

(2017) 11 BOM CK 0145
In the Bombay High Court
Case No : 679 of 2011

M/s Gerson Engineering Works Now Unit of M/s Ashoka Non-Ferrous Metals Ltd.

APPELLANT

Vs

The Asst. Provident Fund Commissioner

RESPONDENT

Date of Decision : 01-11-2017

Acts Referred:

Constitution of India, Article 227 -
Power of superintendence over all courts by the High Court
Employees Provident Funds and Miscellaneous Provisions Act, 1952,
Section 6

Citation : (2017) 11 BOM CK 0145

Hon'ble Judges : C. V. Bhadang

Bench : SINGLE BENCH

Advocate : V. Palekar, P. P. Singh

Judgement

1. The challenge in this petition under Article 227 of the Constitution of India is to the order dated 27/03/2006, passed by the respondent holding that the petitioner is liable to pay total contribution of Rs.1,27,573/- as contribution towards provident fund of the employees for the period from November, 2003 to August 2005. The said order has been confirmed in appeal by order dated 17/03/2011.

2. Shri Palekar, the learned Counsel for the petitioner has raised two contentions. Firstly, it is contended that the respondent has not recorded any finding as to what is the basic wage of the individual employees for the purpose of calculation of the provident fund contribution. Secondly, it is submitted that under a Circular of the year 1989, the authorities could not have insisted for recovery of the employees' share of the contribution for pre-discovery period i.e. from November, 2003 to December, 2004. It is submitted that the petitioner establishment was covered under the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (the Act, for short), retrospectively with effect from November, 2003. It is submitted that in terms of the Circular as

referred above, the authorities cannot insist for recovery of the employees' contribution for the period prior to December, 2004.

3. On the contrary, it is submitted by Shri Singh, the learned Counsel for the respondent that the respondent as well as the Appellate Authority have come to the conclusion that the basic wage paid to the employees has been deliberately shown on the lower side, in order to evade the payment of the employees' share of the provident fund contribution. Shri Singh has referred to a chart under which the total emoluments paid to the various employees have been shown with breakup thereof. For instance, Shri Singh has pointed out that in respect of an employee Mr. Navin Bhat, the basic wage is shown to be Rs.500/-, while the HRA is shown to be Rs.375/-. In respect of Mr. Dayanand Roy, while the basic wage is shown to be Rs.600/-, the HRA is shown to be Rs.450/-. This, according to Mr. Singh, is done deliberately to evade the payment of provident fund contribution. Shri Singh, however, does not dispute that the provident fund contribution would be payable on the basic wage, which for the purposes of the Act, includes Dearness Allowance, Food Allowance and other Allowances. According to Mr. Singh, the basic wage for the purpose of arriving at the amount, which is payable by the petitioner, has been computed in the context of Section 2(b) read with Section 6 of the Act. In so far as the second ground based on Circular of the year 1989 is concerned, it is submitted that this ground was neither raised before the respondent nor in appeal nor the same is raised in the writ petition. It is submitted that the said ground cannot be allowed to be raised for the first time before this Court.

4. In counter reply, it is submitted by Shri Palekar that the submission about the prohibition from recovering the employees' share of contribution for pre-discovery period is based on the Circular of the respondent and as such, notwithstanding the fact that the said ground was not raised before the authorities below, the same can be considered by this Court.

5. I have carefully considered the rival circumstances and the submissions made. Perused record.

6. The only contention raised on behalf of the respondent is that the petitioner had deliberately shown the basic wage on lower side, with a view to evade the payment of appropriate provident fund contribution. If this be so, it was necessary for the respondent to arrive at the basic wage, which in the opinion of the respondent, can be reckoned for the purpose of determination of the provident fund contribution. The impugned order passed by the respondent does not show as to what is the basic wage considered in respect of each individual employee for the purpose of computation of the provident fund contribution. In my considered view, it was incumbent on the respondent to carry out such an exercise. In this regard, a useful reference may be made to the decision of the Madras High Court in the case of M/s. Topaz Security Services Vs. The Commissioner (W.P. (MD) No.6501 of 2010) and more particularly to paragraphs 13 and 14 thereof, in which it has been inter alia, held that it was incumbent on

the authority to assess the basic wages and Dearness Allowance before passing an order under Section 7(A) of the Act. In the said case, the Assessing Officer had fixed the contribution at 70% of the gross salary/ wages without determining the basic wages under Section 2(b) of the Act. The Madras High Court, after noticing that the order was silent as to the manner in which and the reason for which the basic wage was considered as 70% of the gross salary, found that the order cannot be sustained.

7. Coming back to the present case, in my considered view, the order passed by the respondent does not show what is the basic wage considered in respect of an individual employee for ascertaining the provident fund contribution.

8. In so far as the second ground is concerned, it is true that the petitioner has not raised this ground before the authorities below. However, I find that the ground is based on the Circular issued by the respondent itself and as such, it is expected that respondent adheres to the same unless according to the respondent, the Circular is modified. In view of the fact that I am inclined to remit the matter back to the respondent for deciding it afresh, I find that the ground based on the Circular of the year 1989 can also be left open, to be considered by the respondent while deciding the matter afresh.

9. In the result, the petition is partly allowed. The impugned order is hereby set aside. The matter is remitted back to the respondent for deciding it afresh after hearing the parties, in accordance with law. All the rival contentions, including the one based on the Circular of the year 1989, are left open. The petitioner to appear before the respondent on 27/11/2017.

10. Rule is made partly absolute in the aforesaid terms, with no order as to costs.