there were five different "grades" and "operatives". The minimum basic pay-scale of operative is Rs. 260/- and the maximum is Rs. 357.50 ps. Similarly there are seven different grades of Tally checker, clerical, lower technical and supervisory staff. Irrespective of the workman or the pay-scale in which he was working, a lump sum amount of Rs. 450/- was agreed to be paid. Had this amount of Rs. 450/- any relation with the amount of basic wages or the dearness allowance, the amount would have varied in respect of employee carrying different time scale of pay in different grades. But there is no variation in the amount payable to each employee as and by way of lump sum. This appears to be the reason why the expression Lump sum or Rs. 450/- and an "ad hoc" payment have been used in the agreement.

12. The background of the agreement be also examined. There was an award passed by the Union Labour Minister in October 1973. It covered the dispute regarding scales of pay, service weightage and fitments, additional dearness allowance etc. Despite negotiations, the parties could not arrive at a settlement on account of the dispute pertaining to the date from which the new pay-scales etc. should be brought into effect and on the question of quantum of house rent allowance. At the intervention of the two Union Ministers, the agreement was arrived at between the representatives of all the Trade Unions and authorised officers of the Companies. As per the agreement only notional effect to the revised pay structure was given from September 15, 1973, while actual effect was to be given from May 1, 1975. The agreement took care of revised house rent allowance, additional house rent allowance and the period for which the agreement was to remain in force (i.e. upto March 1, 1977). It also took care of escalation in the ex-works retention price of cement and the representatives of the workmen agreed to withdraw the notice of strike. Thus, an overall agreement was arrived at between the parties which took care of various questions not only pertaining to the disputes between the management and the workmen, but also pertaining to the price of the commodity manufactured, i.e., cement. It was a

sort of package deal between the parties.

12-A. In this package deal, in lieu of arrears of the amount payable for the period between September 15, 1973 and April 30, 1975, it was agreed that lumpsum amount of Rs. 450/- be paid to each employee. It was also agreed that this would not be taken into account for the purpose of contribution of Provident Fund, Bonus, Gratuity, ESI contribution. If it is amount of Rs. 450/- were to be taken into account for the purpose of contribution of Provident Fund, Bonus, Gratuity, ESI contribution, etc. the net total of amount of Rs. 450/- would get added by certain contributions and payments to be made on the aforesaid counts. This addition would again reflect in the cost structure of the commodity. This addition may also have reflection on the revised house rent allowance. By taking into consideration all these factors, the parties agreed that this amount of Rs. 450/- is not to be taken into account for the purpose of contribution of Provident Fund, Bonus, Gratuity, ESI contribution etc.

13. In the aforesaid background if the agreement is examined and the test laid down by the Supreme Court, which has been indicated hereinabove is applied it cannot be said that the amount of Rs. 450/- would have been earned by all employees of all concerns or by all employees in concerns. It may even be said that the amount of Rs. 450/- might not have been payable by all the concern in the Industry. At any rate, the payment of Rs. 450/- takes into consideration the revised house rent allowance which is admittedly as per the definition of "basic wages" itself, excluded for the purpose of contribution towards provident fund. Therefore, it would be just and fair to infer that the parties never intended to arrive at an agreement so as to attract the liability for contribution of provident fund as regards the lumpsum payment of Rs. 450/- pursuant to the agreement.

Is it contracting out of law?

14. Then the question is-whether the parties are free to enter into such an agreement? Can it be said that the parties have contracted out of law? Once it is held that the amount of Rs. 450/- did not form part of amount of basic wages, there is nothing in law which prevented the parties from entering into agreement and saying that this amount would not be taken into account for the purpose of contribution of provident fund. Even so, to remove doubt by way of abundant caution, it is mentioned in the agreement as follows:

"This will be in the nature of an ad hoc payment and will not count towards Provident Fund contribution. Bonus, Gratuity, ESI contribution, etc."

The aforesaid part of the agreement indicates that the parties were conscious of the provisions of law and they were contracting within the law rather than outside the law.

15. The learned Counsel for the respondents has relied upon an unreported decision of this High Court in the case of the Indian Rayon Corporation Ltd. v. Union of India and Ors. decided on July 16, 1976. In that case the Company had

agreed to grant special relief to its employees on the following basis:

If the D.A. payable to the employees of the Textile Mills at Ahmedabad comes to Rs.

(a) 280-350 per month.

(b) 311-320 per month.

(c) Above Rs. 321 A.

Relief payable to the employees of the Company be Rs.

(a) 15/- per month

(b) 20/- per month

(c) 25/- per month.

The payment of special allowance of Rs. 15, 20 and 25 was towards dearness allowance. It was linked with unprecedented rise in cost of living and It was paid as dearness allowance. The Regional Provident Fund Commissioner held that it was part of basic wages and held that the Company was liable to make provident fund contribution under the Act and the Scheme. The Company challenged the decision of the Regional Provident Fund Commissioner before this High Court. The Court rejected the petition holding that the parties were not free to contract out of law. The Court further held that the amount of special allowance or special relief was paid in view of the unexpected rise in cost of essential commodities and it was part of dearness allowance. As Indicated hereinabove, the amount of dearness allowance is liable to contribution towards the provident fund as provided u/s 6 of the Act. In view of this position, this Court held that the Regional Provident Fund Commissioner was right in directing the Company to make contribution. However, such is not the case as far as the present petitions are concerned. In this case amount of Rs. 450/- paid lumpsum on ad hoc basis is certainly not part of dearness allowance. Hence this case does not help the respondents.

Other decisions:

16. Similar question arose before the Madras High Court in the case of E.I.D. Parry (India) Ltd v. Regional Commissioner, EPF. Tamil Nadu and Anr. reported in 1984 (1) LLJ 300. A flat ad hoc allowance of Rs. 15/-per month was agreed to be paid to each employee irrespective of the fact that whether the employee was probationer or confirmed. It was also agreed that this amount shall not be reckoned for the purpose of Provident Fund, Bonus, Gratuity, etc. The Court Inter alia observed that neither party intended that the amount of that ad hoc allowance must partake the character of basic wages. If that were not so. the consequences will be serious because the dearness allowance and house rent allowance will also get enhanced. The Court also observed that the parties were trying to be within the framework of the statute and were not trying to contract

out of the statutory provisions. We are in respectful agreement with this judgment of the Madras High Court.

17. In the case of *Burmah Shell O.S.D. Co. of India v. R.P.F. Commissioner* reported in 1980 LIC 1129, a question arose Before the Delhi High Court as regards the interpretation of the settlement between the workmen and the management. As per the settlement all the permanent workmen in the clerical and labour category on the pay roll of the Company as on the date of signing of the settlement were to receive ad hoc non-recurring lumpsum payment of Rs. 600/-(clerks) and of Rs. 300/- (labour). Answering the question as to whether this amount formed part of the basic wages as defined under the Act, the Delhi High Court inter alia observed that whenever there is a package deal, the question of earning or -not earning the payment agreed to be made does not arise. Therefore, though the ad hoc payment is part and parcel of the emoluments, it would not be basic wages as it does not have the characteristic of being earned while on duty. According to the Delhi High Court, the ad hoc payment in question was more in the nature of present made by the employer. In the instant case also, the payment of Rs. 450/- a lumpsum ad hoc payment partakes the character of other allowance agreed to be paid by the employer. The employers agreed to make this payment not towards the arrears of wages, but instead of the arrears of revised wages and revised house rent allowance.

The Conclusion and the Result:

18. For the aforesaid reasons, the petitions are required to be allowed and the order passed by the Regional Provident Fund Commissioner holding that the amount of ad hoc payment of Rs. 450/- to each employee is liable to provident fund contribution is required to be quashed and set aside.

19. In the result the petitions are allowed. The order Annexure-"B" in all the petitions dated January 20, 1979 passed by the Regional Provident Fund Commissioner, Ahmedabad is quashed and set aside. Rule made absolute accordingly in all the petitions.