

(2000) 01 MAD CK 0057

In the Madras High Court

Case No : Writ Petition No. 9500 of 1992 and W.M.P. No. 13743 of 1992

Gordon Woodroffe Ltd.

APPELLANT

Vs

Regional Commissioner, Employees Provident Fund

RESPONDENT

Date of Decision : 05-01-2000

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2
Industrial Disputes Act, 1947 — Section 12(3)

Citation : (2002) 2 LLJ 653

Hon'ble Judges : Y. Venkatachalam, J

Bench : Single Bench

Advocate : P.K. Gopal Raj, for the Appellant; P. Narasimhan, for the Respondent

Final Decision : Dismissed

Judgement

Y. Venkatachalam, J.—Invoking Article 226 of the Constitution of India, the petitioner herein has filed the present writ petition seeking for a writ of certiorari to call for the records in proceedings No. C4/TN/2622/Regl/91 on the file of the respondent, viz., the Regional Commissioner, Employees' Provident Fund, Tamil Nadu and Pondicherry, Madras-600014, and to quash the impugned order dated August 9, 1991, made by the respondent.

2. In support of the writ petition, the petitioner herein has filed an affidavit wherein they have narrated all the facts and circumstances that forced them to file the present writ petition and requested this Court to allow the writ petition as prayed for. Per contra, in the counter-affidavit filed by the respondent, they have rebutted all the material allegations levelled against them one after the other and ultimately they have requested this Court to dismiss the writ petition for want of merit.

3. Heard the arguments advanced by learned counsel appearing for the respective parties. I have perused the contents of the affidavit and the counter-affidavit together with all other relevant material documents available on record

in the form of typed set of papers. I have also taken into consideration the various contentions raised by learned counsel appearing for the respective parties during the course of their arguments.

4. In the above facts and circumstances of the case, the only point that arises for consideration in this case is, as to whether there are any valid grounds to allow this writ petition or not. The brief facts of the case of the petitioner as seen from the affidavit are as follows: the petitioner-company is carrying on business at various places and has its registered office at Madras. It also owns a factory at Pallavaram. Altogether about 230 employees are employed in the petitioner-company and out of the same about 122 are employed as permanent workers. Three are employed as temporary workers, three are employed as sweepers and three others are employed as bearers in the head office. Apart from this about 69 employees are employed as executives and 30 other employees who are working in the various other branches of the company situated at Vizag, Ernakulam, Hyderabad, Bombay, Bangalore, Delhi and Calcutta. The petitioner-company is an "employer" as defined u/s 2(a) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. u/s 17(1)(a) of the said Act, the petitioner-company has been exempted from the operation of the Employees' Provident Funds Scheme, 1952. As such the contribution under the Act is being regularly remitted to the trustees who manage the Provident Fund Scheme as per the said exemption u/s 17(1)(a). According to them, prior to January 1, 1976, the working days in the company were 5 days a week, i.e., totally 35 hours a week with Saturday and Sunday as holidays. However, under a settlement dated September 15, 1976, entered into between the company and its union u/s 12(3) of the Industrial Disputes Act, 1947, it was, inter alia, agreed in Clause (4) of the settlement that the management would pay a Saturday allowance of Rs. 20 p.m. to all permanent employees. The reason behind this concession, although it does not ex facie appear in the settlement was that the management originally had five days a week, by Section 9-A of the Industrial Disputes Act notice dated March 5, 1976, the management and the union agreed to work for half a day on Saturday also, although the total number of working hours per week were actually reduced from 35 hours to 34 1/4 hours. For reintroducing the above system no increase in the wages payable to the employees were made because they worked for a lesser number of working hours per week as mentioned above. The petitioner-company considering the fact that the employees will incur further expenses such as transport for attending to work and other incidental special expenses on Saturdays agreed to pay a sum of Rs. 20 p.m. with effect from September 15, 1976, and this payment was paid on an ad hoc basis. The union also agreed that the said Saturday allowances paid on ad hoc basis shall not be taken into account for the purpose of provident fund, gratuity, bonus, overtime. The trade union representing the workmen employed in the petitioner-company had in the end of 1978 raised an industrial dispute on a charter of general demands such as revision of wages, dearness allowance and other fringe benefits such as medical

benefits, regular conveyance, higher rate of HRA, CCA, LTA, reimbursement of lunch expenses on outside work, etc. At the conciliation proceedings the settlement was reached on the demands relating to wages and dearness allowance in January, 1979, and when the union was required to give up other demands at the suggestion of the conciliation officer payment of a sum of Rs. 20 p.m. to all confirmed employees with effect from January 1, 1979, in the name of special allowance was agreed to between the management and the union. It was also mutually agreed by that Section 12(3) of the Industrial Disputes Act settlement that the said special allowance need not be taken into account for any other benefit such as provident fund, gratuity, bonus, etc. Thus, the said special allowance of Rs. 20 p.m. paid to confirmed employees with effect from January 1, 1979, cannot be regarded as wages inasmuch as if it was wages, the petitioner-company ought to pay the said amount to all its employees whether confirmed or not. If the said special allowance was intended to be treated as wages under the Provident Fund Act, then the petitioner-company would have insisted upon apportionment of the said sum of Rs. 20 p.m. into various allowances paid which are not treated as wages under the Employees' Provident Funds Act. On the grounds, it was raised to Rs. 40 p.m. with effect from January 1, 1982, under the subsequent settlement under the Industrial Disputes Act. According to the petitioner, normally, the trade union adopts such a strategy by way of face saving device as the union officials will have to justify giving up of other demands and satisfy their members who question the terms of the settlement. Further when it is a settlement u/s 12(3) of the Industrial Disputes Act, arrived at in the course of conciliation by a public servant who takes care of the interest of both the employer and the workmen, it is not open to the first respondent to give a different meaning to the special allowance and call it wages under the Employees' Provident Funds Act. According to them, even though their Employees' Provident Fund is an exempted scheme u/s 17(1)(a) of the Employees' Provident Funds Act, the Provident Fund Inspectors have been periodically inspecting their books of account and that even though there were a number of periodical inspection by the Provident Fund Inspectors between 1979 and 1988, there was no objection or whisper from the said Inspectors that the petitioner-company had to deduct the employee's contribution from the said Saturday allowance and special allowance of Rs. 20 each treating them as wages under the Employees' Provident Funds Act and pay the employer's contribution also in those amounts during the said ten years. Further, according to them, even though the petitioner-company was started in the year 1924 and had flourishing business it had been incurring losses in the 1980s. The petitioner-company incurred cash loss of Rs. 1.24 crores for the year ending December 31, 1985 and Rs. 1.72 crores for the year ending December 31, 1986. The accumulated losses of the petitioner-company as on December 31, 1986, stood at Rs. 3.65 crores as against the paid up capital of Rs. 2.5 crores and free reserves of Rs. 2.31 lakhs. Hence, in; Case No. 205 of 1987, the petitioner-company filed a petition to the Board for Industrial and Financial Reconstruction (hereinafter referred to as "the BIFR") u/s 15(1) of the Sick Industrial Companies

(Special Provisions) Act 1985, for determining the measures to be adopted under the said Act. After considering the records and the oral submissions made by the petitioner-company and all other parties concerned by order dated March 17, 1988, the said BIFR declared that the petitioner-company has become a sick industrial company within the meaning of Clause (o) of Sub-section (1) of Section 3 of the said Act and continues to be sick and directed further proceedings under the Act be taken with respect to the petitioner-company. The Employees' Provident Fund authorities after inspection of the petitioner-company directed the petitioner to comply with the Government notification dated May 17, 1989, enhancing the percentage of contributions from 8.33 to 10 per cent, under the amended provisions of the Act with effect from June 1, 1989. The petitioner-company raised objection to the said notice, subsequent to which a personal hearing was provided for the company to put forward its contentions. It was contended before the Regional Provident Fund Commissioner the respondent herein by the petitioner-company that the Saturday allowance paid on ad hoc basis to the employees was only merely in the nature of an allowance to cover the transport expenses incurred by the employees for attending to their work on Saturday and as such the same need not be termed as wages earned by an employee. For the reasons given above, the special allowance of Rs. 20 p.m. paid to the confirmed employees from January 1, 1979 also cannot be regarded as wages. As the petitioner-company is a sick industrial company u/s 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985, the notification dated May 17, 1989, enhancing the Employees' Provident Fund contribution to 10 per cent. will not apply to the petitioner-company. However, the Provident Fund Commissioner, the respondent herein rejected the representations made by the petitioner-company and passed the impugned order dated August 9, 1991, holding that the special allowance and Saturday allowance were wages earned by the employees and these allowances would fall within the main definition u/s 2(b) of the Act and therefore the contributions were payable at 10 per cent on these allowance also. It is also their case that though appeal remedy is available as no notification as on the date of filing this writ has been published constituting such appellate authority, having no alternate and adequate remedy, they have filed the present writ petition, challenging the impugned order dated August 9, 1991.

5. Per contra, in the counter-affidavit inter alia it is contended by the respondent that the petitioner-establishment is covered independently under the Employees' Provident Funds and Miscellaneous Provisions Act with effect from May 1, 1962 and exempted u/s 17(1)(a) of the Act. The Enforcement Officer, who inspected the petitioner-establishment reported the following shortcomings in the matter of compliance under the Act:

1. Though the establishment is required to deposit provident fund contribution at the rate of 10 per cent of wages payable to the employees with effect from May 1, 1989, in terms of the notification issued by the Government of India under the Act the petitioner is depositing contribution at the rate of only 8.33 per cent of

the wages.

2. The establishment had not included in the wages for payment of provident fund contribution, the Saturday allowance paid to its employees on October 1, 1976, and special allowance paid on January 1, 1979, though the said allowance were paid to the workmen in connection with the work done by them for the establishment. Communications were issued to the petitioner for rectifying the shortcomings. Instead of making good the short contribution the petitioner has taken recourse to the plea that the establishment has been declared as a sick industrial company by the Board for Industrial and Financial Reconstruction and claimed exemption from paying enhanced rate of contribution as indicated in the notification in question.

6. Further, it is the case of the respondent that as a matter of policy with a view to improve the organisational efficiency, the petitioner introduced the six day week and allowed its employees extra wage under the nomenclature of Saturday allowance. According to them, this component of wage is nothing but basic wage as defined u/s 2(b) of the Act. It is noteworthy that the contract of employment necessitated the petitioner for payment of additional wage for the extra day of work which forms part of basic wages and attracts provident fund liability even if the petitioner assigns whatever nomenclature to it. It is contended by the respondent that the petitioner paid an allowance of Rs. 20 regularly to all the confirmed employees with effect from January 1, 1979, in the form of Saturday allowance for compensating the extra work and that the same is nothing but basic wages inasmuch as the said allowance is very much linked with the Saturday work necessitated due to policy revision. Therefore, it is contended by the respondent that notwithstanding the agreement to the contra u/s 12(3) of the Industrial Disputes Act, the said allowance partakes the character of basic wages and attracts provident fund liability. It is also their strong case that merely for the reason that the Provident Fund Inspectors who inspected the petitioner-establishment between 1979 and 1988 did not point out the said lapse, the petitioner cannot escape his unconditional and absolute liability under the Act causing prejudice to the workmen especially when the action of the respondent is not barred by any limitation under the Act. Further according to them, the contention that the petitioner-company incurred losses during 1980-1986 and incurred cash losses during the said period is not correct. The petitioner has taken into account the overall position of accounts and finance of all the establishments of the group companies with a view to take undue advantage under the Act. This is not permissible under the Act. It is their strong contention that the petitioner herein being an independent establishment covered under the Act independently without any truck with the other units of the group company the financial position of the petitioner-company alone should be taken into account for deciding the issue as to whether the petitioner is liable for provident fund contribution at 10 per cent, of the wages or at a lesser rate of 8.33 per cent. According to the respondent, the financial position of the petitioner-establishment alone is required to be taken into consideration for deciding the

issue. It is the case of the respondent that the petitioner- establishment which is financially sound does not fall under the Sick Industrial Companies (Special Provisions) Act, 1985, and BIFR and hence the petitioner is liable for higher rate of contribution as notified by the Government of India, and that the increase in wages paid for the compulsory work done on every Saturday under whatever nomenclature it was paid forms only part of basic wages and attracts provident fund liability.

7. Having seen the entire material available on record and from the facts and circumstances of this case and also from the claims and counter-claims made by the rival parties, it is contended by the petitioner herein that the reasons given by the respondent for treating the Saturday allowance and special allowance as wages under the Employees' Provident Funds Act are perverse and not sustainable in law, as the Saturday allowance and special allowance were paid for specific special purposes and contingencies they cannot be regarded as wages under the provision of the Employees' Provident Funds Act and that therefore the impugned order is erroneous. They also contend that the respondent erred in overlooking the fact that the reason behind the payment of special allowance on an ad hoc basis was to enable the employees to attend to the work on Saturday also including the coverage of their transport charges, and other incidental expenses and further that these settlements are binding on the employees/workers and the union who were parties to the settlement. Whereas, it is the contention of the respondent that the extra allowance in question partakes the character of basic wages and attracts provident fund liability and that therefore the mutual agreement entered into between the parties u/s 12(3) of the Industrial Disputes Act to the contra is unsustainable under law. Their contention is that since the workmen are required to work on Saturdays, the money paid therefore under whatever name, partakes the character of basic wages only. That being so, in this case it is an admitted fact that the special allowance of Rs. 20 stated to be paid on an ad hoc basis with effect from January 1, 1979, not only continued to be paid indefinitely without any stop but also got increased to Rs. 40 with effect from January 1, 1982, and that, therefore, it cannot be interpreted as a stop gap arrangement. In such circumstances it is rightly contended by the respondent that the said allowance is paid only for the work required to be done by the petitioner-workmen on each Saturday which was holiday previously, and hence the extra allowance, in question partakes the character of basic wages and attracts provident fund liability. Because in this case it has been made clear by the respondent that the abovesaid increase in wages paid for the compulsory work done on every Saturday under whatever nomenclature it was paid, it forms only part of basic wages and attracts provident fund liability. Further, since the workmen are required to work on Saturdays, the money paid, therefor, under whatever name, partakes the character of basic wages only. Therefore, I am of the view that the reasons given by the respondent for treating the Saturday allowance and special allowance as wages are sound and sustainable. Because the Saturday allowance and special allowance were continued to be paid

indefinitely contrary to the petitioner's contention that it is only ad hoc payment in the settlement and apart from that, the quantum of the said allowance was increased from Rs. 20 to Rs. 40 from January 1, 1982, as admitted by the petitioner in the letter dated December 3, 1990, and that, therefore, the allowance would fall under the definition of the term "basic wages" as defined u/s 2(b) of the Act. Therefore, the contentions raised by the petitioners in this regard cannot at all be accepted.

8. Now, coming to the other contention of the petitioner that regarding the payment of the said allowance, it is settlement u/s 12(3) of the Industrial Disputes Act and that therefore these settlements are binding on the employees/workers and the union who were parties to the settlement. But in this regard it is significant to note that any agreement made contrary to the provision of the statute shall be null and void and cannot be enforceable. Therefore, I see every force in the contention of the respondent that the mutual agreement entered into between the petitioner and his workmen has no force in the matter of issue on hand u/s 12(3) of the Industrial Disputes Act. The other contention of the petitioner herein is that since their company is a sick industrial company declared by the Board for Industrial Finance and Reconstruction, they are entitled to exemption from paying the higher rate of contribution of 10 per cent from June 1, 1989. In this regard it is contended by the respondent that the petitioner-establishment is one independently covered under the Act and the petitioner units is not subjected to any cash loss and that, therefore, for the said reason the consolidated balance sheet which reflects the overall picture of the profit/loss or assets and liabilities of the organisation which controls various independently covered establishments is not relevant to the issue and hence the petitioner is liable for contribution at 10% of the wages from June 1, 1989. Thus, it is the strong contention of the respondents that as per the Government of India notification the petitioner-establishment was required to pay contribution at the rate of 10 per cent of the wages from June 1, 1989, and also that the BIFR has not passed any orders in regard to the payment of provident fund dues in Case No. 205 of 1987 and that therefore, the impugned order of the respondent is in accordance with the Act and strictly following the principles of natural justice. That apart it is also significant to note that the present Act is a piece of welfare legislation intended to extend some social security benefit to the workmen employed by the petitioner-establishment and the successful working of the welfare legislation depends very much on the prompt compliance secured from the petitioner-establishment. Therefore, from all the above, I am of the clear view that the order impugned herein has been passed by the respondent in accordance with the Act and that, therefore, there is no need for any interference with the same in this writ petition.

9. In support of their case, the petitioners rely on the following two decisions:

1. Regional Commissioner, EPF, Tamil Nadu and Pondicherry Vs. Management of Southern Alloy Foundries (P) Ltd., wherein it has been held as follows at p. 28

(head note):

"The definition of basic wages in Section 2(b) excludes a number of allowances grouped in Sub-clause (ii) of the Section, however, u/s 6 dearness allowance and remaining allowances are taken into consideration for calculating the contribution. In the instant case, the special allowance was paid as a result of an agreement and they had not agreed to treat it as part of basic wages or dearness allowance and hence it could not be included for computation of contribution by the employer vide Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI), .

2. E.I.D. Parry (India) Ltd. Vs. Regional Commissioner EPF Tamilnadu and Another, wherein it has been held as follows at p. 303 :

"For the purpose of contribution under the Act, what requires to be paid by the employer is 6 1/4 percent of the basic wages. If it (the ad hoc allowance) were to partake the character of basic wages, certainly Clause (iii) of the memorandum of settlement will be meaningless. The Clause reads, "the flat ad hoc allowance and incentive earnings under (i) and (ii) above shall not be reckoned for the purpose of provident fund, bonus, gratuity, ESI, etc.". Neither party intended that this flat ad hoc allowance must partake the character of basic wages. If that were not so, the consequence will be serious because the dearness allowance and house rent allowance will get enhanced."

10. That being so, it is significant to note that in this case it has been clearly made out that the allowance in question herein is paid only for the work required to be done by the petitioner-workmen on each Saturday which was a holiday previously and hence the extra allowance in question partakes of the character of basic wages and attracts provident fund liability and that for the reason stated above the amount paid in the form of Saturday allowance attracts provident fund and the mutual agreement entered between the parties u/s 12(3) of the Industrial Disputes Act to the contra is not sustainable and that apart the special allowance of Rs. 20 stated to be paid on ad hoc basis with effect from January 1, 1979, was not only continued to be paid indefinitely without any stop but also got increased to Rs. 40 with effect from January 1, 1982, and hence it cannot be interpreted as a stop gap arrangement as alleged by the petitioner. Therefore, in the above circumstances of the case on hand, the above decisions relied on by the petitioners are not helpful in this writ petition.

11. Therefore, for all the aforesaid reasons and in the facts and circumstances of this case, and also in view of my above discussions with regard to the various aspects of this case and also in the light of the above decisions discussed, I am of the clear view that the petitioner herein has failed to make out any case in their favour and that, therefore, there is no need for any interference with the order impugned in this writ petition. Thus, the writ petition fails and the same is liable to be dismissed for want of merit.

12. In the result, the writ petition is dismissed. No costs. Consequently W.M.P. No. 13743 of 1992 also is dismissed.