

(2008) 09 MAD CK 0195

In the Madras High Court

Case No : W.A. No. 1500 of 2005 and W.A.M.P. No. 2780 of 2005

Dalmia Cement (Bharat) Limited

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 08-09-2008

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2, 6, 7A
Industrial Disputes Act, 1947 — Section 10A, 12(3), 18(1), 18(3)
Tamil Nadu Industrial Disputes Rules, 1958 — Rule 25(1)

Citation : (2008) 119 FLR 635 : (2009) 1 LLJ 257

Hon'ble Judges : P.P.S. Janarthana Raja, J;K. Raviraja Pandian, J

Bench : Division Bench

Advocate : Vijay Narayanan for R. Parthiban, for the Appellant; V. Vibhishanan, for the Respondent

Final Decision : Dismissed

Judgement

K. Raviraja Pandian, J.—In this appeal, the appellant Dalmia Cement (Bharat) Limited assailed the order of the Writ Court dated June 14, 2002 made in W.P. No. 2467/1990, wherein and whereby the Writ Court dismissed the writ petition filed by the appellant seeking for the relief of issuance of writ of certiorari to quash the order of the Regional Provident Fund Commissioner dated December 1/4 1989 passed u/s 7-A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, (hereinafter referred to in short "P.F. Act") directing the appellant to remit certain sum to the respective employees' provident fund accounts.

2. Mr. Vijay Narayanan, learned senior 5 counsel appearing for the appellant contended that the benefit extended to the workmen by virtue of the settlement under Sections 12(3) and 18(3) of the Industrial Disputes Act before the Chief Labour Commissioner dated 10 May 10, 1999 would not form part of basic wages as defined in Section 2(b) of the Provident Fund Act; that the amount paid as ad hoc lump sum payment in terms of the settlement, which is specifically provided

such payment would not classify or attract any statutory provision cannot be regarded as basic wages and that such term in settlement arrived at under the Industrial Disputes Act is valid, rather held to be valid by the Court. He further contended that having regard to the purpose of the enactment, an order compelling the appellant to pay the contribution after long period of two decades would not serve, rather further the intention of the legislature.

3. Per contra, Mr. Vibheeshanan, learned Counsel appearing for the respondent has contended that the issue involved in the present appeal is no more *res Integra*. The Division Bench of this Court in W.A. Nos. 619,620 and 1953/1999 and 504/2001 dated March 30, 2001, considered the very issue containing very identical terms of settlement in respect of sugar industries and held that the lumpsum payment made under the settlement would form part of basic wages under the P.F. Act. The said judgment would squarely apply to the facts of the present case and in view of the said judgment, the appeal deserves to be dismissed.

4. We heard the argument of the learned Counsel on either side and perused the materials on record.

5. It could be seen from the records that a dispute arose between the workers of the cement industries represented by Indian National Cement Workers Federation and the employers represented by cement manufacturers association and was referred to arbitration u/s 10-A of the Industrial Disputes Act, 1947. The Charter of Demand contained fifty demands including among other things increase in basic wages, dearness allowance, house rent allowance and other allowances. Demand No. 47 was to the effect that all the employees should be given the interim relief of Rs. 800/- per month with effect from July 1, 1986 i.e., the day immediately following the expiry of the previous settlement. Pending arbitration, as the workmen pressed for interim relief forming part of demand No. 47, an interim award was passed on January 22, 1988 to the effect that every employer in the cement industry would pay a sum of Rs. 2,500/- to the workers as against the benefit under the award of the arbitration Board. The said amount was directed to be paid in three instalments, the first of which is a sum of Rs. 1,000/- has to be paid on January 31, 1988 and the second instalment of likesum has to be paid on March 31, 1988 and the third instalment in a sum of Rs. 500/- was to be paid on July 31, 1988. On September 12, 1988, under the threat of strike, another interim award came to be passed for payment of Rs. 1,100/- to the workers as against the benefit under the final award. The said amount was agreed to be paid in four instalments, the first three instalments at the rate of Rs. 300/- each have to be paid on October 31, 1988, January 31, 1989 and April 30, 1989 respectively and the balance amount of Rs. 200/- has to be paid on June 30, 1989. On May 10, 1989, a final settlement was arrived at u/s 12(3) of the Industrial Disputes Act. The material terms of the settlement are extracted in the latter paragraph.

6. The respondent Regional Provident Fund Commissioner by their notice dated

June 16, 1989 having treated the payments as increase in basic wages directed the appellant to pay the P.F. contribution. When disputed before the Regional Provident Fund Commissioner by the appellant, by reason of the order impugned in the writ petition, the Regional Provident Fund Commissioner concluded that the interim advance paid for the period from July 1, 1986 to July, 1988 and again from August 1, 1988 to June, 1989 at the rate of Rs. 100/- per month was paid in lieu of interim relief of Rs. 800/- per month under Charter of demand No. 47 and other demands such as increase in basic wages, that the interim advance of Rs. 400/- paid for the period from January 1989 to April 1989 had been adjusted towards the basic wages increase and the balance Rs. 200/- payable as interim advance for the months of May 1989 and June 1989 had been agreed to be paid as basic wages increase for the said month at the rate of Rs. 100/- per month. The interim advance of Rs. 100/- per month paid for the period from July 1, 1986 to June, 1989 is a recurring payment and paid to all the employees of the establishment and it was earned by the employees as the said interim advance was paid on the basis of number of days worked in a month. The said order was challenged before the Writ Court. By reason of the order impugned in this writ appeal, the learned single Judge confirmed the same.

7. In order to resolve the issue, it is necessary to refer the relevant statutory provisions and the terms of settlement. Sections 2(b) and 6 of P.F. Act reads thus:

2(b). 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 contract of employment and which are paid or payable in cash to him, but does not include

(i) 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 employments.

(iii) any presents made by the employer.

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 six-and-a-quarter per cent 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 contributions shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires and if the scheme makes provision therefor, be an amount not exceeding eight-and-one-third per cent of his basic wages (dearness allowance and retaining allowance (if any))....

8. The material clauses of the Settlement" dated May 10, 1989 reads thus:

1. The interim advance paid with effect from July 1, 1986 to December 31, 1988

will be deemed to be an ad hoc lump sum payment. This payment will not be adjusted or otherwise recovered and will not qualify for any of the fringe benefits, statutory or otherwise.

2. On and from January 1, 1989, there will be an increase of Rs. 100 per month in the basic pay of all eligible employees. For the months January 1, 1989 to April 20, 1989, the interim payment of Rs. 400/- will be adjusted against the basic wages increase of Rs. 400/- due for this period. Similarly, the balance amount of Rs. 200 would be payable as interim advance for the months of May and June, 1989 will now be paid as basic wages increase....

3. The basic pay increase of Rs. 100 p.m. from January 1, 1989 will qualify for all the fringe, statutory and other benefits.....

4. As and from January 1, 1989 there will be a special payment called "Settlement Benefits" at the rate of Rs. 50/- per month from January 1, 1989 and further settlement benefit of Rs. 40/- per month from January 1, 1990 and from January 1, 1991 there will be another payment of special settlement benefit of Rs. 40/- per month. These settlement benefit payments will not qualify for any fringe benefits, statutory or otherwise.....

9. Term (1) of settlement dated May 10, 1989 was pressed into service to contend that the ad hoc lump sum payment would not qualify as basic wages in terms of Section 2(b). The terminology used in term (1) of settlement "payment will not be adjusted or otherwise recovered and will not qualify for any of the fringe benefits, statutory or otherwise" cannot be interpreted as contended by the learned Counsel for the appellant. As per the clauses contained in the settlement, which have been extracted above, it is evident that the interim payment for the period from July 1, 1986 to July, 1988 and again from August 1, 1988 to June, 1989 at the rate of Rs. 100/- per mensem was paid in lieu of interim relief of Rs. 800/- per month sought for in demand No. 47 of the Charter of Demands. Further, it could be also seen that the advance of Rs. 400/- paid for the period from January 1989 to April 1989 has been adjusted towards basic wages increase and the balance of Rs. 200/- payable as interim advance for the months of May and June 1989 has been agreed to be paid as "basic wages increased for the said period at the rate of Rs. 100/- per month. In addition to that, it could be seen that the interim advance of Rs. 100/- per month for the period from July 1, 1989 to June 1989 is the recurring payment and paid to all the employees of the establishment and it was earned by the employees as the said interim advance was paid on the basis of the number of days worked in a month. Hence, on the face of the terms contained in the settlement, it is amply clear that the payments were made in meeting the demand No. 47 and other demands. Otherwise, it amounts to increase in "basic wages", as defined in Section 2(b) of the Act.

10. In the decision relied on by the learned Counsel for the appellant in the case of Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance

Corporation, , the appellant company introduced the Inam Scheme in the year 1955. In the Scheme itself, it was indicated that the payment of Inam did not become the terms of the contract of employment. The Inam would be paid if the specified conditions were fulfilled by the employees. The Scheme also stated that the Management reserved the right to withdraw the Scheme altogether without assigning any reason or to revise the condition at the Management's discretion. The Scheme also contained another clause that the Inam would not be paid even if the target has not been reached by the employee for certain other reasons, which are not attributable to them, but attributable to the Management. Having regard to the several such conditions, the Apex Court has come to the conclusion that the payment of Inam was not enforceable as one of the terms of employment, whether implied or expressed.

11. Reliance has been placed by the learned Counsel for the appellant on a Division Bench judgment of this Court in the case of Employees' State Insurance Corporation, Madras v. E.I.D. Parry (India) Limited (1984) 1 LLN 159, wherein while considering the Settlement arrived at u/s 18(1) of the Industrial Disputes Act and Rule 25(1) of Madras Industrial Disputes Rules, the Division Bench has held that

it was perfectly legitimate for the employees, while settling their dispute, to come to a settlement, that such payment shall not be reckoned for purposes of provident fund, bonus, gratuity, Employees' State Insurance contributions, etc., and to clarify the matter when the provisions of the Industrial Disputes Act do not forbid such a settlement or make such a provision in a settlement invalid.

The said judgment has been rendered after considering the terms of the settlement viz., Sub-clause (iii) of Clause (I), which, without any ambiguity, has stated that the flat ad hoc allowance and incentive earnings under (i) and (ii) above shall not be reckoned for purposes of provident fund, bonus, gratuity, Employees' State Insurance, etc.

12. In the other Division Bench judgment of this Court relied on by the learned Counsel for the appellant in the case of Regional Commissioner, EPF, Tamil Nadu and Pondicherry v. Management of Southern Alloy Foundries (P) Limited 1982 1 LLJ 28, the question was whether the special allowance paid by the employer to the employee as a result of agreement entered into between the parties could be said to form part of dearness allowance or not for the purpose of calculating the contribution payable by the employer under the provisions of the Employees Provident Fund Act. After referring to the definition clause 2(b) and the judgment of the Supreme Court in Bridge and Roof Company (India) Limited v. Union of India 1962 11 LLJ 490, has held that the special allowance was not agreed to be treated by the employer and the employees as part of the basic wages or dearness allowance and, therefore, it cannot be included for computation of the contribution payable by the employer under the provisions of the Employees Provident Fund. In that case, the Commissioner has recorded a finding that special allowance is deemed to be dearness allowance. The Division Bench has

pointed out that the Office like the appellant has no power to deem something to be something else., which it is not, it being the prerogative only of the Legislature.

13. Having regard to the facts of the present case and the terms of the settlement dated May 10, 1989, none of the above ratio decidendi can be made applicable, in our view, to the facts of the present case.

14. A recent judgment of the Supreme Court in the case of H.P. State Forest Corporation Vs. Regional Provident Fund Commissioner, , was also relied on by the learned Counsel for the appellant to contend that after the lapse of two decades, the action of the authorities responding to recover the contribution from the appellant would not further the intention of the Legislature. In that case, the inaction was on the part of the, Commissioner to initiate proceedings within a reasonable time. Having regard to that fact, the Supreme Court has held that inaction on the part of the Commissioner to initiate proceedings within a reasonable time has to be deplored., However, as the Corporation itself had submitted that it was covered under the Act and in view of the limited relief granted by the authorities below and by the High Court, the Supreme Court declined to interfere with the matter at that stage and directed that the amount due from the Corporation would be determined only with respect to those employees, who are identifiable and whose entitlement could be proved on evidence. It is pertinent to state here that this aspect of the matter has not been argued either before the authorities under the Act or before the Writ Court. For the first time, it has been raised in the appeal. Hence, we are not inclined to go into this aspect of the matter. Even otherwise, the cited case cannot be applied to the facts of the present case on the simple reason that the settlement u/s 12(3) and 18(3) have been arrived at on May 10, 1989 and on June 16, 1989, the respondent has initiated the proceedings. The appellant has agitated the matter before the Provident Fund Commissioner, who passed his order clearly as on December 1/4, 1989. The writ petition, which was filed before this Court in the year 1990 has been disposed of on June 14, 2002 and it appears from the record that the appeal has been presented on August 5, 2002 but taken on file only on August 4, 2005, as the appellant has not taken any immediate action to get the appeal numbered and to bring for admission. Hence, in this case, no inaction can be attributed to the respondent.

15. The workmen have inherent right to collective-bargaining under the Act. The demands raised by the workmen through their unions are decided by arbitration. When the arbitration proceedings were protracted, interim awards were passed. Interim awards; were subsequently considered in the final award and their adjustment has been clearly stated therein. Merely because a term has been introduced that the amount paid as ad hoc lump sum payment and would not qualify for any fringe benefit, statutory or otherwise, could not by itself take away the character of the payment, which is amplified in Clauses (2) to (4) of the settlement dated May 10, 1989.

16. In an identical set of facts, in respect of sugar industries, a question raised as to whether certain payments made to the employees by the employer for the period from January 1, 1988 to September 30, 1989 pursuant to a concluded settlement entered between the employer and various unions represent the basic wages within the meaning and for the purpose of Employees Provident Fund Miscellaneous Provisions of the Act has been considered by the Division Bench of this Court in W.A. Nos. 619, 620 and 1953/1999 and 504/2001 dated March 30, 2001 and the Division Bench after taking into consideration of the various judgments of the Supreme Court viz., *The Buckingham and Carnatic Co. Ltd. Vs. Venkatiah and Another*, *M/s. Whirlpool of India Ltd. Vs. Employees' State Insurance Corporation*, *Wellman (India) Pvt. Ltd. Vs. Employees' State Insurance Corporation*, *Bridge & Roof Co. (India) Limited v. Union of India* (supra), *The Daily Partap Vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh*, and *Prantiya Vidhyut Mandal Mazdoor Federation Vs. Rajasthan State Electricity Board and others etc. etc.*, held thus:

...We hold that it cannot be stated that what is being paid is a lumpsum or ad hoc one time payment. As pointed out above, it is quite plain, it was never intended and never envisaged and never laid down so. In order to test the contention, it is necessary to consider what the position would have been if this contention is to be upheld, it will defeat the statutory measure and result in denial of social security measure. In this statute there is no such circumstances to cut down the meaning of the words basic wages" so as to exclude the payment in question from being assessed for contribution.

The said decision squarely applies to the facts of the present case.

17. For all the above reasons, the writ appeal fails and the same is dismissed. However, there is no order as to costs.

18. Consequently, the connected W.A.M.P. is also dismissed.