

(2003) 07 RAJ CK 0115

In the Rajasthan High Court

Case No : S.A. (W) No. 1339 of 1997 and C.M.S.AIn Writ Petition No. 1112 of 1986

D.C.M. Shriram Consolidated Limited

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 29-07-2003

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2
Factories Act, 1948 — Section 59

Citation : (2004) 102 FLR 424 : (2004) 3 LLJ 396 : (2004) WLC 365

Hon'ble Judges : S.K. Keshote, J;K.S. Rathore, J

Bench : Division Bench

Advocate : M.D. Agarwal, for the Appellant; N.K. Jain, for the Respondent

Judgement

S.K. Keshote, J.—These two matters are in between the same parties and arising from the proceedings initiated by the respondent Regional Provident Fund Commissioner, Nidhi Bhawan, Jyoti Nagar, Jaipur (for short, the "respondent-Commissioner") u/s 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter shall be referred to as "the Act, 1952") and, thus, the same are taken up for hearing together and are being decided by this common order. In the writ petition, the petitioner D.C.M. Limited, Bara Hindu Rao, Delhi-6 (the appellant in the special appeal) (hereinafter shall be referred to as "the establishment firm") challenged the order dated May 15, 1985 of the respondent-Commissioner. This order is enclosed of the writ petition as Annexure-15 at page Nos. 71-77. Under this order, the respondent-Commissioner held that the employees of the transport contractors are the employees of the establishment for the purpose of the Act, 1952 and that the Good Work Reward (for short, "GWR") given to the employee is not in the nature of overtime. The respondent-Commissioner after recording the findings on these points against the establishment under the impugned order, ordered to proceed further to determine the amounts of provident fund due in respect of the contractor's employees as well as on the amounts paid by the establishment firm

to their workers as GWR.

2. The writ petition came up for preliminary hearing of the Board on October 7, 1985. Shri N.K. Jain put appearance for the respondent-Commissioner. The writ petition was admitted on August 18, 1986. On that day on the stay application, after hearing the learned counsel for the parties, the Court ordered that the Regional Provident Fund Commissioner shall proceed with the determination of the amount payable as contribution. As and when the determination is made the payment of the amount of provident fund contribution on Good Work Reward employer's contribution shall remain stayed provided that the petitioner furnishes a Bank Guarantee to the satisfaction of the Regional Provident Fund Commissioner within a period of one month of the order of determination to the effect that in the event of dismissal of the writ petition, the petitioner or the Bank shall pay the amount alongwith interest at the rate of 12% per annum. The Court has not granted any stay so far as the provident fund contribution on the amount of Good Work Reward is concerned. The respondent- Commissioner under its order dated May 5, 1986 determined the amount of provident fund contribution payable by the establishment firm under the different heads on GWR and the contract employees. On GWR the amount of contribution payable by the establishment firm was fixed at a figure of Rs. 28,53,895/- and in respect of the Contractor's employees it was Rs. 20,41,801/-. This order has been challenged by the establishment firm by filing S.B. Civil Writ Petition No. 1112/1986. In that writ petition, the learned single Judge was not pleased to grant the interim relief against the recovery of the amount of contribution determined by the respondent-Commissioner for the Contractor's employees. The writ petition was decided by the learned single Judge on July 2, 1997 against the establishment. That judgment of the learned single Judge is under challenge in the special appeal.

3. Shri M.D. Agarwal, the learned counsel for the establishment contended that GWR is the overtime and thus it is not included in basic wages. He read out before us Clause (b) of Section 2 of the Act, 1952. It has next been contended that though the contractor's employees are covered under the Act, 1952 but the Contractors who were working with the establishment firm were covered establishment under the Act, 1952. It is urged that for those employees the covered contractors were depositing the contribution and thus for them no liability could have been fastened on the establishment. But it has been done and it resulted in double payment of the contribution. He fairly submitted that in respect of the uncovered employees the respondent-Commissioner could have ordered for payment of contribution against the establishment firm. This aspect of the matter has not been considered by the respondent Commissioner as well as the learned single Judge.

4. Per contra Shri N.K. Jain, the learned counsel appearing for the respondent-Commissioner, submitted that GWR is not a overtime payment. It is an incentive and thus is the basic wages and accordingly the contribution is to be made on that amount by the establishment firm for the employees.

5. As regards the second contention raised by Shri M.D. Agarwal, Shri N.K. Jain submitted that the Commissioner has taken all the care and it is not the case of double charge of the contribution. Shri Jain very fairly submitted that otherwise it is a matter of record and where it is shown that the payment of the contribution of those employees is made by the Contractors, certainly to that extent, the amount recovered by the respondent-Commissioner is liable to be refunded to the establishment.

6. We have given our anxious and thoughtful consideration to the rival contentions raised by the learned counsel for the parties and also carefully scanned all the material facts of the case.

7. Basic wages, as per Clause (b) of Section 2 of the Act, 1952, 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 it 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 allowances, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment; and

(iii) any present made by the employer.

8. The learned counsel for the establishment firm does not dispute that the word "overtime allowance" is not defined in the Act, 1952. The learned counsel for the respondent-Commissioner submitted that the "Factories Act, 1948 (for short, "the Act, 1948") is relevant to understand the word "overtime allowance" for the employees working in the establishment firm. In the absence of the definition of the word "overtime allowance" in the Act, 1952, it is necessary to look into the provisions of the Act, 1948 to understand and determine whether any particular payment is overtime or not. Section 51 of the Act, 1948 prescribes "weekly hours" of the employees working in the factory. No adult worker, as per the provisions of this Section of the Act, 1948, shall be required or allowed to work in a factory for more than forty- eight hours in any week.

9. Section 54 of the Act, 1948 provides that subject to the provisions of Section 51, no adult worker shall be required or allowed to work in a factory for more than nine hours in any day. However, there is a proviso to this provision which provides that subject to the previous approval of the Chief Inspector, the daily maximum specified in this Section may be exceeded in order to facilitate the change of shifts.

10. Section 55 of the Act, 1948 is the provision relating to intervals for rest and the period of work of an adult worker in a factory each day shall be so fixed that no period shall exceed five hours and that no worker shall work for more than

five hours before he has had an interval for rest of at least half an hour. Sub-section (2) of Section 55 of the Act, 1948 empowers the State Government or subject to the control of the State Government, the Chief Inspector, by written order and for the reasons specified therein, to exempt any factory from the provisions of Sub-section (1) so however that the total number of hours worked by a worker without an interval does not exceed six.

11. Section 56 of the Act, 1948 makes a provision that the period of work of an adult worker in a factory shall be so arranged that inclusive of his intervals for rest u/s 55, they shall not spread over more than ten and a half hours in any day. Proviso to this section lays down that the Chief Inspector may, for reasons to be specified in writing, increase the spread-over up to twelve hours.

12. Section 59 of the Act, 1948 makes a provision for extra wages for overtime. It says 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 overtime work, be entitled to wages at the rate of twice his ordinary rate of wages.

13. The burden to establish to the satisfaction of the respondent-Commissioner that the GWR was not the part of the basic wages was on the establishment firm. The establishment firm has failed to produce on record that GWR was in fact not the part of the basic wages of the employees of the establishment firm. In case this payment under the head GWR was overtime allowance, what was the difficulty with the establishment firm to have named it and to have shown this payment under that head. It is difficult to accept that the Officers of the establishment firm were not aware (sic) of the provisions of the Act, 1952. The overtime allowance is not basic wages as per Clause (b) of Section 2 of Act, 1952 and thus there is no liability or obligation of the establishment firm to pay the contribution for that amount but the establishment firm has not paid it as overtime allowance. This amount is paid in the name of GWR. GWR as what its name goes and suggests a reward for good work, an incentive.

14. The learned counsel for the establishment has failed to cite any authority of any High Court or the Hon'ble Supreme Court where the payment is made for incentive is not taken to be the part of basic wages under Clause (b) of Section 2 of the Act, 1952. The scheme of the Act, 1948 is clear which provides that only in case the establishment takes the work from the employee exceeding the working hours prescribed under that Act, the liability falls for payment of the overtime allowance. Only on oral submission made that the amount paid under the GWR to the employees cannot be taken as (sic) the overtime allowance. The Act, 1952 is the benevolent piece of the legislation. It has socio-economic object and purpose. The contributory provident fund scheme is provided for the benefits of the employees working in the factories, industries and establishment so the employee may have the economic security for his maintenance during his old age after his retirement. Thus, the words and phrases used by the establishment firm in the matter of payment of the allowances, wages etc. are to be interpreted and

understood so as to advance the benefits of these provisions of the benevolent piece of legislation to the beneficiaries thereof.

15. If what is contended by the learned counsel for the establishment firm is (sic) accepted, it will be detrimental to and the sufferers will be the low paid employees. It is to be stated at the cost of repetition what for this word GWR has been used, in case it was an overtime allowance.

16. We have gone through Pay Rolls produced along with the writ petition and have no hesitation to state that there is no head of the payment of overtime allowance therein. This is a writ of certiorari and we do not find any error apparent on the face of the order of the respondent-Commissioner which calls for our interference. The respondent- Commissioner is correct in his approach that wherever prescribed daily hours are exceeded the prior permission of the Chief Inspector of Factories is to be obtained, except to the extent exemption for the operation of the particular provision has been granted by the State. Government in the Rules framed under those provisions. The establishment made no attempt to show that prior permission of the Chief Inspector of Factories was obtained to detain the workers beyond the prescribed hours of work for which GWR is being paid to them. Not only this even there are no pleadings made by the establishment that the State Government has granted exemption to the establishment firm from operation of the mandatory provisions.

17. Referring to the statement of the witness of the establishment, the respondent-Commissioner found that the witness has unequivocally confessed that the workers who are detained beyond their normal working hours up to the exemption of the limits they are paid overtime and over and above that is GWR. From this statement of the witness of the establishment firm there remains no doubt whatsoever that the amount paid as GWR is not overtime in law. It has rightly not been treated and taken as overtime within the meaning of Clause (b) of Section 2 of the Act, 1952 by the respondent-Commissioner.

18. As regards another contention raised that GWR is to be treated as such and taken to be the allowance similar to the overtime allowance, firstly it is not similar to the overtime, secondly if it is taken so, rightly the respondent-Commissioner pointed out that it will tantamount to taking cognizance of an illegality as committed by the establishment firm. If a worker is detained for work either at the place of any work or to complete the work of emergent nature he will be deemed to be on duty and extra amount earned by him from such duty which are over and above the amount of overtime, legitimately earned by him, will be basic wages within the meaning of Clause (b) of Section 2 of the Act, 1952 and all such payments shall be liable for provident fund contribution.

19. As regards the second contention raised, by Shri Agarwal, it is suffice to say that it is a matter of accounts for which it is always open to the establishment firm to bring the fact to the notice of the respondent-Commissioner. In case the respondent- Commissioner is satisfied on the basis of the record produced by the

establishment firm that for the contractor employees the establishment firm is made liable for the payment of the contribution, the contractor is covered and paid contribution certainly he has no option except to refund that amount to that extent to the establishment firm. For this the establishment has to provide that the contractor was covered under the Act, 1952, he has deposited the contribution of the provident fund in respect of the employees who were working on contract with the establishment firm and the documentary evidence to establishment firm the deposit of the amount. In case the establishment firm has produced such material, before the respondent-Commissioner, he will consider the same and pass appropriate order.

20. In view of the foregoing discussion, both the writ petition and the special appeal are devoid of any substance and merit. Accordingly, the same are dismissed. However, there shall be no order as to costs.

21. As the writ petition and the special appeals are dismissed, the stay applications filed therewith do not survive and the same are also dismissed.