

(1982) 08 MAD CK 0025
In the Madras High Court
Case No : Writ Petition No. 103 of 1977

E.I.D. Parry (India) Ltd.

APPELLANT

Vs

Regional Commissioner EPF Tamilnadu and Another

RESPONDENT

Date of Decision : 20-08-1982

Acts Referred:

Industrial Disputes Act, 1947 — Section 18(1), 2, 6

Citation : (1984) 1 LLJ 300

Hon'ble Judges : S. Ratnavel Pandian, J; S. Mohan, J

Bench : Division Bench

Judgement

Mohan, J.—The writ petition is for the certiorari to quash the order of the Regional Commissioner, Employees' Provident Funds, made in

Proceedings No. D7/TN/4101/Regl./76 dated 21st December, 1976. The writ petitioner, the Management and the Employees entered into a

settlement under S. 18(1) of the Industrial Disputes Act, 1947 in the following terms :

MEMORANDUM OF SETTLEMENT.

(Under S. 18(1) of the Industrial Disputes Act, 1947 and Rule 25(1) of the Madras Industrial Disputes Rules, 1958).

Parties to E.I.D. Parry Limited, Ennore

Settlement : (Compound Fertiliser Factory) and its workmen

represented by the E.I.D. Parry Employees' Union,

Ennore.

Representing 1. Mr. C. G. Ramanathan

Employer : Special Director,

E.I.D. Parry Limited,
Madras.

2. Mr. S. H. Kanga,
Works Manager,
E.I.D. Parry Limited,
Compound Fertiliser
Factory, Ennore.

3. Mr. R. Ramanujam,
Manager,
E.I.D. Parry Limited,
Personnel Department,
Madras.

Representing 1. Mr. R. Kuchelan, President,
employees : E.I.D. Parry Employees"
Union, Ennore.

2. Mr. V. Rangan,
Vice President,
E.I.D. Parry Employees
Union, Ennore.

3. Mr. V. Ramachandran,
Vice President,
E.I.D. Parry Employees"
Union, Ennore.

4. Mr. P. V. Issac,
General Secretary,
E.I.D. Parry Employees"
Union, Ennore.

No. of workmen
covered by
the settlement. Approximately 670.

SHORT RECITAL OF THE CASE

Whereas the E.I.D. Parry Employees' Union, Ennore (hereinafter referred to as the Union) by their letter dated 7th May, 1970 submitted a

Charter of Demands.

Whereas following a strike/lock-out, the Labour Commissioner issued a communication Ref : A3 106667/70 dated 16th January, 1971, the

strike/lock-out was called off with effect from 20th January, 1971,

And whereas further direct negotiations were held with the Union and the Management of E.I.D. Parry Ltd. (hereinafter referred to as the

"Company") on several dates and finally on 23rd March, 1972 at "Dare House", Madras, a settlement was reached as recorded hereunder :

TERMS OF SETTLEMENT

I. i) The Union, with a view to give its full co-operation in maintaining maximum production and productivity hereby agrees to the introduction and

operation in good faith of the Productivity Oriented Scheme attached to this Settlement marked Annexure "A" which will be in effect from 1st

March, 1971.

ii) In view of the foregoing, the Company will extend to each employee on the factory's probationary and confirmed rolls, a flat ad hoc allowance

of Rs. 15/- per month with effect from 1st March, 1971.

iii) The flat ad hoc allowance and incentive earnings under (i) and (ii) above shall not be reckoned for purposes of the Provident Fund, Bonus,

Gratuity, E.S.I. etc.

II. Employees on the canteen rolls will be only eligible for a flat ad hoc allowance of Rs. 12.50 per month with effect from 1st March, 1971. This

ad hoc allowance shall not be reckoned for purposes of Provident Fund, Bonus, Gratuity, E.S.I. etc.

The question arose whether flat ad hoc allowance of Rs. 15/- per month paid to all the employees with effect from 1st March, 1971, irrespective

of the fact whether they were on the probationary or confirmed rolls can partake the character of basic wages so as to make it a liability for

contribution, under the employees' Provident Funds and Family Pension Fund Act, 1952 (19 of 1952). The contention of the writ petition was that

the "ad hoc" allowance was pursuant to the agreement and that being special in

nature cannot be included for the purpose of computation of liability under the provident fund contribution, since it would not tantamount to basic wages nor can it be called an emolument. By the order sought to be quashed, the Regional Commissioner of the Employees' Provident Funds, held that the agreement between the writ petitioner, the management and the employees' union that ad hoc allowance will not count for provident fund deduction is not of any importance. Therefore, he decided to assess the provident fund contribution on ad hoc allowance and, therefore, proceeded to work out the contribution. Accordingly in the order dated 21st December, 1976 contribution was fixed towards the Employees' Provident Funds Account No. 1 at a sum of Rs. 1,03,401.50 and administrative charges in account No. II at a sum of Rs. 2,291.15. The demand was raised on even date, requiring the writ petitioner to pay the same on or before the 15th of the following month, failing which the revenue recovery proceedings would be initiated. It is at this stage, the writ petition was preferred.

2. Mr. M. R. Narayanaswami, learned counsel for the petitioner urges before us having regard to the definition of basic wages under S. 2(b) read

with the liability on which the contribution is to be worked out as per the terms of S. 6, the adhoc allowance can never form part of basic wages.

The object of providing for adhoc allowance, as the memorandum of settlement itself would clearly disclose, is for the purpose of the employees

giving their fullest co-operation in maintaining maximum production and productivity. The productivity oriented scheme was attached to the

settlement, and was marked as Annexure "A". Basic wages have been defined under S. 2 of the Act which states that the earnings of the employee

should be in accordance with the terms of the contract of employment. So long as the term of settlement is specifically to the effect that the same is

not to be reckoned for the purpose of provident fund, it cannot be included. The writ petitioner was not contracting out of the statute as has been

wrongly held by the Commissioner. On the contrary, it is only in accordance with the agreement abiding by the terms of the contract. Therefore,

the contrary interpretation placed by the Commissioner is totally wrong. In support of the submission, the learned counsel relies upon a Division

Bench ruling reported in The Regional Commissioner, Employees' Provident

Fund, Pondicherry v. The Management, Alloy Foundries (P) Ltd. 93

L.W. 797, where the question arose whether a special allowance, which was agreed not to be treated as part of basic wages, can be reckoned for

the purpose of provident fund contribution. The Court answered in the negative. The ratio of the ruling squarely applies having regard to Clause 3

of the memorandum of settlement. For the reasons, it is prayed that the order be quashed.

3. In opposition to this, the learned Government Pleader (Mr. T. Somasundaram) contends that though this is called a flat adhoc allowance, such a

clause has been introduced only with a view to get over the statutory liability. The fact that all the employees are paid irrespective of the

production, though it is stated to be linked to enlist the full co-operation in maintaining maximum production, it must partake the character of basic

wages. This is the test applied by the Supreme Court as seen from Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI), . It is further

contended on behalf of the Commissioner that it is not possible for the parties to contract out of the statute, since the section does not provide for

any such liberty to contract out of the statutory provisions. Lastly, it is contended having regard to the definition under S. 2(b) only allowances,

which are similar to allowances spoken to under the definition clause can be excluded and not one of this kind which is paid to all the employees

irrespective of the production.

4. We have given our careful consideration to the above arguments. In the beginning of our judgment itself we have extracted the terms of the

settlement. Clause 2 states that a flat ad hoc allowance of Rs. 15/- per month with effect from 1st March, 1971 shall be paid to all employees,

whether on the probationary or confirmed rolls. The only question that arises for our consideration is whether such an allowance can be treated as

forming part of partaking the character of basic wages. This leads us to refer to S. 2(b) of the Employees' Provident Funds and Family Pension

Act, 1952, hereinafter referred to as the Act. That definition may be extracted in full.

"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) the cash value of 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 present made by the employer.

We understand by Clause 2 constituting an exception with regard to allowances that speaks of (i) dearness allowance (ii) house rent allowance (iii)

over-time allowance (iv) bonus (v) commission (vi) or any similar allowance payable to the employee in respect of his employment or of work

done in such employment. For instance, uniform allowance is not spoken to here. Therefore, according to the learned Government Pleader, that

will not stand excluded. We are unable to agree with this argument. The object of exclusion of certain categories of allowance under clause (ii) in

this definition can be easily determined if regard is had to S. 6. That section is also extracted.

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" contribution 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 thereafter, be an amount not exceeding eight and one-third per cent of his basic wages (dearness allowance

and retaining allowance if any).

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(Explanation 1) For the purpose of this (section), dearness allowance shall be deemed to include also the cash value of any food concession

allowed to the employee." (Provisos omitted as unnecessary Explanation II omitted as unnecessary.)

Therefore, by a combined reading of both we are able to deduce the following proposition. For the purpose of contribution under the Act, what

requires to be paid by the employer is 6 1/4% of the basic wages. If it were to partake the character of basic wages, certainly Clause 3 of the memorandum of settlement will be meaningless. That clause, at the risk of repetition may be referred to again : ""The flat ad hoc allowance and incentive earnings under (i) and (ii) above shall not be reckoned for purposes of the Provident Fund, Bonus, Gratuity, E.S.I. etc."" Neither party intended that this flat ad hoc allowance must partake the character of basic wages. If that were not so, the consequence would be serious because the dearness allowance and house rent allowance, will get enhanced. We do not think an employer like the writ petitioner would have bargained for such an unhappy situation. Therefore, the intention of the parties is very material. Why we say it is very material is because the Commissioner has taken the view as though the parties are contracting out of the statutory provision, which is prohibited by the Act. Far from it, the parties are trying to be within the framework of the statute. This is because in defining basic wages under clause (b) which clearly states ""in accordance with the terms of the contract of employment"". Therefore, if in accordance with the terms of the contract of employment, if the parties agree that a particular sum should be excluded, we cannot hold that it has to be treated as basic wages. It is, in this connection we may make useful reference to The Regional Commissioner, Employees' Provident Fund, Pondicherry v. The Management, Alloy Foundries (P) Ltd. 93 L.W. 797. That was a case in which the Division Bench was confronted with the question whether the special allowance under an agreement can be treated as part of basic wages. The Court held :

It had been agreed between the employer and the employees that the ""special allowance"" need not be treated 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 and Family Pension Fund Act, 1952. The Regional Commissioner of the Employees' Provident Fund cannot direct that the special allowance, which does not form part of the dearness allowance should be ""deemed to be dearness allowance"". Needless to say that an officer like him has no power to deem something to be something else which it is not, being the prerogative only of the Legislature.

5. According to us, the ratio of this case clearly governs the case on hand as well. However, the learned Government Pleader tried to distinguish

that it would not get included in basic wages. We are of the view that the very intention of incorporating Clause (3) in the memorandum of

settlement is to arrive at such a position.

6. One other argument of the learned Government Pleader is that as this is being paid to all the employees irrespective of the production, it should

be deemed to be basic wages and for this purpose reliance is placed on Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI), . In that case,

what the Supreme Court observed was as follows :

Then we come to Clause (ii). It excludes dearness allowance, house-rent allowance, over-time allowance, bonus, commission or any other similar

allowance payable to the employee in respect of his employment or of work done in such employment. This exception suggests that even though

the main part of the definition includes all emoluments which are earned in accordance with the terms of the contract of employment, certain

payments which are in fact the price of labour and earned in accordance with the terms of the contract of employment are excluded from the main

part of the definition of ""basic wages"". It is undeniable that the exceptions contained in Clause (ii) refer to payments which are earned by an

employee in accordance with the terms of his contract of employment. It was admitted by counsel on both sides before us that it was difficult to

find any one basis for the exceptions contained in the three clauses. It is clear, however, from Clause (ii) that from the definition of the word ""basic

wages"" certain earnings were excluded, though they must be earned by employees in accordance with the terms of the contract of employment.

Having excluded ""dearness allowance"" from the definition of ""basic wages"", S. 6 then provides for inclusion of dearness allowance for purposes of

contribution. But that is clearly the result of the specific provision in S. 6 which lays down that contribution shall be 6 1/4 per cent of the basic

wages, dearness allowance and retaining allowance (if any). We must therefore try to discover some basis for the exclusion in Clause (ii) as also

the inclusion of dearness allowance and retaining allowance (if any) in S. 6. It seems the the basis of inclusion in S. 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 S. 6 but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution. Dearness allowance (for example) is payable in all concerns either as an addition to basic wages or as a part of consolidated wages where a concern does not have separate dearness allowance and basic wages. Similarly, retaining allowance is payable to all permanent employees in all seasonal factories like sugar factories and is therefore included in S. 6; but house-rent allowance is not paid in many concerns and sometimes in the same concern it is paid to some employees but not to others, for the theory is that house-rent is included in the payment of basic wages plus dearness allowance or consolidated wages. Therefore, house-rent allowance which may not be payable to all employees of a concern and which is certainly not paid by all concerns is taken out of the definition of "basic wages" even though the basis of payment of house-rent allowance where it is paid is the contract of employment. Similarly, 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". Similarly, commission or any other similar allowance is excluded from the definition of "basic wages" for commission and other allowance are not necessarily to be found in all concerns, nor are they necessarily earned by all employees of the same concern, though where they exist they are earned in accordance with the terms of the contract of employment. It seems therefore, that the basis for the exclusion in Clause (ii) of the exceptions in S. 6(b) is that all that is not earned in all concerns or by all employees of a concern is excluded from basic wages. To this, the exclusion of dearness allowance in Clause (ii) is an exception. But that exception has been corrected by including dearness allowance in S. 6, for the purpose of contribution. Dearness allowance which is an exception in the definition of "basic wages", is included for the purpose of contribution by S. 6 and the real exceptions therefore in Clause (ii) are the other exceptions beside dearness allowance, which has been included through S. 6.

7. We do not understand this passage's meaning that if the payment is made to

all the employees irrespective of the nature of the payment, it would straightaway partake the character of basic wages. But the Supreme Court clearly pointed out that it is only on combined reading of S. 2(b) and S. 6, the basis for computation can be arrived at and we are adopting the same basis in the instant case also. Therefore, we find the order of the respondent, the Regional Provident Fund Commissioner, cannot be supported in law and accordingly the same is quashed. The writ petition is allowed and the rule nisi is made absolute. But we make no order as to costs.