

(2009) 06 KAR CK 0002
In the Karnataka High Court
Case No : Writ Petition 26090 of 2005

Gurukripa Beedi Industry Pvt. Ltd.

APPELLANT

Vs

Asst. Provident Fund Commissioner Employees Provident
Fund Organisation and Recovery Officer

RESPONDENT

Date of Decision : 23-06-2009

Acts Referred:

Employees Provident Fund and Miscellaneous Provisions Act, 1952 — Section 2 (b), 6, 7 A
Industrial Disputes Act, 1947 — Section 18 (1)

Citation : (2010) 124 FLR 679 : (2010) ILR (Kar) 861 : (2010) 1 KCCR 439

Hon'ble Judges : Huvadi G. Ramesh, J

Bench : Single Bench

Advocate : K. Kasturi for Kasturi Assts, for the Appellant; Vijaya Hanumanthgad, for the Respondent

Final Decision : Allowed

Judgement

Huvadi G. Ramesh, J.—Petitioner has sought for quashing the order passed by the Assistant Provident Fund Commissioner on 30.5.2000 - annexure A as also the order dated 6.9.2005 - annexure D passed by the Employees Provident Fund Appellate Tribunal and the order of the Recovery Order dated 14.10.2005 - annexure E passed by the 2nd respondent.

2. Petitioner is a Beedi manufacturing industry having two units at Ullal and Uchilla falling within the jurisdiction of Employees Provident Fund Regional/Sub-Regional Office in Mangalore. There was said to be a wage revision of staff of both head office and its two units on 10.9.1996 as per the settlement between management and the Union u/s 18(1) of the Industrial Disputes Act Besides including basic pay, DA, HRA, local allowance and bata applicable to all staff, special allowances adhoc/exgratia was given to certain employees who were on the rolls as on the date of settlement i.e., 10.9.1996 as per the settlement between the management and the union u/s 18(1) of the Industrial Disputes Act.

According to the petitioner, the benefits of the said settlement are not available to temporary staff as well as future entrants who join service after 1.9.1996.

3. After verification of the records of the petitioner company, respondent had taken the view that special allowance paid from 1.9.1996 has to be reckoned for the purpose of provident fund calculation and provident fund contribution as required to be paid on the said allowance. According to the petitioner, merely special allowance being paid to certain employees does not form part of basic pay. However, in this regard, after issuance of notice, inquiry was held on 23.7.1997 by the Assistant Provident Fund Commissioner, Mangalore for which objections were filed by the petitioner denying the allegation. Respondent authority on the point of payment of special allowance, as per Clause 10 of the agreement dated 10.9.1996, as well as adhoc/ex-gratia payment as per Clause 11(a) of the Settlement, after entertaining the objection filed by the petitioner, after holding an inquiry passed an order as per Section 7(a) of the Industrial Disputes Act on 30.5.2000 and determined the dues payable by the petitioner to the extent of Rs. 2,30,700/- towards contribution against which appeal was filed before the Appellate Authority. Appellate Authority after hearing the parties, dismissed the appeal by order dated 4.10.2005. Based on the said order, on receiving the recovery order from the Regional Office of Employees Provident Fund Organisation, petitioner is before this Court urging various grounds.

4. On behalf of respondents, objections have been filed contending that the petitioner is liable to pay provident fund contribution on payments made to employees towards special allowance, adhoc/ex-gratia payment. For non-deduction of the provident fund contribution, notice was issued to the petitioner. Since petitioner disputed the liability, inquiry was held u/s 7A, and after hearing the parties order dated 30.5.2000 - annexure A came to be passed dismissing the appeal and confirming the order of the 1st respondent.

5. According to the respondents, special allowance, adhoc/ex-gratia amount had to be reckoned for the purpose of provident fund calculation and contribution had to be made on the said amount paid and on the basis of the terms and conditions of settlement and the memorandum of understanding, the 1st respondent and the Appellate Tribunal have rightly come to the conclusion that special allowance is based on the length of service, fitment, merger of DA, etc. The terms of settlement makes it clear that all the employees on the rolls on the date of settlement be entitled to it. It does not fall within the excluded allowance u/s 2(b) of the Act. The nature and purpose of payment of special allowance is different from any other allowance as per Section 2(b) and it forms the part of basic wage and has a close relationship with work done in the past and is paid in terms of contract of employment.

6. Similarly, adhoc/ex-gratia amount is paid on the length of service and thereby it depicts a close nexus between performance of duty and payment. The Appellate Tribunal has rightly observed though allowance was named as adhoc/ex-gratia payment, it was given depending upon the length of service and is paid

as compensation for arrears of salary and the employees would have the benefit if the pay scale had been revised with effect from the date of the dispute as such it has been rightly included for the purpose of contribution. The settlement entered into between the management and Union cannot over ride the provisions of the Act. The decision as to whether contribution had to be recovered on any payment made to the employee has to be taken by the Authority under the Act, not as per the clauses in the settlement which runs contrary to the provisions of the Act. Any clause in the settlement which is contrary to the provisions of the Act is not valid and binding on the Authorities under the Act. The Appellate Tribunal has passed the order after considering all aspects and also the terms of settlement and related decisions on the point. As such, learned Counsel sought for dismissal of the petition.

7. Heard the counsel representing the parties.

8. It is the argument of the counsel representing the respondents that the special incentive given to the employees forms part of basic wages. The Controlling Authority as well as the Appellate Authority having rightly applied their mind, have taken note of the allowance given to the workman on the basis of length of service and after verifying that allowance is almost in the form of regular incentive given, have opined that it forms part of basic wage for the purpose of contribution towards provident fund. It is also submitted that there is no illegality or error committed as such by the authorities below and the impugned orders do not call for interference. Accordingly, in support of her argument, teamed counsel has relied upon several decisions, which I have referred to in the course of my order.

9. In the case of Gujarat Cypromet Ltd. v. Asst. Provident Fund Commissioner 2095 LLJ 484, referring to Section 2(b), 6 and 7A of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952, the Gujarat High Court has held the term "Basic Wages" means all emoluments earned by an employee while on duty or on leave or on holidays with wages in accordance with the terms of contract of employment and which are paid or payable in cash to him and includes various allowances such as medical allowance, house rent allowance, etc., paid by the employer, Once a payment is held to be emolument, the same becomes part of "basic wages" as per Section 2(b) of the Act.

10. In the case of Regional Provident Fund Commissioner (II) and Another Vs. Vivekananda Vidyamandir and Others, the Division Bench of the Calcutta High Court held that special allowance could be treated as part of basic wages or dearness allowance attracting provident fund contribution and contribution thereon was payable.

11. In Shree Changdeo Sugar Mills and Another Vs. Union of India and Another, the Supreme Court has held that payment made to workmen in full and final settlement of their claims is basic wages and deductions towards provident fund can be made on wages paid under settlement.

12. The Apex Court in various decisions has taken the view that the court by interpretative process must strive to reduce the field of conflict and expand the area of agreement and show its preference for upholding agreements sanctified by mutuality and consensus in larger public interest, namely to eschew industrial strife, confrontation and consequent wastage - (Workmen of Hindustan Lever Ltd. v. Hindustan Lever Ltd. referred in 2094 III LLJ 228 (para 17)

13. In Usha Sales, Ltd. v. Regional Provident Fund Commissioner 1980 (I) LLJ 452, it is held, authorities have to keep in view the definition of "wages" as given in the Rules and not the definition of "basic wages" given in the Act. The concept of emoluments is distinct from wages as defined in the Provident Fund Rules or even basic wages as defined in Section 2(b) of the Act. To go against the terms of contract or service would not be permissible unless fraud is established.

14. In the case of Burmah Shell Oil Storage and Distributing Company of India Ltd. Vs. The Regional Provident Fund Commissioner Delhi and Others, , the Division Bench of the Delhi High Court has held that emoluments to constitute basic wage must be earned by an employee while on duty. If it is a payment made to anyone who was not on duty and not paid to some who were on duty, it cannot be regarded as "basic wages". Basic wages are those which are paid to all the employees of a concern and are generally paid to employees of all concerns. Adhoc payment is not an allowance of any kind and such, adhoc payment cannot be regarded as "basic wages".

15. It is farther held referring to Section 6 of the Act, for the purpose of contribution, basic wages, dearness allowance and retaining allowance if any has to be added. Adhoc payment does not bear the characteristic of basic wage as such, no contribution u/s 6 of the Act would be made or could be asked for on the adhoc payment postulated by one of the clauses of the settlement.

16. In the case of Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI), in a Constitution Bench, the Apex Court with reference to Employees Provident Fund Act has held that Section 2(b) of the Act does not exclude only profit bonus but also other kind of bonus also. The amount paid by way of production bonus under the Scheme in the said case was held excluded from the definition of basic wage and covered by the exception.

17. In the case on hand, Clause (10) of the Settlement dated 10.9.1996 provides for payment of special allowance to persons whose names are on the rolls of the company as on the date of entering into settlement and also since allowance is not payable to all employees of the company, it is excluded from the definition of basic wages. Even adhoc/ex-gratia payment shall not form basic wages. It is pertinent to note that as per the settlement special allowance/ex-gratia amount is excluded from the payment of contribution towards provident fund. In Hindustan Lever Ltd. case noted above, it is observed the Court by interpretative process must try to reduce the field of conflict and expand the area of agreement. In Bridge & Roof company's case noted above, it is held that amount

paid by way of production bonus under the Scheme is excluded from the definition of "basic wages" and falls within the exception of Clause (ii) of Section 2(b). In the instant case also, as argued by the petitioner's counsel, in the Settlement, ex-gratia amount and also incentive said to have been paid is necessarily excluded and does not necessarily form part of the basic wages. As such, amount so paid in excess as incentive/ex-gratia ought not have been taken into consideration for contribution towards provident fund stating that the incentive paid would form part of basic wage for the purpose of calculation of contribution by the management towards provident fund.

18. It is the specific case of the petitioner that commission or similar other allowance is excluded from the definition of basic wages as they are necessarily excluded in the Settlement not to be treated as part of the basic wage and those incentives were earned in accordance with the terms of contract. As rightly pointed out by the petitioner, there would be no contribution payable on special allowance and ex-gratia amount having regard to the terms of settlement which has to be honoured.

19. The opinion formed by the appellate authority referring to various clauses in the Settlement is on the premise that different classes of persons have been categorised for the purpose of payment of adhoc/ex-gratia payment for the year on the basis of their qualifying service as such, that forms arrears of salary and it was paid to all sets of employees. The appellate authority has noted that the person who has rendered service between 1-5 years was given ex-gratia payment at the rate of Rs. 600/- and a person who has put in service of 10 years was paid Rs. 1,300/-. Noting the same, it has formed an opinion that such payment cannot be considered as ex-gratia amount but rather, it forms part of the basic wages. Some special incentive paid to some category of persons does not necessarily amount to payment of special allowance to all employees. A paltry sum of special allowance given to some persons cannot form part of basic wage and all employees are not getting special allowance and rather, incentive is given having regard to the length of service and it does not form part of basic wage so as to make it liable to pay contribution towards provident fund. In my view, it does not appear there is an attempt being made to escape liability towards payment of contribution.

20. As per the terms of settlement, petitioner's counsel has demonstrated what has been paid as special allowance was not necessarily in the normal course to compensate all the workmen but, to only a category of workmen as a matter of incentive. The incentive so paid by virtue of the settlement in honouring the settlement of contract would not form basic wage for the purpose of payment of contribution towards provident fund. In the circumstances, the appellate authority ought to have taken into consideration the nature of the emoluments paid in detail. Rather, it has formed an opinion that ex-gratia amount forms part of basic wage as such, management is liable to pay contribution towards provident fund on the said difference of amount. The Controlling Authority as well as the

Appellate Authority have committed an error in coming to such a conclusion on the basis that adhoc/ex-gratia amount also forms part of the basic wage.

21. In that view of the matter, the order passed by the Controlling Authority as well as by the Appellate Authority is set aside and it is held contributions by way of special allowance and ex-gratia amount paid does not form part of basic wage so as to make it liable for contribution towards provident fund. Accordingly, petition is allowed.