

(2017) 04 GUJ CK 0001

In the Gujarat High Court

Case No : Special Civil Application No. 1313 of 2011

Deepak Nitrite Limited

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 03-04-2017

Acts Referred:

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

Citation : (2017) LabLR 489 : (2017) 2 LLN 184

Hon'ble Judges : Mr. K.M. Thaker, J.

Bench : Single Bench

Advocate : Mr. K.M. Patel, Senior Counsel with Mr Varun K. Patel, Advocate, for the Petitioner No. 1; Ms. E. Shailaja and Ms. Sheela, Advocates, for the Respondent No. 1; Mr. Amresh N. Patel, Advocate, for the Respondent No. 2

Final Decision : Dismissed

Judgement

Mr. K.M. Thaker, J.— Heard Mr. K.M. Patel, learned senior counsel with Mr. V.K. Patel, learned advocate for the petitioner company and Ms. Shailaja, learned advocate for the respondent P.F. Department.

2. In present case, the petitioner has placed under challenge order dated 6.12.2010 passed by the learned Employees' Provident Fund Appellate Tribunal and the order dated 4.4.1996 passed by respondent No. 1 RPFC in exercise of powers under section 7A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act").

3. By his order dated 4.4.1996, the respondent No. 1 held that the amounts paid in name and style of "production incentive" would fall within the purview of the term "basic wages" as defined and contemplated under the Act and consequently, the said payments liable to be taken into account for calculating contribution payable towards provident fund and other funds under the Act.

3.1 Feeling aggrieved by the said order dated 4.4.1996, present petitioner filed appeal before the learned Appeal Tribunal. The learned Tribunal, vide its order

dated 6.12.2010, confirmed the said decision of respondent No. 1 and rejected the appeal (ATA No. 926 (5) 2004) filed by present petitioner.

4. So far as factual background is concerned, it has emerged from the record and submissions by learned advocates for the petitioner and the respondent P.F. Organization that the petitioner is a company incorporated under the Companies Act, 1956 and it is also an establishment covered under the Act. It is claimed that the petitioner is an exempted undertaking/establishment because since 1973 it has established and set up its own provident fund trust.

4.1 The petitioner claims that its employees are paid salary as well as other benefits and other perquisites under and in accordance with settlements arrived at between the workmen/union and the company. It is also claimed that one of such settlements was arrived at in September 1992 which brought in operation "production incentive scheme". It is further claimed that the said settlement was arrived at between the parties during pendency of Reference No. 10 of 1992 and the learned Industrial Tribunal, after considering the settlement, passed award dated 2.9.1992 in terms of the settlement.

4.2 It is further claimed that subsequently, somewhere in May 1994, the respondent No. 2 issued notice dated 12.5.1994 under Section 7A of the Act on the ground that the petitioner had committed default in payment of provident fund contribution in respect of its employees inasmuch as contribution in respect of the amounts paid to the employees towards so-called production incentives, i.e. in name and style of incentive have not been paid.

4.3 It is claimed that the petitioner opposed the notice by filing reply in July 1994. It is also claimed that the petitioner placed on record before the respondent No. 1 relevant material/documents with the contention and explanation that the demand was unjustified and production incentive would not come within the purview of the term "basic wages" defined under section 2(b) of the Act. However, the respondent No. 1 did not accept the said reply and contentions and passed order dated 4.4.1996 holding, inter alia, that the amounts paid by the petitioner is part of basic wages and that, therefore, contribution should be paid in respect of the amount paid in name of "production incentive".

4.4 Feeling aggrieved by such direction, the petitioner had filed petition, i.e. Special Civil Application No. 3554 of 1996 in this Court. The said petition came to be disposed of vide order dated 15.10.2004 and the Court relegated the petitioner to statutory remedy under the Act, i.e. appeal before the learned Tribunal.

4.5 The said appeal came to be dismissed by the learned Tribunal vide order dated 6.12.2010 whereby the learned Tribunal confirmed the order passed by respondent No. 1. It is against the said order dated 6.21.2010 passed by the learned Tribunal that the petitioner has taken out present petition.

5. Mr. Patel, learned senior counsel for the petitioner submitted that the term "basic wages" is defined under the Act and by virtue of the said definition under section 2(b) of the Act, "bonus" is expressly excluded from the purview of the term "basic wages". He submitted that contribution towards provident fund and other funds under the Act is required to be made in respect of "basic wages" and "dearness allowance" and not in respect of any other amounts paid to the employees. He also submitted that in case of the petitioner, the production incentive is introduced by way of settlement between the workmen/union and the company and the learned Tribunal has passed an award in terms of the said settlement which provides, inter alia, that the said production incentive is paid with the object of achieving higher production and for increasing productivity by providing incentive over and above wages payable as per the settlement. He also submitted that by virtue of the provision under the settlement, it is an agreed and accepted term that the amount paid by way of production incentive would not attract provident fund and that, therefore, the demand of the Provident Fund Department for contribution in respect of the amount paid towards production incentive is unjustified and de hors the Act. He also submitted that the production incentives paid by the company to its employees are not paid to all employees in all establishments/concerns in the industry covered by the Act, i.e. it is not uniform payment to all employees in all concerns. He also submitted that since bonus is expressly excluded from the purview of basic wages, the demand and decision of the authority is misconceived and unjustified. He relied on clause 17 of the settlement which provides for payment of production incentive. He also submitted that the respondent No. 1 has not dealt with and/or decided the contentions raised by the petitioner and the respondent No. 1 passed cryptic order without dealing with and deciding the contentions raised by the petitioner. He also submitted that the respondent No. 1 erred in construing clause 17 in holding that such amount is liable for contribution. Learned senior counsel for the petitioner further submitted that respondent No. 1 erred in holding that the said incentive is nothing but part of regular wage. So as to support his submissions, learned counsel for the petitioner relied on the decisions in case of Jay Engineering Works Ltd. v. Union of India [AIR 1963 SC 1480], The Daily Partap v. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh [AIR 1999 SC 2015], TI Cycles of India, Ambattur v. M.K. Gurumani & Others [(2001) 7 SCC 204], Associated Cement Co. Ltd. v. R.M. Gandhi, Regional Provident Fund Commissioner, Gujarat & Ors. [1991 (2) GLR 1286], Manipal Academy of Higher Education v. Provident Fund Commissioner [(2008) 5 SCC 428].

5.1 Per contra Ms. Shailaja, learned advocate for the respondents submitted that there is no error or illegality in the order passed by respondent No. 1 and/or in the order passed by the learned Tribunal. She submitted that in light of the decision by Hon"ble Apex Court in case of Jay Engineering and the decision by Hon"ble Apex Court in case of Delly Pratap, the claim of the petitioner is not sustainable and actually the amount paid allegedly as incentive is part of wages

defined under Section 2(b) of the Act. She further submitted that in his order, respondent No. 1 has extensively dealt with all contentions raised by the petitioner and relevant provision under the Scheme as well as the decisions on which the petitioner placed reliance. She submitted that the learned Tribunal has also considered relevant statutory provision, the scheme and the decisions by Hon''ble Apex Court and High Court. She submitted that there is no error in the conclusion and decision by respondent No. 1 and/or learned Tribunal. She also submitted that the petition which is taken out against concurrent decisions by respondent No. 1 and learned Tribunal does not deserve to be entertained and that, therefore, the petition may be rejected.

6. I have considered rival submissions by learned advocates for the contesting parties. I have also considered the order passed by respondent No. 1 and impugned order by learned Tribunal. I have also taken into account the decisions by Hon''ble Apex Court and Hon''ble High Courts on which the contesting parties relied as well as the scheme/settlement and other material available on record.

7. From rival contentions and impugned orders, it has emerged that present dispute and the controversy on hand have arisen on account of the "production incentive scheme and productivity linked wages" which is contained in clause 17 of the settlement dated 6.8.1992. According to the petitioner, the amount paid under the said scheme cannot be considered basic wage and such amount would fall under clause 2(b) of the Act and that, therefore, the respondent cannot direct the petitioner to pay contribution in respect of the said amount.

7.1 The respondent, however, has claimed and held that the said payment would fall within purview of Section 2(b) of the Act and therefore, it is liable for contribution.

7.2 So as to support their respective submissions, learned advocates have placed reliance on certain judicial pronouncements. Therefore, it would be appropriate to take into account relevant observations by Hon''ble Apex Court.

8. Learned advocate for the petitioner relied on the decision in case of Bridge and Roof Company (supra) and submitted that Hon''ble Apex Court has applied principle of universality and he emphasized below quoted observations by Hon''ble Apex Court in the said decision:

"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 under Section 6 but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purposes of contribution."

8.1 From the said decision, learned advocate for the petitioner also relied on below quoted observations:

"This brings us to the consideration of the question of bonus, which is also an exception in clause (ii). Now the word "bonus" has been used in this clause

without any qualification. Therefore, it would not be improper to infer that when the word "bonus" was used without any qualification in the clause, the legislature had in mind every kind of bonus that may be payable to an employee.

... ..

We are therefore of opinion that there is no reason why when the word "bonus" is used in clause (ii) without any qualifying word, it should not be interpreted to include all kinds of bonus which were known to industrial adjudication before 1952 and which must therefore, be deemed to be within the knowledge of the legislature."

8.2 While relying on above quoted observations by Hon'ble Apex Court in the decision in case of Bridge and Roof Company (supra), the petitioner overlooked four points viz. (a) the system/method of payment of salary in the petitioner company provides, inter alia, payment of basic wage and dearness allowance and some other benefits/perquisites (hereinafter referred to as "the salary") to all employees in accordance with the settlement with the union and the said salary is different and distinct from the disputed "incentive" prescribed by clause 17.01; and (b) the scheme, i.e. said clause 17.01, interestingly, also guarantees, by virtue of sub-clause (2) of clause 17.01, "minimum incentive" which should be paid irrespective of level of production; and (c) under clause 17.01 the benefit is payable to the workmen irrespective of their attendance or absence during the month (for which amount is being quantified) and the said clause does not restrict payment of said "incentive" in respect of only few or specifically identified workmen who put in extra work/labour and/or who actively contribute - by way of extra or additional work/performance - for increasing output/for higher or increased production/output but it is applicable/payable to all workmen who are covered under the settlement; and (d) observations by Hon'ble Apex Court in paragraph No. 12 of the said decision, which read thus:

"12. This court had occasion to consider production bonus 1959 Supp (2) SCR 1012. (AIR 1959 SC 1095). It was pointed out that "the payment production bonus depends upon production and is in addition to wages. ...

... ..

The core of such a plan is that there is a base or a standard above which extra payment is earned for extra production in addition to the basic wages which is the payment for work up to the base or standard. Such a plan typically guarantees time wage up to the time represented by standard performance and gives workers a share in the savings represented by superior performance. The scheme in force in the Company is a typical scheme of production bonus of this kind with a base or standard up to which basic wages as time wages are paid and thereafter extra payments are made for superior performance. This extra payment may be called incentive wage and is also called production bonus. In all such cases however the workers are not hounded to produce anything beyond the base or standard that is set out. The performance may even fall below the base

or standard but the minimum basic wages will have to be paid whether the basic or standard is reached or not. When however the workers produce beyond the base or standard what they earn is not basic wages but production bonus or incentive wage. It is this production bonus which is outside the definition of "basic wages" in Section 2(b), for reasons which we have already given above."

Above quoted observations clarify that the payment of production bonus/incentive "depends on production" and is in addition to wages and in effect it is "incentive" for higher production. The said decision also clarifies that only when the workmen produce beyond the base or minimum standard then the amount earned for such additional or increased production that is not "basic wage" but "incentive wage".

8.3 Learned advocate for the petitioner also relied on the observations by Hon"ble Court in case of TI Cycles of India, Ambattur (supra). In the said decision, the controversy arose with reference to the incentive wages and the definition of the term "wage" under the Payment of Gratuity Act. In the said decision, Hon"ble Apex Court compared the definition of the term "wage"/"basic wage" under the Provident Fund Act and the Payment of Gratuity Act and after considering the observations by Hon"ble Apex Court in case of Strawboard Manufacturing Co. Ltd. (supra) as well as in case of Bridge and Roof Company (supra), Hon"ble Apex Court observed that:

"17. The Authorities were carried away by considering that the bonus is payable on the basis of output equivalent to certain pieces per manday. But it is made clear in the scheme that each payment will be made not on the basis of pieces of per manday nor is it a piece rate work for which wages are paid but it is an additional incentive for payment of bonus in respect of extra work done. The measure of extra work done is indicated by pieces and not wages as such that are paid on that basis. It is not that in respect of each piece any wages are paid but altogether if certain number of pieces are produced, additional incentive will be payable at a particular rate. Therefore, the authorities have completely missed scope of the scheme and have incorrectly interpreted the same. Inasmuch as both the High Court and the authorities have incorrectly understood the position in law and have wrongly held that the concept of wages under the Act would include bonus and that even on facts the scheme would attract Section 4(2) of the Act. Proviso to Section 4(2) of the Act is to the effect that in case of a piecerated employee, daily wages shall be computed in a particular manner but that is not the rate at which the wages are paid in the present case at all. Therefore, Section 4(2) of the Act is not attracted in the case of the present scheme with which we are concerned."

8.4 However, the petitioner overlooked below quoted observations in paragraph No. 16 of the said decision:

"It was made clear that no incentive will be payable to workmen on leave,

absent, away from duty or on holidays. The minimum performance level is indicated in each sectional incentive table and below which no incentive will be paid for any reason whatsoever. If a person works for more than one group during the month, he will be awarded incentive as per the performance of each group in the respective periods."

8.5 In present scheme on hand, there are no qualifications. Instead, the scheme on hand guarantees "minimum incentive". Besides this, in present case, it has emerged from the affidavit by the union's Vice President that the so-called "incentive" is paid, in case of petitioner company, even to the workmen who are not present on account of privilege leave, sick leave and casual leave it is only in case of absence without leave that the "incentive" is not paid. Further from the observations in said decision, it comes out that the scheme which was considered in the said decision indicated "minimum performance level in each section in incentive table". The said scheme (considered in the cited decision) also prescribed that any incentive will not be paid for performance below the minimum performance level and no incentive will be payable to workman on leave or absent/away from duty or for holidays. In present case the scheme does not contain such conditions and consequently even during the period when production is less so-called "incentive" has to be paid and even minimum guaranteed "incentive" has to be paid. It is also pertinent that the scheme in the cited decision did not guarantee minimum incentive like in present case.

8.6 Learned advocate for the petitioner also relied on the observations by Hon"ble Apex Court in case of Manipal Academy of Higher Education (supra). It is pertinent that in the said case the issue which arose for consideration before Hon"ble Apex Court was whether the amount received on encashment of earned leave would form part of "basic wage" and whether it would fall under Section 2(b) of the Provident Fund Act or not. In the decision in case of Manipal Academy of Higher Education (supra), Hon"ble Apex Court considered the case of Bridge and Roof Company (supra) and summarized, in following words, the principles which emerged from the decision in case of Bridge and Roof Company (supra):

"(a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.

(b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages. By way of example it was held that overtime allowance, though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment but because it may not be earned by all employees of a concern, it is excluded from basic wages.

(c) Conversely, any payment by way of a special incentive or work is not basic wages."

Thus, for being qualified as genuine incentive the payment must fulfil above mentioned factors or characteristics i.e. is paid specially to those who avail

opportunity and is paid for extra work and has direct nexus or linkage with extra production whereas the amount which is paid to all universally and across the board is "basic wage".

8.7 What is overlooked by the petitioner with reference to the observations by Hon"ble Apex Court in case of Manipal Academy of Higher Education (supra) is that Hon"ble Apex Court explained the facts and observations in case of TI Cycles of India, Ambattur (supra) in below quoted succinct manner:

"In TI Cycles of India, Ambattur v. M.K. Gurumani and Ors. (2001 (7) SCC 204) it was held that incentive wages paid in respect of extra work done is to be excluded from the basic wage as they have a direct nexus and linkage with the amount of extra output."

(Emphasis supplied)

8.8 Thus, Hon"ble Apex Court emphasized the fact that what is to be or what can be excluded from basic wage is the incentive which is paid in respect of "extra work done". Hon"ble Apex Court also explained the reason for such exclusion with the observations that such incentive wage paid for extra work is to be excluded because it has "direct nexus" and linkage with the extra out put.

8.9 Thus, it emerges that what is necessary for treating particular payment as "incentive" and to exclude it from the purview of "basic wage" i.e. Section 2(b) is that there must be direct nexus or linkage between the payment and extra work done coupled with extra output.

9. At this stage, it would be appropriate to consider observations by Hon"ble Apex Court in para 16 of the decision in the case of Daily Pratap. The said paragraph No. 16 reads thus:

"In order to become a genuine Production Bonus scheme payment to be made to meritorious workmen who put in extra output, has to have a direct nexus and linkage with the amount of extra output produced by the eligible workmen so that the scheme can work as a real incentive scheme equally to them to make extra efforts. Such a scheme may have sliding scales of bonus amount based to total extra quantity of production for which all workmen can uniformly be paid bonus on the basis of their cooperative efforts. More the extra production more the available surplus of bonus to be divided amongst all eligible workmen uniformly. Other type of incentive bonus scheme may be made available to an individual meritorious workman extra payment for extra work having direct linkage with the extra production out turned by him. In neither case such distributable bonus can be a static figure as in the present case. On the facts of the present case, as seen earlier, unfortunately for the appellants the scheme on which they relied does not fulfil the aforesaid legal logistic for becoming a genuine Production Bonus scheme. It is not a scheme of sliding scale bonus having real nexus with the amount of extra output furnished by the concerned workmen either individually or collectively. As seen earlier, once they crossed

even slightly the norm of work expected of them in a given shift, they all fall in the same category of eligible workmen entitled to get on uniform basis extra amount of 1.5 times the basic daily wage. Thus, this scheme of paying extra remuneration to more eligible and efficient workmen is a scheme of super wage fixation and is not a genuine scheme of incentive bonus which has to be earned by the workmen by showing their capabilities for earning such extra bonus linked up with the quantity of extra production."

(Emphasis supplied)

10. The principles which can be derived from the observations by Hon''ble Apex Court are:

(a) A genuine production bonus scheme should provide for payment to those workmen who give "extra output". The incentive or bonus is in addition to wages. It must depend upon production;

(b) The incentive or bonus is paid for superior performance and it is earned for extra production and it is paid in addition to wages, as extra payment for extra output/production above the determined base or standard of production;

(c) "extra output" is that quantity of output which is more than/above normal level of production or more than/above standard or average level of production and which is achieved by extra input/labour, by the employees;

(d) the payment in question must be paid in respect of that "extra output/production" to the employee whose contribution results into extra output;

(e) The payment should have direct nexus and linkage with the amount or degree of extra or additional work or labour (i.e. input) by workmen which results into higher/more output/production;

(f) The scheme must provide incentive which would motivate or persuade the workmen to put in more efforts. The scheme must ex facie reflect that extra payment is made to offer bonus or extra amount to those workmen who give extra input (labour work) for achieving higher or extra output;

(g) The workman who is away from duty or on leave or absent and who does not contribute, during particular period, for higher production, cannot earn incentive or bonus and therefore, genuine incentive scheme would not consider such workman eligible for payment of incentive or bonus since such amount is paid in respect of extra work done and it has direct nexus with additional output. The scheme must show that incentive is offered to the workmen who give extra input;

(h) The incentive would vary in proportion to extra production/output.

10.1 Thus, when a scheme styled as incentive wage is introduced and implemented, it could be considered and treated as genuine production incentive scheme when the scheme, while not compelling workmen to produce more/give higher production, recognises and appreciates and rewards extra work or extra

performance and thereby motivates and convinces the workman to put extra work or to improve his skill and performance so as to lead to and reach to the ultimate goal and object of better performance and increase in production above the normal or average or standard level of production. Only if such characteristics are fulfilled by a scheme, then the scheme can be considered genuine production incentive scheme.

10.2 In this context, it is relevant and appropriate to turn to and take into account observations by Hon"ble Apex Court in the decision in case of Daily Pratap observed that:

"16. It, therefore, becomes clear that in order to become a genuine Production Bonus scheme so as to get covered by exception (ii) to the definition of "basic wages" as found under Section 2(b) of the Act, it must be shown that the scheme in question seeks to offer production bonus to the workmen concerned who put in extra output wherein either collectively bonus be fixed to all of them on the basis of total extra output on a sliding scale or may be paid individually to a given number of workmen who by their own efforts earn such bonus. Thus in each case payment of bonus cannot be of a fixed or proven nature having no nexus with the quantity of extra output produced by them. As in the present case the scheme relied on by the appellants does not fulfil this legal test it does not attract the exception (ii) to Section 2(b). It remains in the realm of basic extra wage. The decision rendered by learned Single Judge of the High Court as confirmed by the Division Bench decision, cannot, therefore be found fault with. The submission of learned counsel for the appellants that in the scheme in question there was no compulsion for the workman to put in extra work and the management could not compel him to do extra work not can it allege any misconduct on the part of such workman who does not want to do excess work cannot be of any avail to the learned counsel for the appellants as even if this criteria may be common to the present scheme as well as the genuine Production Bonus scheme, the further requirement of the scheme to become a genuine Production Bonus scheme, namely, that the payment by way of bonus to the concerned eligible workman should vary in proportion to the extra output put up by him beyond the norm of output prescribed for him, is conspicuously absent in the present scheme, as seen earlier, and on the other hand, this requirement which is the very heart of a genuine Production Bonus scheme is missing in the present scheme and therefore, similarity on only one aspect between the genuine production incentive scheme and the present scheme, namely, that the workman could not have been compelled to carry out extra work pales into insignificance on the facts of the present case. Therefore, the second question has to be answered against the appellants and in favour of the respondent."

11. Since the controversy in present case has arisen in light of "production incentive scheme and productivity linked wage", it is necessary and relevant to take into account relevant clause which prescribes the modality of the productive incentive scheme:

"17.00 PRODUCTIVITY LINKED WAGES AND PRODUCTION INCENTIVE SCHEME

17.01 The Management explained in detail that the Company is facing competition and in the coming years the necessity to improve/increase the productivity has assumed a greater importance not only for the growth of the company but also for the survival. Upon detailed discussions to link certain portions of the remunerations with the productivity, both the parties agree to revise the present production incentive scheme for achieving better productivity and efficiency. The scheme is broadly defined as under:

- 1) The Management shall pay production incentive at the rate of Rs. 0.20 (Paise twenty only) for each ton of Sodium Nitrite/Nitrate produced (including sales of Sodium Nitrite in the liquor form) upto 2000 (two thousand) tons of total Salt production for the month.
- 2) However, if incentive such calculated is below Rs. 200/p. m. (Rupees two hundred only) then Rs. 200/p. m. (Rupees two hundred only) shall be paid as minimum production incentive for the month.
- 3) The previous Production Incentive Scheme and the amount given therein gets discontinued and in lieu thereof the above scheme is worked out by and between the parties.
- 4) This scheme has been worked out based on existing capacities and the targets and shall be revised from time to time.
- 5) Upon expansion of the capacities of the plant the scheme and the targets will be revised/revamped."

(Emphasis supplied)

11.1 In the said clause the word "upto" is crucial. It is vital part of the "scheme". It explains the philosophy as well as the effect of the scheme.

11.2 The sub-clause (1) of said clause 17.01 provides, inter alia, that "incentive shall be paid at 20 paise for "each ton" of sodium nitrite produced "upto" 2,000 tons". Meaning thereby according to said clause 20 paise/ton shall be paid for production from insignificant or negligible level upto 2,000 tons. Thus, even if only 100 or even 75 or 50 tons of sodium nitrite is produced then also the workmen would be paid the so-called "incentive". If the production, in a given month, touches the mark of only 75 tons in a given month then also the workmen - according to clause 17.01 (1) would be entitled to receive 20 paise x 75 tons = 1500 paise and if production touches the mark of only 50 tons in a given month then also they will be eligible to receive 1,000 paise in that particular month towards "incentive". The effect or result of the scheme which emerges on conjoint reading of clauses 17.01, 17.01(1) and 17.01(2), is, illustratively, that if in a given month the workman produced, 700 tons of sodium nitrate, then according to clause 17.01 (1) the workmen would earn 14,000 paise, however, in view of sub-clause (2) of clause 17.01 the company would still

pay the workman Rs. 200, i.e. 20,000 paise as if the workman had produced 1,000 tons of sodium nitrite.

11.3 On plain reading of the scheme it emerges that the scheme does not expressly prescribe minimum norm or standard level of production which should be crossed for being eligible for "incentive" and it also does not flow from the scheme that the workman would earn incentive wage if and only when level of production crosses minimum or standard level of production.

11.4 On conjoint and cumulative reading of clause 17.01 (1) and (2) it emerges that the amount contemplated under the said clauses is not paid for additional or more production over and above the normal and standard and/or minimum level of production i.e. the amount is not paid for achieving higher than standard level of production but the said amount is paid for entire production i.e. for every ton of sodium nitrite which may be produced in a given period i.e. one month.

11.5 Further, there is no linkage between payment of incentive and extra work input and extra output. According to the scheme, the same amount i.e. 20 paise would be payable for production of 50 tons or 75 tons or 200 tons or 1,000 tons or 2,000 tons and in the event production is less than 1,000 tons i.e. even if said mark is not achieved then also the amount which would be payable @ 20 paise/ton for production of 1,000 tons (i.e. Rs. 200/) would still be paid to all workmen as "minimum incentive". The scheme guarantees payment @ Rs. 200/as minimum incentive even if production required to earn Rs. 200/- (@ 20 paise per ton i.e. 1,000 ton) is not achieved.

11.6 Not only this, but sub-clause (2) brings out interesting part of the scheme inasmuch as according to sub-clause (2) the scheme guarantees Rs. 200/as "minimum incentive" which would be paid irrespective of the level of production (quantity produced) in a given month. Meaning thereby even if production is less than 1,000 tons in a month then also workmen will get Rs. 200/as so-called "incentive". Thus, in the event the production level in a given month does not reach the mark where workmen would be entitled for guaranteed payment of Rs. 200/@ 20 paise per ton (i.e. even if the production level does not reach to 1,000 tons and falls short of 1,000 tons in a given month) then also the workmen would receive Rs. 200/as "minimum" incentive (which is guaranteed by virtue of sub-clause (2) of clause 17.01). Meaning thereby even without actually producing 300 tons of sodium nitrite, the workman will still be paid 6,000 paise inasmuch as sub-clause (2) of the scheme guarantees minimum incentive of Rs. 200.

11.7 There is another perspective and dimension to the said scheme/settlement and present case deserves to be considered from that other perspective and dimension. From the peculiar provision which guarantees minimum incentive i.e. Rs. 200/- it appears that by such arrangement/provision the company has, actually, introduced dual or hybrid system of payment of salary or wages, whereby part of wages are paid on per ton basis (i.e. at piece rate) and part of

the wages are paid on monthly rate basis and thereby part of the amount/wages paid in name and style of "incentive" to the employees on per ton basis (i.e. at piece rate) so that it can be taken out from the purview of the Act and from the purview of section 2(b) and the obligation to pay provident fund contribution can be reduced.

11.8 The facts of the case, foregoing discussion and the reasons mentioned above bring out clearly that the payments made by the petitioner employer under the settlement/scheme (clause 17.01 thereof) in name and style of "incentive") cannot be excluded from purview of clause (b).

12. In present case, it has emerged seen that -

(a) the scheme does not prescribe any particular quantity or units of production as minimum or normal or average or standard level of production which shall be considered minimum required production and which the workmen should cross to earn "incentive" and such "incentive" would be paid for the production beyond that mark or level;

(b) the scheme provides for payment of incentive to all workmen irrespective of presence or absence and it does not distinguish (or does not award) those workmen who put extra labour from those who do not and the scheme provides for incentive for even minimal or negligible/insignificant quantity of the produce;

(c) the amount would be paid to all workmen having regard to total production in the month irrespective of and without having regard to individual input and/or individual attendance/absence of workman; and

(d) there is no provision in the scheme to provide that the workmen who remain absent or on leave will not be eligible for "incentive" for period of leave/absence and he will be paid proportionately less amount;

(e) there is no linkage between additional labour work and additional output and incentive;

(f) in respect of the same amount (i.e. the amount which is paid in name and style of incentive, the employer deducts/pays contribution towards E.S.I.;

(g) such a scheme can hardly be classified or treated as genuine scheme of incentive. It does not possess the characteristics of genuine incentive scheme explained in the judgment in case of Daily Pratap;

(h) even if it is assumed that under the scheme production of 1,000 tons is minimum or standard level of production then also in view of the sub-clause (2) of clause 17.01 of the settlement, the amount contemplated thereunder i.e. Rs. 200/would be paid to the employees even though the mark/level of production in given month is less than 1,000 tons or even if utmost negligible production/performance is given by the employees. On the other hand same rate i.e. 20 paise will be paid to the workmen for production from level of 1,000 tons to 2,000 tons. Therefore, by any standard and from any perspective the said

amount of Rs. 200 cannot be termed "incentive" and the said amount of Rs. 200 cannot escape and cannot be taken out of purview of basic wage and that amount cannot be excluded from purview of Section 2(b) read with Section 6 of the Act.

12.1 When the scheme (i) does not envisage or does not prescribe standard or minimum level of production (i.e. particular quantity or units as minimum or standard level) and/or it does not provide that the "incentive" will be paid/payable when production crosses such minimum or average or standard level; and (ii) it does not prescribe payment of "incentive" for "actual extra input of labour" or for additional performance" and is not linked with "actual extra or additional output"; and (iii) the scheme, on the contrary, assures "minimum" incentive @ Rs. 200 to all workmen without having regard to his actual input/contribution and/or his; and (iv) there is no linkage between payment of incentive and extra input/extra output; and (v) also provides for payment to all workmen without having regard to individual input; and (vi) when the reward is not for meritorious and extra work and higher output, then such payment can hardly be described as "incentive" so as to exclude said payment from the purview of section 2(b) of the Act; more so when the scheme guarantees minimum incentive.

12.2 Thus, on overall consideration, it has emerged that the payment made by the petitioner employer under the settlement/scheme (clause 17.01 thereof) in name and style of "incentive" does not qualify for exemption and cannot be excluded from the purview of sub-clause (ii) of clause (b) of Section 2 of the Act. The said sub-clause (ii) of clause (b) reads thus:

"2. Definitions. - In this Act, unless the context otherwise requires, -

(a)

(i)

(ii)

(aa)

(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;"

12.3 By virtue of sub-clauses (i), (ii) and (iii) of clause (b) of Section 2, certain amounts/emoluments have been excluded from the definition of the term "basic

wages". The payments are do not fall within purview of the said three clauses of Section 2(b) would fall within purview of the term "basic wages". Foregoing discussion has brought that the payments made by the petitioner employer to its employees under clause 17.01 of the settlement/scheme cannot be termed bonus/incentive or any other allowance and that, therefore, the payments made by the petitioner employer under the said settlement/scheme cannot be excluded. Consequently, there is no basis or justification to upset the decision by APFC which is confirmed by the learned Tribunal.

13. At this stage, it is appropriate to deal with a formal contention against APFC's order viz. APFC's order is not a speaking and reasoned order. So as to consider said contention it is necessary to mention that on reading the order it comes out that the APFC has considered the provision of the scheme and he has also considered other material on record and he has extensively recorded the submissions by the company including the details and contentions mentioned in its written submissions. The APFC has also taken into account and dealt with the decisions on which reliance was placed by the company. In his order, the APFC has recorded that:

"In the present case production incentive element is to be given incentive for minimum production and even if minimum production is not given a workers is entitled to get 0.20 paise per tone of production of Nitrite. Thus it is clear that it is a form of wages, which has been guaranteed at least upto Rs. 200/per month thus nomenclature production incentive is nothing but it is a part of regular wage and this is liable for deduction.

The main activities of the establishment to manufacture Sodium Nitrite/Nitrite etc. and selling in the open market, with facing competition with other units, globalization and even to stand in the international market. The establishment is paying basic minimum wages, D.A. And variable D.A. To its employees as per law. The establishment and establishments" Union entered into an agreement on account of charter of demands of Union and settlement arrived was placed before the Hon"ble Industrial Tribunal who has passed an award on 16.9.1992 although the same kind of production incentive Scheme, was in existence prior to 16.9.1992 on the same pattern of payment of production incentive more or less on production of tonnage.

In the present case, the establishment and Union by an agreement, agreed to pay Rs. 0.20 paise per each tone of production and monthly quota was fixed upto minimum production upto 2000 tones per month. A target is fixed and over the target production on incentive is paid @ 0.20 paise per tonnage. Therefore, the base is fixed and incentive is over the standard performance with the joint cooperative efforts of the employees."

13.1 On reading the order by APFC it comes out that the submission and allegation by the petitioner is unjustified.

14. Before concluding, it is necessary to take into account one more important

aspect which has emerged from the record and which has bearing on the issue and which bring out the debit side of company's claims and the scheme and also demonstrate that the scheme lacks characteristics (explained by Apex Court) of genuine "incentive" scheme, have come out from the affidavit filed by the union/workmen of the petitioner. The said aspects and details also deserve to be considered.

14.1 Therefore, it is appropriate to refer to the affidavit of the union at this stage. With reference to said clause 17 of the settlement, the deponent - Vice President of the union has, in his affidavit dated 7.3.2011, stated and asserted that:

"5(a) Before I deal with the legal contention raised in the petition, I would like to clarify the factual submissions made by the petitioner company. I say that the controversy in the present petition is arising out of the settlement dated 6th August, 1992 entered into between petitioner company and respondent No. 2 Union on which award was passed by the industrial Tribunal Baroda, in Reference IT No. 10 of 1992 by which at Clause - 17 productivity linked wages and production incentive was introduced by which amount was decided to pay to all the workmen on the basis of production. It is pertinent to note that in this settlement irrespective of the achieving of the production, minimum amount was decided to be paid as part of the basic wage and in fact in the objective itself it is clearly stated that the part of wage is linked with the productivity. I say that it is the say of the company that as Union has agreed not to deduct provident fund on production incentive scheme, and therefore, it cannot be termed as basic wage as per section 2(b) of Employees' Provident Fund Act, 1956. I say that the term of the settlement dated 6th August, 1992, which makes production incentive scheme is not in reality a production incentive scheme. In the scheme itself it is clearly mentioned that what is the reason for introducing the scheme and how the portion of amount payable as per the Scheme will be linked with the remuneration of the workmen. In the clause 17.1 of the Terms of Settlement it is clearly mentioned that common irrespective of the fact of the productivity. From this it is quite clear that basic wage of the concerned workmen are divided into twofold; workmen and second would be payable on the basis of productivity incentive scheme which will be achieved by the concerned workmen within their shift schedule work. Over and above this, it is also quite clear that in the first part of the Scheme irrespective of the minimum tons of total salt production the amount towards production incentive of Rs. 200 shall be payable to all the workmen and over the minimum tonnage of the production, the amount will be payable as per the terms of the settlement to all irrespective of the fact that individual output of the workmen. In fact from clause 17 of the settlement it does not reflect any genuine incentive scheme based upon the individual performance of the workmen but it clearly reflects that amount will be payable in two fold i.e. minimum and above minimum. I say that the amount of production incentive as per the clause 17 of the settlement is paid to all the employees on month to month basis and even if the workmen are on leave of any nature

including public holidays, the amount is paid as per the achieved production in every month towards production incentive to all workmen. I also submit that it is not correct to say that the amount of production incentive is paid only to the workmen who are working in different production departments. In fact, amount is paid to all the staff members who are part of the definition of workmen as per Section 2(s) of the Industrial Disputes Act, 1947. I say that in fact to achieve the terms of the settlement clause - 17 the workmen were asked to work in continuous process and even the weekly offs were also changed and workmen were asked to enjoy their weekly offs on different days of the week. Thus, it shows that the production incentive scheme is nothing but the compulsory production and this compulsory production will be part of basic wage as it has been directly connected with the part of remuneration. I say that from this clause it is quite clear that this scheme is over and above the payment which is to be made as per the provisions of Payment of Bonus Act, 1965. In this regard, at clause - 22 company has specifically agreed that company shall pay 20% bonus to all the workmen and no ex gratia payment will be made during the period of the settlement. I say that in the terms of settlement, it is also provided that if workmen is absent without sanctioned leave along with the basic and other allowances amount of productivity incentive will also be deducted from the wages of the workmen. It is further respectfully submitted that it has emphasized that except basic pay, fixed dearness allowance and variable dearness allowance no other allowance shall be taken into consideration for the purpose of computing any benefit such as provident fund, bonus, etc. In this regard, I say that it is true that this clause exists in the terms of settlement but such term firstly cannot override the statutory provisions of Employees' Provident Funds Act. Secondly, it is also quite clear that on production incentive amount company is also deducting contribution to ESI as per the Employees State Insurance Act. Thirdly, when clause 17.1 clearly defines that part of remuneration will be linked with the productivity and after linkage of this amount with the productivity and irrespective of the minimum achievement of production when company has agreed to pay Rs. 200, it cannot be said that amount which is payable as per the clause - 17 is not part of basic wage specially when this amount is paid to all the workmen equally.

(c) I say that it is not correct to say that as per clause 17 the amount of incentive is between Rs. 325 and Rs. 400. In fact, the amount as per the scheme payable to every workmen on month to month basis is around Rs. 600 to Rs. 800. As submitted earlier, if any of the workmen is on privilege leave, sick leave, casual leave and/or public holiday, this amount is paid to all the workmen for such leave days and if they are absent without leave this amount is deducted from their salary. Thus, the amount is paid to all the workmen irrespective of their presence and/or their absence in the company. Thus, this cannot be considered as incentive amount paid as such for any particular allowance..... I further say that even on factual averment also it is not true that in other concerns employers are not having any such benefits for their employees. As per

my information in Vadodara as well as different parts of Gujarat production incentive scheme are formulated by the employers different companies and unions. As per my information in 1992 when the settlement was entered into, in Vadodara Apollo Tyres and ABS Plastics Limited were also having such Schemes for their workmen and in fact, ABS Plastic is involved in similar business like petitioner company. Besides this, as submitted earlier, in the petitioner company all the workmen whether they are concerned with the direct production or not, they are being paid amount towards production incentive as a part of their every monthly salary and therefore it cannot be said that scheme which is in controversy is production incentive scheme and amount paid toward is incentive amount."

(Emphasis supplied)

15. The said statements and assertions by the union through its Vice President bring out that the submissions made by the company with regard to the provision under the settlement and/or implementation of said scheme do not present accurate or correct picture about the scheme and about the implementation or even the understanding of the union/employees, who are party to the settlement, about the scheme.

15.1 From the affidavit by the Vice President of the union, it has emerged that according to the scheme the incentive amount would be paid to the workman even if the workman remains absent from the duty on account of privilege leave/earned leave or casual leave or sick leave. Thus, even if the workman is on leave, e.g. for 7 days in a month, then also payment of Rs. 200 is guaranteed by virtue of clause 17.01(2). The said payment would be in addition to the fixed salary (in accordance with the pay scale fixed by the settlement).

15.2 From the affidavit made by the Vice President of the union, it also comes out that in respect of the incentive amount paid to the workman under clause 17.01(1) and (2), the company deducts and pays contribution towards ESI, however, provident fund contribution is not paid.

15.3 From the said affidavit, it also comes out that the incentive amount is paid to all workmen irrespective of the fact that a particular workman may not have contributed extra input. Thus, so-called incentive has no linkage with extra work/input.

15.4 Further, the amount of so-called "incentive" is paid irrespective of number of days of absence or presence in a given month.

15.5 It is pertinent that not only the company but even any other employee or office bearer of the union have not filed any counter affidavit against or in response to the affidavit dated 7.3.2011 filed by Vice President of the union, and the facts and details stated therein are not denied or controverted by anyone.

16. On examination of the facts of this case and the features of present scheme in light of the characteristics and features of genuine incentive/bonus scheme

explained by Hon"ble Apex Court in above mentioned decisions, it has emerged that the payment made by the company in form of and in garb of "production incentive" is actually "wages" and falls within the purview of section 2(b) of the Act and does not qualify for exclusion under section 2(b) as genuine "incentive" and the conclusion by APFC is neither incorrect nor unjustified nor baseless or perverse. The order by learned Tribunal confirming the order by the APFC also cannot be faulted.

17. In light of the foregoing discussion and for reasons mentioned above, the contentions and claim of the petitioner that (i) the amounts paid to the workmen in accordance with clause No. 1701 of the settlement/scheme, do not constitute "wages" and do not fall within purview of Section 2(b) of the Act and should be excluded from purview of Section 2(b) of the Act and the said amount are not liable for contribution towards provident fund; as well as the submission that (ii) impugned orders by APFC and learned Tribunal are unjustified and erroneous; are not sustainable and the said submissions do not deserve to be accepted. Any ground to interfere with the impugned orders is not made out. The orders passed by APFC and learned Tribunal which are challenged in present petition do not suffer from any error of law and/or jurisdiction or any error of fact. The impugned orders cannot be faulted. The petition, therefore, fails and deserves to be rejected. Consequently, the petition is rejected. Rule is discharged. Orders accordingly.

At this stage, learned senior counsel for the petitioner requested that interim relief which is in operation may be continued for some time so as to enable the petitioner to prefer appeal.

In view of the said submission by learned senior counsel for the petitioner, it is clarified that interim relief which has remained in operation until now shall continue until 5.5.2017.