

(1996) 10 BOM CK 0099
In the Bombay High Court
Case No : Writ Petition No. 162 of 1994

Gosalia Shipping Pvt. Ltd., Goa and Another	APPELLANT
Vs	
Regional Provident Fund Commissioner, Goa and Anr	RESPONDENT

Date of Decision : 29-10-1996

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2, 6, 7
Industrial Disputes Act, 1947 — Section 2, 33C(2)

Citation : (1997) 3 ALLMR 642 : (1997) 75 FLR 609 : (1997) 2 LLJ 38

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : M.S. Sonak, for the Appellant; E.P. Badrinarayan, for the Respondent

Judgement

1. The Petitioners, a Private Limited Company by this Petition impugns the Recovery Certificate dated April 7, 1993, Demand Notice dated April 23, 1993 and order dated April 30, 1993 passed u/s 8-F of the Provident Fund Act and Show Cause Notice dated March 9, 1994. By subsequent Amendment, the Petitioners have also sought quashing of the Assessment orders dated March 26, 1981 and May 7, 1985 made u/s 7-A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 by the Regional Provident Fund Commissioner, Maharashtra and Goa. It may be noted that ultimately, it is these last two Orders that are the subject matter of this Petition. The Petitioners have also prayed for writ of mandamus to direct the Respondents to refund forthwith the excess amount of Rs. 58,881.05 together with interest thereon at the rate of 18 % per annum from May 10, 1993, till the date of the refund, which amount according to the Petitioners was paid in excess.

2. The facts which give rise to the Petitioners are as under :-

The Petitioners, a Private Limited Company were initially managed and controlled by one Vinod Kumar S. Gosalia and Mr. Pravin Kumar S. Gosalia. In the year 1987, the management of the said Company was taken over by the second Petitioner.

3. The Petitioners have contended that in February, 1979, the employees of the first Company abandoned their work and on their volition chose not to resort to work any more. It is the contention that these employees have abandoned their work voluntarily between the period July, 1979 to December, 1981. They were not entitled to any wages nor earned any wages for the said period. It is further pleaded that on December 31, 1981, the first Petitioner Company declared a closure.

4. The Petitioners have pleaded that the employees of the Petitioner Company raised industrial disputes which were referred by the Central Government which was the appropriate Government under Reference Nos. CCIT-2/46 and 49 of 1984. A common Award came to be passed in respect of the said disputes on January 12, 1984 which were published in the Gazette of India on March 10, 1984. In terms of the Award, the Petitioner No. 1 was directed to pay full back wages due to the employees upto December 31, 1981. Though an Award had been passed, as the Petitioner Company failed to pay the amounts in terms of the Award, the employees of the Petitioner No. 1 moved an application u/s 33-C(2) of 1947 before the Labour Court, Bombay. During the course of pendency of the said application u/s 33-C(2), the Petitioner No. 1 Company somewhere in the year 1991, entered into a settlement with the employees u/s 2(p) of 2 the I.D. Act. By the said settlement, it was declared and confirmed by the employees that they had voluntarily abandoned their work from August, 1979 to December 31, 1981 and, therefore, they were not entitled to any wages and as such, the matter would be settled between the employer and employees in terms of the settlement. The Labour Court was pleased to dispose of the application u/s 33-C(2) of the I.D. Act by its Order dated January 27, 1993. It is the contention of the Petitioner No. 1 that as the employees had not worked for the said period, the question of any contribution towards Provident Fund dues did not arise. The main challenge in the petition by the Petitioners is that there was a violation of the principles of natural justice and fair play in as much as no show cause notice was issued to them before the Orders u/s 7-A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 were passed. It is further the contention that on a combined reading of Section 6 and Section 12(b) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 a reasonable inference could be drawn that contribution towards Provident Fund would be attracted in the event the employees had worked and earned wages and not otherwise. That in the instant case, the employees had themselves abandoned services according to the settlement and as such, the question of back wages should not arise.

5. On behalf of the Regional Provident Fund Commissioner, an Affidavit was filed which is dated October 17, 1996. In para 3 of the Affidavit-in-reply, it is pointed out that the Order dated March 26, 1981 assessing an amount of Rs. 1,45,891.95 for the period February 1, 1979 upto December 31, 1981 was made after giving due opportunity to the Petitioner Company. The second Order which is dated May 7, 1985 is for the period February 1, 1981 to December 31, 1981 and that the said Order u/s 7-A was also made after giving due opportunity to

Petitioner No. 1. It is pointed out that the demand made is legal and consequently, the Petition ought to be dismissed.

6. At the hearing of the Petition, Shri Sonak, Learned Counsel for the Petitioner points out that the Petition should be allowed firstly on the ground that there has been violation of the principles of natural justice and fair play, in respect of both the Orders dated March 26, 1981 and May 7, 1985. He points out that any Order which is in violation of the principles of natural justice is non est and consequently the Court without much ado should quash both the impugned orders. Secondly, he points out to the provisions of Section 6 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952. It is his contention that the contributions payable by the employer to the fund are the basic wages, dearness allowance and retaining allowance if any, and the employees contribution be equal to the contribution payable by the employer. He then draws my attention to Section 2(b) of the Act which has defined what are basic wages. As per the definition, 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. He submits that the definition gives an indication that contributions towards the Provident Fund dues can only be if the employee was on duty and had earned basic wages. It is his contention that if the employee was not on duty and though, he may receive any compensation or amounts for the period not on duty, the same would not constitute basic wages and consequently, the question of contribution by the employer will not arise. He relies on the Judgment of a Division Bench of Delhi High Court in *Burmah Shell Oil Storage and Distributing Company of India Ltd. Vs. The Regional Provident Fund Commissioner Delhi and Others*, for the proposition that emoluments to constitute basic wages must be earned by an employee while on duty and if payments are made to some who are on duty and not paid to others not on duty, it cannot be regarded as basic wages. He then relies on a Judgment of the Apex Court in the case of *The District Exhibitors Association, Muzaffarnagar and others Vs. Union of India and others*, . He relies on the said Judgment for the proposition that even if there has been a revision of wages with retrospective effect, the same cannot be considered for the purpose of working out the employers contribution.

7. Shri Sonak thereafter from the documents on record points out that though there was an Award made by the Tribunal dated January 12, 1985 in respect of two independent references made by the Central Government in respect of the employees of Petitioner No. 1, one covering 3 employees and the others covering 26 employees, the findings of the said Award are not of a binding nature in view of the subsequent settlement between the Petitioners and the employees. The settlement was filed before the Labour Court and based on the settlement the Labour Court was pleased to dispose of the application by its judgment dated January 22, 1993. He draws my attention to para 5 of the said settlement, wherein it is contained as under :-

"That it is declared, confirmed and admitted by the ex-workmen and or by the legal heirs that in fact they abandoned the work from August 1, 1979 to December 31, 1981 and, therefore, have not earned their wages for the same period".

The Learned Counsel points out that both the demands in the present case cover the said period to a substantial extent in as much as the Order dated March 26, 1981 is for the period February 1, 1979 to January 31, 1981 and the Order dated January 7, 1985 is for the period February 1, 1981 till December 31, 1981. A perusal of the said Orders passed u/s 7-A and the settlement arrived at shows that a substantial period has been covered except for the period February 1, 1979 to July 31, 1979. Shri Sonak, therefore, contends that at least for the period covered by the settlement, it is an admitted position that the workers had abandoned service and as such were not in employment. If, they were not in employment, the question of drawing basic wages would not arise. In fact, Clause 4(iv) of the settlement reads as under :

"It is declared and confirmed by the ex-workmen that they have not worked and, therefore, have not earned their wages from August 1, 1979 to December 31, 1981".

Thus, if this settlement is taken into consideration, Shri Sonak contends, the workmen, themselves have admitted that they have not worked for the said period and as such, were not entitled to wages and consequently, the question of any contribution towards the fund does not arise. The orders to the extent at least in respect of the demand from August 1, 1979, he submits should be quashed.

8. I will first deal with the second submission of Shri Sonak namely as to whether a person must be on duty, in order to enable an Authority to pass an Order under the Act, as that goes to the root of the matter. Section 7-A as it then stood reads as under :-

7-A Determination of the monies due from employees :-

The Central Provident Fund Commissioner, and Deputy Provident Fund Commissioner or any Regional Provident Fund Commissioner may, by Order determine the amounts due from any employer under any provision of this Act or the family pension scheme and for this purpose may conduct such inquiry as he may deem necessary.

There are other sub-sections regarding show cause notice etc. A perusal of the Section shows that before an Order is passed, an inquiry has to be held by the Authorities specified u/s 7-A. The Section also provides that before any Order is passed, the employer has to be given a reasonable opportunity of representing his case. The order so passed is final and is not subject to any challenge in any Court of Law. Therefore, a full-fledged inquiry is contemplated with the Authority having all the trappings of Court, like enforcing attendance of a person or

examining him on oath, requiring the discovery and production of documents etc. The employer in such a situation is entitled to lead all evidence available in his defence and/or put forward his case before any Order is passed. In the present case, the Orders were passed on March 26, 1981 and May 7, 1985. The Award of the Tribunal is dated January 12, 1984 and 30 was published on March 10, 1984. It is thus seen that when the first Order was passed on March 26, 1981, the Award of the Tribunal had not been passed and the Authority proceeded on the basis of the material available before him. There have been some subsequent amendments to the Act. One such amendment is Section 7-B which permits review of Orders passed u/s 7-A, on discovery of new and important matters or evidence. However, though this Section was inserted by Act No. 33 of 1988, till date, the amendment has not been notified. The said Section 7-B, therefore, can be of no assistance.

9. The Petitioner has relied on the said two Awards at the time of filing of this petition. It is the contention that the Award and subsequent settlement can be looked into by the Court in the exercise of jurisdiction under Article 227 of the Constitution. It is true that the Award and the settlement can be looked into to do justice in the exercise of the extraordinary jurisdiction of this Court as the said material was not available before the Authority. In so far as the first Order dated March 26, 1981 is concerned, it must be borne in mind that the references are of the year 1982 and as such this aspect will also have to be borne in mind. A conjoint reading of the Award and the Settlement will lead to the inference that the employee was not on duty for a substantial part of the period for which the Orders are passed, that is, at least from August 1, 1979 and as such, the Order of the authority u/s 7-A after August 1, 1979 is without jurisdiction. The question however is whether the employees must be physically present to enable the authority to make an Order u/s 7-A. Do the authorities referred to, support the proposition ? The Division Bench of the Delhi High Court in the case of *Burmah Shell O. S. & D. Go of India v. R. P. F. Commissioner*, (supra), was cited for the proposition that emoluments to constitute basic wages must be earned by an employee while on duty. If, it is payment made to anyone who was not on duty and not paid to some one who was on duty, it cannot be regarded as basic wages. The facts of the case were that there were some disputes between the employer and the employees. A Settlement was arrived at between the employer and the employee. The settlement provided that it was to come into force with immediate effect from the date of signing. The settlement also provided for reorganisation in the Establishment and in respect of demand for bonus by the workmen. It was agreed that certain bonus agreed to be paid was part of a package deed. The crucial part of settlement which came up for consideration was certain ad hoc payments to be made to Clerks and Labour in their Establishments whereby the basic salaries/basic wages effective from. January 1, 1970 was revised for clerical and labour respectively. The Division Bench of Delhi High Court was considering this aspect of the matter. The Division Bench held that the ad hoc payment, though part and parcel of emoluments, it., would not

be basic wage as it did not have the characteristic of having been earned while on duty. This judgment to my mind would not be of much assistance in so far as the facts of the present case are concerned nor of much assistance for the contention canvassed by the Learned Counsel that an employee must be on duty as on the facts of that case they were on duty. The next Judgment relied on by the Learned Counsel is in the case of District Exhibitors Association, Muzaffarnagar & Ors. v. Union of India & Ors.(supra). The Apex Court in that case was considering a revision of wages with retrospective effect. However, at the relevant time, no scheme had been framed but a scheme came to be framed subsequently and was made applicable retrospectively to Cinema Theatres. The employer had already paid full wages for the retrospective period. It is in these circumstances that the Apex Court held that question of the employer deducting employees share of the contribution towards the scheme from their future wages does not arise.

10. Both these Authorities are of no assistance for the arguments advanced on behalf of the Petitioners namely that an employee must be on duty and earn basic wages for an employer to deduct or make contributions to the scheme. A perusal of Section 2(b) of the Act itself gives an indication :-

2(b) 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 contract of employment and which are paid or payable in cash to him but does not include

From this definition what is relevant is the 3, deductions which can be made from the emoluments. These deductions are to be made even when the employee is absent provided he is entitled for wages for that period. The real test is not whether the employee is on duty but whether the employee is entitled to basic wages even during the period of absence from duty. If this test is not accepted then in case of an illegal closure, illegal termination etc., though, the employee is kept out of work for no fault of his, the employer can contend that no contributions are due and payable. This is not what the Act contemplates.

11. A corollary to the above is whether the Award and subsequent settlement between the employer and employee is binding on the Authority under the Act. In other words, if an employer and employee arrived at some understanding in respect of the period for which the Authority can exercise jurisdiction, can the understanding or settlement by the employer have a bearing on the Order to be passed by the Authority. The scheme framed is a part of a statutory scheme. It is the statute that provides under what circumstances the Act becomes applicable and when the Act becomes applicable the amount of contribution which an employer is bound to pay. The employer has no choice in the matter but to make the contribution. Once the amount is determined if due and payable, failure to pay would invite penal consequences on the employer. The question is whether the Provident Fund Commissioner can take into consideration the agreements and/or settlement between the employer and employee while

passing any Order u/s 7-A of the Act. To my mind, an agreement or settlement between the parties cannot have any bearing on the statutory demand due and payable under the Act. There is no provision by which an employer and employee can opt out of the provisions of the Act if they are covered by the provisions. If an employer/employee is covered by the provisions and cannot opt out the question of any understanding or settlement in respect of wages or basic wages, will not in any way affect the jurisdiction of the Authority u/s 7-A of the Act. In *Union of India (UOI) and Another Vs. Ogale Glass Works*, the Apex Court had an occasion to consider the effects of a settlement in respect of statutory dues under the Act. The Apex Court observed as under at p. 527 :

"Admittedly, the appellants were not parties to the Award. No doubt under the Industrial Disputes Act, the Award would be binding as against the Respondent and its workmen. But the Appellants are seeking in these proceedings to enforce the statutory duty cast upon them to collect the contributions due from the Respondent which again is a statutory liability against the Act and the scheme. The object of the Appellants in enforcing the Act is only to discharge the statutory duty enjoined on them for the benefit of the employees concerned. In view of the decision of this Court, it is clear that the Act and the scheme apply to all the Sections of the Respondent and if so it follows that the Respondent is liable to make contributions and that at the rate specified in the Act ..."

This Judgment of the Apex Court should conclude the matter. Therefore any settlement and the Award between the parties cannot be binding on an Authority under the Act who can arrive at a conclusion based on all materials available including settlements if any produced before him.

12. There is another aspect of the matter in respect of Award and the Settlement which has to be considered. The Award was a judicial determination by the Industrial Tribunal in respect of the references made to it by the appropriate Government that is the Central Government. The Industrial Tribunal has given clear findings based on the material produced by the parties before it that the parties were in employment during the period in respect of which the two Awards have been passed. Back wages have been awarded for the period which is co-extensive with the period covered by the two Orders. This Award as pointed out was a determination of dispute referred to by the Central Government. This Award became final on its publication and was not challenged before any Authority or Court. It was only when an application was moved before the Labour Court for recovery of the amounts due under the Award that a settlement was arrived at. Proceedings u/s 33-C(2) of the I.D. Act are in the nature of execution proceedings. If the parties between themselves agree to work out an arrangement about the quantum due, the said settlement cannot in any manner have the effect of setting aside the Award. All that can be said is that though there is an Award in favour of the parties, the parties between themselves have arrived at a settlement in respect of the quantum due and that does not have the effect of modifying or amending the award. If one examines the matter from this

aspect it cannot be said that the Orders suffer from want of jurisdiction.

13. That takes me to the first submission of the Learned Counsel Shri Sonak that before the Orders were passed, no hearing was given to the Petitioner No. 1 and consequently, the petitioner had no opportunity of meeting the case and/or putting forward their defence in respect of the show cause notice issued by the Authority under the Act. Shri Badrinarayan has made available to me the records from the Office of the Respondent No. 1 . The records clearly show that in so far as Order dated March 26, 1981, the Respondent No. 1 was notified and participated in the proceedings and it is only after that, that the Order dated March 26, 1981, was passed . The Order dated March 26, 1981 , therefore, cannot be challenged on the ground of violation of the principle of natural justice and fair play.

14. In respect of the Order dated August 7, 1985, the challenge is that the Petitioner No. 1 was not given any hearing. Shri Badrinarayan, Additional Standing Counsel for the Respondents again relies on the record. He points out that though, there is some correspondence in the file, there is no means of ascertaining whether in fact the show cause notice was served and received by the Petitioners. In these circumstances, the contention on behalf of Petitioner No. 1 has to be accepted that they had no opportunity of meeting the case in so far as second Order dated August 7, 1985 for the period February 1, 1981 to December 31, 1981 is concerned. The Order dated August 7, 1985 for the period February 1, 1981 to December 31, 1981 is therefore, liable to be quashed and set aside .

15. For the aforesaid reasons, this petition is partly allowed. The challenge to Order dated March 26, 1981 fails. The Order dated August 7, 1985 is quashed for the reasons aforesaid. The matter is remanded to the Respondent No. 1 to give an opportunity to the Petitioner No. 1 and thereafter to pass an Order according to Law. Rule made absolute in the above terms. In the circumstances of the case, there shall be no order as to costs.