
(2012) 07 GAU CK 0021

In the Gauhati High Court

Case No : Writ Petition (C) No. 140 of 2011 with WP (C) No's. 472 of 2010, 136, 137, 138, 139 and 140 of 2011

M/s. Mekhilipara Tea Company Ltd.

APPELLANT

Vs

The Regional Provident Fund Commissioner, Agartala

RESPONDENT

Date of Decision : 23-07-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2(b), 5, 6, 6A, 6C

Citation : (2013) 136 FLR 1108 : (2013) 1 GLD 199

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : D.K. Biswas and Mr. G.S. Bhattacharjee, for the Appellant; A. Lodh, N.C. Pal, GA and Mr. B. Datta, for the Respondent

Judgement

I.A. Ansari, J.—Considering the fact that all these writ petitions, made under Article 226 of the Constitution of India, have raised common questions of law, based on identical facts, all the writ petitions, on the request made by the learned counsel for the parties concerned, have been heard together and are being disposed of by this common judgment and order. The basic case of the writ petitioners may, in brief, be set out as under:

Ordinarily, in a Tea Estate, though not necessarily in all the Tea Estates, rice and atta are made available by the management of the Tea Estate to their workmen at highly concessional rate. Making of rice and atta so available at concessional rate does not according to the petitioners, form part of the basic wages of the workman concerned/but Regional Provident Fund Commissioner, Agartala, has by his letter, dated 07.11.2009, initiated a proceeding, under Sections 6-A and 6-C of the EPF Act read with paragraph 38 of the Employees Provident Fund Scheme, 1995, in purported exercise of his power u/s 7A of the EPF Act, directing the petitioners to produce certain records for the purpose of holding an enquiry if the petitioners are liable for having not contributed, as required by law, for, the

Regional Provident Fund Commissioner has taken the view that rice and atta, made available at a concessional rate, is covered by the term cash value of food concession and, therefore, falls within the definition of basic wages, though, according to the petitioners, no notification, in this regard, has been issued by the Government making the employer liable to make contribution for the employer's act of providing to his employees rice and atta at concessional rate as indicated hereinbefore. The proceeding, which was so initiated by letter, dated 07.11.2009, aforementioned, stands culminated into issuance of a letter, dated 13.08.2010, directing the petitioners to make payment of their contribution for the cash value of food concession as basic wages.

2. I have heard Mr. D.K. Biswas, learned counsel, for the petitioners, and Mr. A.S. Lodh, learned counsel, for the respondent No. 2. I have also heard Mr. N.C. Pal, learned Govt. Counsel, Tripura, for the respondent No. 3.

3. Before proceeding to determine as what the meaning of the term basic wages is, it needs to be pointed out that the term basic wages has been defined in Section 2(b) of the EPF Act. Section 5 of the EPF Act introduces the concept of employees provident fund scheme for those industries, which are included in Schedule 1 to the EPF Act.

4. Section 2(b) of the EPF Act, which defines basic wages, reads as follows:

Section 2(b) "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 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.

5. From a bare reading of the definition of basic wages, as embodied in Section 2(b) of the EPF Act, it clearly follows that basic wages mean 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. Basic wages would not, however, include:

- (i) the cash value of any food concession;
- (ii) any dearness allowance (that is to say, all cash by whatever name called paid to an employee on account of 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;
and

(iii) any presents made by the employer.

6. The concept of the term basic wages, as embodied in Section 2(b) of the EPF Act, has been elaborately dealt with in *Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI)*, , which has been followed, without exception, by the Supreme Court in its subsequent decisions in *Jay Engineering Works Ltd. and Others Vs. The Union of India (UOI) and Others*, ; *T.I. Cycles of India, Ambattur Vs. M.K. Gurumani and Others*, ; *The Daily Partap Vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh*, ; *Hindustan Lever Employee's Union Vs. Regional Provident Fund Commissioner and Another*, , and *Manipal Academy of Higher Education Vs. Provident Fund Commissioner*, .

7. As to what the term "basic wages" conveys, the Supreme Court has succinctly explained at para 7 and 8 of *Bridge and Roofs Co. Ltd. (supra)*. The relevant observations, appearing, in this regard, in *Bridge and Roofs Co. Ltd. (supra)*, are, therefore, reproduced herein below:

7. The main question therefore that falls for decision is as to which of these two rival contentions is in consonance with Section 2(b). There is no doubt that "basic wages" as defined therein 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. If there were no exceptions to this definition, there would have been no difficulty in holding that production bonus whatever be its nature would be included within these terms. The difficulty, however, arises because the definition also provides that certain things will not be included in the term "basic wages", and these are contained in three clauses. The first clause mentions the cash value of any food concession while the third clause mentions any presents made by the employer. The fact that the exceptions contain even presents made by the employer shows that though the definition mentions all emoluments which are earned in accordance with the terms of the contract of employment, care was taken to exclude presents which would ordinarily not be earned in accordance with the terms of the contract of employment. Similarly, though the definition includes "all emoluments" which are paid or payable in cash, the exception excludes the cash value of any food concession, which in any case was not payable in cash. The exceptions therefore do not seem to follow any logical pattern which would be in consonance with the main definition.

8. Then we come to CI. (ii). It excludes 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. 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". It is undeniable that the exceptions contained in Clause (ii) refer to payments which are earned by an employee in accordance with the terms of his contract of employment. It was admitted by counsel on both sides before us that it was difficult to find any basis for the exceptions contained in the three clauses. It is clear however from Clause (ii) that from the definition of the word "basic wages" certain earnings were excluded, though they must be earned by employees in accordance with the terms of the contract of employment. Having excluded "dearness allowance" from the definition of "basic wages". Section 6 then provides for inclusion of dearness allowance for purposes of contribution. But that is clearly the result of the specific provision in Section 6 which lays down that contribution shall be 6-1/4 per centum of the basic wages, dearness allowance and retaining allowance (if any). 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 concerns or may not be earned by all employees of a concern is excluded for the purpose 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 are. 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. 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 a 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 exceptions 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 el. (ii) are the other exceptions beside dearness allowance, which has been included through Section 6.

8. From a minute and patient reading of the above observations, made in Bridge and Roofs Co. Ltd. (supra), with regard to what the term basic wages, as defined by Section 2(b) of the EPF Act, implies, what transpires is that though the term basic wages has been defined to mean 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, the fact remains that from the term basic wages, certain classes of payments, which may be made to an employee, stand excluded by three distinct clauses. Clause (i) excludes cash value of any food concession and clause (iii) excludes the presents, which an employer may make to his employee. As far as clause (ii) is concerned, it seeks to exclude, from the purview of the term basic wages, dearness allowance paid to an employee on account of 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 of work done in such employment.

9. Thus, notwithstanding the fact that the term basic wage is defined to mean all emoluments, which are earned by an employee, while on duty or on leave, or on holidays in accordance with the terms of the contract of employment, which are paid and payable in cash, payments have been excluded specifically by the said three clauses as mentioned hereinbefore.

10. What falls, therefore, within the term basic wage is the payment, which is received by all permanent employees in terms of their contract of employment. Logically extended, it would mean that what is not payable to all concerns or may not be earned by an employees of a concern would stand excluded from the purview of contribution, which is required to be made by virtue of Section 6 of the EPF Act.

11. Thus, when overtime allowance is not received by everyone except those, who work over time allowance so paid would not fall within the term basic wages. Though dearness allowance has been excluded from the definition or the term basic wages, dearness allowance, has been included, for the purpose of making contribution by virtue of Section 6. No wonder, therefore, that in Bridge and Roofs Co. Ltd. (supra), the Supreme Court has pointed out that overtime allowance, though is, generally, in force in all concerns, is not earned by all employees of a concern and, hence, overtime allowance stands excluded from the purview of the term basic wages. Similarly, any payment, which is made by way of special incentive of work, is not basic wages.

12. In the case of Manipal Academy of Higher Education Vs. Provident Fund

Commissioner, , the Supreme Court has succinctly held that since under the terms of contract of employment, overtime allowance is not earned by all employees of the concern, it has to be excluded from the definition of basic wages and cannot, therefore, be computed for the purpose of determination of contribution u/s 6 of the EPF Act.

13. While determining the question as to whether making of rice and atta available to the employee by an employer at a concessional rate would fall within the term basic wages or not, one has to carefully determine if the act of providing rice and atta concessional rate by the employer is in terms of a contract, which the employer has with the employee or in terms of any statutory requirement or it is on his/its own volition that the employer provides his/its employees with rice and atta at a concessional rate. If neither the contract of employment imposes any obligation to make ration available to the workmen at concessional rate or if there is no statutory provision for making ration at concessional rate available to a given set of employees, the act of making rice and atta available to the employees at a concessional rate, cannot be regarded as basic wages, for, the term basic wages has an element of compulsion arising out of contract of employment or statutory obligation.

14. In the case at hand, there has been no determination by the Provident Fund Commissioner that the cash value of food concession is covered by any contract between the employer and the employee or is covered by any statute. Without of any of these two factors, it would be not only impermissible, but wholly illegal for the Provident Fund Commissioner to raise demand for contribution as has been done in the present cases.

15. In the result and for the reasons discussed above, the impugned letters, issued by the Provident Fund Commissioner, are hereby set aside and quashed. The Provident Fund Commissioner is, however, left at liberty to take, in accordance with law, appropriate steps for determination of the question as to whether making of rice and atta available by an employer to its employee at a concessional rate would fall within the term basic wages or not.

16. With the above observations and directions, these writ petitions shall stand disposed of. No order as to costs.