
(1994) 09 BOM CK 0080

In the Bombay High Court

Case No : Writ Petition No. 527 of 1992 With W.P. No. 530 of 1992

Hindustan Lever Employee's Union

APPELLANT

Vs

Regional Provident Fund Commissioner and Another

RESPONDENT

Date of Decision : 29-09-1994

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1, 17, 2, 6

Industrial Disputes Act, 1947 — Section 9A

Citation : (1995) 2 BomCR 90 : (1995) 71 FLR 46 : (1995) 2 LLJ 279 : (1995) 1 MhLj 312

Hon'ble Judges : V.P. Tipnis, J

Bench : Single Bench

Judgement

V.P. Tipnis, J.—Writ Petition No. 527 of 1992 is filed by the Hindustan Lever Employees' Union whereas Writ Petition No. 530 of 1992 is filed by Hindustan Lever Research Central Employees' Union. However, as both these petitions challenge the very same orders passed by the Regional Provident Fund Commissioner, Maharashtra and Goa, and as the issue involved is identical, both the petitions are heard together and are being disposed of by this common judgment.

2. The petitioners are trade unions representing the employees of Respondent No. 2 - Hindustan Lever Ltd. It appears that for a considerable period, running over several years. Respondent No. 2 has been including the amount of leave encashment in the amount of employments for the purpose of calculating the employer's as well as the employees' contribution towards payment of provident fund. However, by letter dated 3-7-1991 which was in reply to the letter sent by the Central Secretary, Hindustan Lever Mazdoor Sabha, the Regional Provident Fund Commissioner, Maharashtra and Goa, informed that according to the provisions of Section 6 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "Act"), provident fund contribution is payable on basic wages, dearness allowance and retaining

allowance, if any. The said provision does not provide for any deduction of provident fund on leave encashment which does not form part of wages as defined therein. Further, the leave encashment is not earned wages and, therefore, deduction of provident fund contribution on it is not envisaged. In view of the aforesaid, the action of the employer, viz., Hindustan Lever Ltd., in discontinuing the provident fund deduction on leave encashment will not cause any reduction in the existing benefits being available to the members. In a letter dated 11-3-1991 it appears that the Regional Provident Fund Commissioner, Maharashtra and Goa, informed the Assistant manager (Funds), Hindustan Lever Ltd., that as regards provident fund deduction on leave encashment it may be noted that such payment is not earned wages and as such provident fund is not liable to be deducted on such wages i.e., encashment of leave. These directions of the Regional Provident Fund Commissioner, Maharashtra and Goa, are impugned in these two petitions.

3. Mrs. Menon, learned counsel appearing for the petitioners in both the petitions, has contended that the orders are passed without giving any hearing or without any notice to the employees or to their unions and as such, the orders are in breach of the principles of natural justice. Secondly, she contended that the establishment is an exempted establishment and such exclusion of encashment of leave from the emoluments for the purposes of contribution of total quantum of benefits of provident fund and the same cannot be done without the leave of the Central Government as provided in Section 17(3)(b). She further contended that it also amounts to change in the conditions of service and in as much as the requirements of Section 9-A of the Industrial Disputes Act are not followed, the change cannot be lawfully and validly effected. Lastly, she contended that the Income Tax department considers the amount received by way of encashment of leave as earned wages and also imposes a tax under the provisions of the Income Tax Act and it is unfair that the Income Tax authorities for the purpose of tax include amount of encashment of leave into earned wages while the same amount is being deducted by the Provident Fund Commissioner from the amount of emoluments for the purposes of Section 6 of the Act. To show that the amount of encashment of leave is taxable. Mrs. Menon has cited a decision of a Division bench of the Karnataka High Court reported in 1985 (15) Income Tax Reports 48. Mrs. Menon also contended that on proper reading of the definition of "basic wages" and on proper reading of Section 6 of the Act, the amount of encashment of leave ought to fall within the term "basic wages". For all these reasons, Mrs. Menon contended that the view taken by the Provident Fund Commissioner as reflected in the aforesaid two letters is totally erroneous and the said amount of encashment of leave must be included in the basis wages for the purposes of calculating the contribution towards provident fund.

4. Mr. Rele, learned counsel appearing for respondent No. 2, and Mr. Pradhan, learned counsel appearing for respondent No. 1, on the other hand, contended that so far as the inclusion of amount of encashment of leave in earned wages for the purposes of the Income Tax Act is concerned, it is thoroughly irrelevant.

We will have to govern ourselves by the definition of "basic wages" and the provisions of section 6 of the Act. Secondly, it is contended that so far as the challenge is based on the impugned orders on the alleged ground of breach of section 9A of the Industrial Disputes Act, the petitioner will have to agitate the grievance before a different forum, in accordance with the provisions of the Industrial Disputes Act. So far as the contention regarding the requirement of the Central Government's permission under sections 1 and (3) (b) of the Act is concerned, it was submitted that when the exemption was granted, there was no practice of granting any amount by way of encashment of leave at all. As such, there is no question of refusing any benefits under the scheme. Lastly and mainly it was contended that on proper reading of the definition of basic wages given u/s 2(b) of the Act and the provisions of section 6 of the Act, it is clear that the amount which is paid to the employees towards encashment of leave can never fall within the meaning of "basic wages" as defined u/s 2(b) of the Act. In that behalf, strong reliance is placed on the judgment of Apex Court in *Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI)*, .

5. After having heard the learned counsel for rival parties, I find it unnecessary to decide several of the contentions raised before me excepting the one as to whether the amount payable by way of encashment of leave would be covered by "basic wages" within the meaning of the definition given in section 2(b) of the Act.

6. So far as that aspect of the matter is concerned, it is clear that u/s 6 of the Act, it is provided that the contribution which shall be paid by the employer to the Fund shall be eight and one-third 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 employee's contribution shall be equal to the contribution payable by the employer in respect of him..... Thus, the amount will have to be calculated on the basis of basic wages, dearness allowance and retaining allowance, if any for the time being payable to each of the employees. There is no difficulty that the amount of encashment if leave will not fall either under dearness allowance or retaining allowance. So far as the question whether the said amount can fall within section 2(b) of the Act is concerned, it is necessary to refer to the definition of the "basic wages" as given u/s 2(b) of the Act which is as under :-

"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 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."

Section 6 clearly refers to basic wages being payable to each of the employees. Admittedly, each and every employee of Hindustan Lever Limited is free and entitled to receive the amount by way of encashment of leave. Therefore, the said amount is payable to each and every employee if warranted by the case of a particular employee. So far as the definition of "basic wages" is concerned, it is a definition specifying what is meant by basic wages. It refers to 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 and but for the exclusion specifically made, it would have included even those items mentioned u/s 2(b) (i), (ii) and (iii). However, cash value of any food concession, any dearness allowance, 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 and any presents made by the employer are specifically excluded. Now, unless the payment falls in any one of these specifically mentioned excepted categories, every emolument which is earned by an employee while on duty or on leave 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 must be included within basic wages. As stated earlier, every employee is entitled to encash leave as per the rules. Thus, the amount is definitely payable to each of the employees, subject to his satisfying the requirements that he is so entitled for encashment of leave. In view of the definition of "basic wages", if an employee who has earned leave goes on leave, his salary or wages can obviously fall within the terms "basic wages". I see no good ground to hold that in the event of his not availing the leave but encashing it, the amount which he gets in such encashment should be excluded from the basic wages within the definition of "basic wages" as given in Section 2(b) of the Act.

7. So far as the reliance on the decision of the Apex Court in Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI), is concerned, it must be appreciated that the issue before the Supreme Court was as to whether "production bonus" could be included in basic wages for the purposes of the Act. The Apex Court observed that Clause (ii) of Section 2(b) excludes, amongst other allowances, bonus payable to the employee in respect of his employment or of work done in such employment, from the definition of "basic wages". 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". 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. It was, therefore, held that production bonus is outside the definition of "basic wages" in Section 2(b). This was the central issue before the Apex Court. While deciding the said issue, in Para 8, the Apex Court addressed itself to find out the reason or the rationale behind excluding certain categories of emoluments in Clause (ii) of Section 2(b). Specifically referring to the items excluded in Clause (ii) and also provision of Section 6, the Apex Court observed as under :-

"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 Section 6. 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 u/s 6 but whatever is not payable by all concern or may not be earned by all employees of a concern is excluded for the purposes 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 Section 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 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 allowances 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 exception in Section 2(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 Section 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 Section 6 and the real exceptions therefore in Clause (ii) are the other exceptions beside dearness allowance, which has been included through

Section 6."

It is very clear to me that in para 8, the Supreme Court addressed itself exclusively to discover some basis for the exclusion in Clause (ii) as also the inclusion of dearness allowance and retaining allowance in Section 6. The entire discussion is with specific reference to the specific items of exclusion. In my opinion, therefore, for the purpose of deciding as to whether the amount of encashment of leave falls within the meaning of basic wages or not, the said decision is not of any help to the respondents.

8. In view of my finding that the amount of encashment of leave has to be included in the basic wages as defined in Section 2(b) of the Act, it is necessary to deal with any other submission.

9. In the result, the petitions succeed and the decision or order of the Regional Provident Fund Commissioner, Maharashtra and Goa, to the effect that the amount of leave encashment does not form part of wages as defined under the provisions of the Act is quashed and set aside. The rule is made absolute in the aforesaid terms. There shall be no order as to costs.

10. Certified copy expedited.

11. Petition allowed.