
(1997) 07 RAJ CK 0044
In the Rajasthan High Court
Case No : C.W.P. No. 1112 of 1986

D.C.M. Limited

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 02-07-1997

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2, 7A

Citation : (1998) 79 FLR 913 : (1998) 1 LLJ 979 : (1997) 3 RLW 1995 : (1997) WLC 665 : (1997) 2 WLN 10

Hon'ble Judges : V.K. Singhal, J

Bench : Single Bench

Advocate : M.D. Agrawal, for the Appellant; Narendra Jain, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Singhal, J.—The petitioner has challenged the order of determination of dues u/s 7A of the Employees' Provident Funds and Misc. Provisions Act, 1952 dated May 6, 1986 by which the liability in respect of Good Work Reward and Contractor's Employee was determined.

2. The submission of the learned counsel for the petitioner is that good work reward has been paid to the employees for the over time which does not fall within the definition of basic wages as defined u/s 2(b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. It is also submitted that the words "any other similar allowance payable to the employee" have also been used u/Section 2(b)(ii) and as such even if the amount does not fall within the category of "over time allowance" then it is "any other similar allowance". The second point which has been raised is with regard to liability which has been fixed on account of Contractors' employee and good work. It is stated that those employees were neither employed by the petitioner Company nor are known to the petitioner and few of the contractors are already covered under the Act and are paying dues. It is also stated that the notice has not been given for all the contractors while the liability has been determined in respect of various

contractors and thus, the petitioner is deprived of basic principles of audi alterem partem.

3. In this regard it may be observed that in the order of determination dated May 6, 1986 the Commissioner observed that the petitioner has not furnished the particulars relating to contractors' employees, their pay etc., except to the extent that few of their transport contractors have been stated to be already covered under the Act and the other two do not own any truck but only arrange trucks from the market whenever required.

4. Written submissions were made on October 18, 1985 in respect of the period 1967-68 to 1984-85 for the payments towards Good Work Reward. The payments for the notice period upto 1983 were Rs. 1,70,06, 156. In respect of employees engaged through transport contractors for transport and handling of material the notional wages were computed at a figure of Rs. 1,21,86,720/- in which margin of 25% was given and thus total liability i.e. liability of provident fund on account of Good Work Reward was fixed at a figure of Rs. 28,53,895/- and in respect of Contractors' employees Rs. 20,41,801/-.

5. The basic contention which has been raised in the present matter and the facts also do not appear to be in dispute and the nomenclature of Good Work Reward was used by the petitioner Company for the work done by the work-men beyond normal working hours and even beyond over time hours. Though, there had been some factual dispute also, but I am not going on that matter and assuming that Good Work Reward was paid for the work done by the employees beyond normal working hours and over time hours, the question arises as to whether such payment could be considered to be over time and if it is not for the over time whether then it could be said to be similar allowance having the nature of over time.

6. The words "over time allowance" have not been defined under the Act of 1952. u/s 59 of the Factories Act, 1948 the provisions exist for making the payment of extra wages for over time. It provides that where a worker works in a factory for more than nine hours in any day or for more than forty-eight hours in any week, he shall, in respect of over-time work, be entitled to wages at the rate of twice his ordinary rate of wages. Section 51 refers to the weekly hours and no adult worker shall be required or allowed to work in a factory for more than forty-eight hours in any week. Section 64 provides the power to make rules and it has been left to the State Government to make the rules for over time. Sub-section (4) of Section 64 provides that in making such rules the State Government shall not exceed, the limits which have been given therein and total number of hours of work in any day is restricted to 10 hours. There are other restrictions also and in a week the total number of over time hours cannot exceed 12, even they cannot be more than 50 hours for over time work. According to the learned counsel for the petitioner if the work is undertaken beyond outer limit which has been fixed u/s 64(4) of the Act of 1948, it remains in the nature of over time and for which the company could be made liable under

the Factories Act, but so far as the Act of 1952 is concerned, it is submitted that it should be considered to be over time allowance and if it is not over time allowance, then it is similar allowance payable to an employee and, therefore, the exclusion clause u/s 2(b) would apply so as to determine any liability on good work reward.

7. I have considered over the matter. The liability under the Act is not depending on the phraseology used by the employer. For taking the work beyond the hours fixed under the Factories Act, one may call it as over time allowance, others may call it as extra work allowance or extra hours allowance and there can be different nomenclature for that purpose. The question which has to be determined is whether the payment which has been made to a workman/employee in respect of the period which does not fall within normal duty hours or within over time hours would be said to be over time allowance or is a payment of similar nature to fall within the category of similar allowance payable. Basic wages includes all the emoluments which are earned by an employee while on duty. The exception has been provided in Clauses (i), (ii), (iii) of Section 2(b). Since, the Act of 1952 has not defined the over time allowance the expression used under the Factories Act, 1948 therefore, has to be seen. Under the Factories Act, the working beyond time specified for over time is completely prohibited and such a payment is not considered the over time allowance. Section 59 of the Act of 1948 has provided the rate of double wages for over time. Neither there is any provision in this Act with reference to the working of an employee beyond over time prescribed under the Factories Act. A work which is completely prohibited by an Act cannot be considered to be falling within the purview of that Act. Even otherwise, the Act of 1952 is beneficial legislation and is meant for the welfare of the workmen. The employer may act in its interest to take work which is forbidden by the Act. If such work is taken then he cannot complain that the employee is not to be benefitted by the contribution of the provident fund. Firstly, the work which is forbidden or per se illegal and does not fall within the definition of over time in view of the restriction being imposed on the working hours cannot be considered to be over time and secondly if the work is obtained by the employer contrary to the Act or the Rules made then he cannot get the benefit of his own wrongs. Normally, the good work reward could be for the good work which is performed by an employee during the course of employment which may be during the normal factory hours or during over time hours, such an award would partake the same character as the basic wages are i.e. if it is paid for any good work during the normal office hours then it would be part of the basic wages and if it is in respect of over time, then it would be part of over time, if it is neither in respect of normal working of the factory nor in respect of over time, then it would be covered by the definition which has been given u/s 2(b) of the Act of 1952 of basic wage is exhaustive. The first line of the definition of basic wages which incorporates all emoluments which are earned by an employee while on duty, includes all such payments which are made to an employee other than those which are specifically excluded. The specific exclusion

is of over time allowance and since the allowance which has been paid cannot be considered to be over time allowance, the exclusion clause would not apply. It may be observed that under the Factories Act and the Rules made thereunder separate accounts and registers have to be maintained for over time work and admittedly the present allowances of work done for which good work reward was given, were not incorporated in such registers and do not fall within over time permitted under the Factories Act. The Apex Court in the case of Regional Provident Fund Commissioner Vs. S.D. College, Hoshiarpur and others, has also considered the Act of 1952 as a beneficial welfare legislation to ensure help and other benefits to the employees. In the case of Regional Provident Fund Commissioner Vs. M/s. K.T. Rolling Mills Pvt. Ltd., it was also observed that the Act was enacted to serve beneficent purpose and it does not constitute a welfare measure, as it seeks to create a fund which could be drawn upon by certain categories of employees working in factories and some establishments to meet pressing demands so also to provide pensions after the employees have ceased to be in service. The Company which has acted contrary to the provisions of the Act cannot take benefit of its own wrong and say that the provident fund is not payable to such a worker to whom good work allowance has been paid.

8. The contention that the good work allowance is in the nature of over time allowance and "other similar allowance" which have also been excluded from the definition of basic wages. This contention has also no force because applying the theory of *No Scitur Asociis* i.e. the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it. Thus only those allowances which are of the nature specified under the exclusion clause would be considered to have been excluded. Since, the good work allowance has not been considered to be in the nature of over time allowance, therefore, it cannot be considered that it is of similar nature as "over time" as it is contrary to the provisions of the Act.

9. The next contention which has been raised is with regard to inclusion of the amount of contractors employees for which it is stated that the said employees were not the employees of the Company. This matter was considered by the Apex Court in the case of *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, as well in the case of *P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others*, and followed in the case of *Mridang Cinema v. UOI and Ors.* 1989 (2) RLR 834 where the employees of independent Contractor were considered employees within the definition given under the ESI Act. The contractor's employees in the present case were for loading and unloading in respect of transport contract entered into. On the basis of the agreement which has been entered into the Contractor was to employ certain employees. The petitioner Company has submitted in its reply that two of such contractors were already covered in the purview of the Act of 1952 and the employees of those two contractors have been excluded in determining the liability of the petitioner. In respect of rest of them, no such allegation was raised. The notice which has been issued to the petitioner is for contractors

employees" liability and not for the transporters employees" liability. The determination which has been made was on account of non-furnishing the complete details and particulars. The notices which were issued to the petitioner, cannot be considered to be vague. In a case where the information was not furnished to the assessing authority by employer he can make the assessment to the best of his judgment on the basis of information on record available with them. It is not necessary for taking the employees of the contractor within the purview of the Act as the liability of the petitioner as a principal employer, that principal employer should know as to which are those employees, nor it is necessary that they should be employed after taking the consent of the principal employer. The definition of Employee Under Section 2(f) refers to any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer and includes any person employed by or through a contractor in or in connection with the work of the establishment. This definition makes it clear that even if the contractor has employed any person then he will be an employee of an establishment and if it is in connection with a work of the establishment then he will be the employee of the principal employer. It is not necessary that the order of employment would be issued by the Principal employer. The work of transportation was in connection with the work of establishment. Learned counsel for the petitioner has submitted that the employees of loading and un-loading are already covered and, therefore, the dispute remains for the employees of the contractor who were engaged in transportation. Since, the work is also in connection with the work of establishment though employed through a contractor, they will be considered to be employee as defined u/s 2(f) of the Act of 1952. The contention that the notice was issued for the limited purpose for determining the liability of transporter employee alone and not of all the contractors" employees has also no substance in view of clear language of notice issued to the petitioner in which the liability is sought to be determined over the contractors" employees.

10. In these circumstances, I do not feel that any mistake has been committed by the respondents in determining the liability.

11. The writ petition having no force is accordingly dismissed.