

(2014) 03 BOM CK 0128
In the Bombay High Court
Case No : Writ Petition No. 8959 of 2011

M/s. NRB Bearings Limited

APPELLANT

Vs

Asst. Provident Fund Commissioner Employees Provident
Fund Organisation

RESPONDENT

Date of Decision : 06-03-2014

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 12(3)
6 7A 7B 7I
Factories Act, 1948 — Section 46

Citation : (2014) 5 ABR 93 : (2014) 5 ALLMR 543 : (2014) 5 BomCR 717 :
(2014) 141 FLR 799 : (2014) LabIC 3748 : (2014) LLR 470

Hon'ble Judges : Ravindra V. Ghuge, J

Bench : Single Bench

Advocate : S.V. Dankh, for the Appellant; N.K. Chaudhari h/f Mr. K.B.
Chaudhari, for the Respondent

Final Decision : Allowed

Judgement

Ravindra V. Ghuge, J.—By an order dated 25/01/2012, after hearing the learned Advocates for the respective sides, this petition was admitted. Mr. S.V. Dankh, the learned Advocate for the petitioner submits that a short point arises for the consideration of this Court.

2. A settlement between the petitioner Management and its Union was signed on 15/05/2005, providing for a "Tiffin Allowance". Clause No. 1.5 of the said settlement reads thus:

1.5 DEMAND NO.: TIFFIN ALLOWANCE

The Company agrees to increase the existing Tiffin Allowance from Rs. 6,50/- per day to Rs. 11/- per day on actual attendance towards Tiffin, which will be reimbursed on monthly basis. Other terms and conditions remain unaltered. In case of Full Shift OT working, Tiffin Allowance will be paid.

The amount shall not be reckoned for the purpose of any statutory benefit such as Provident Fund, Bonus, Gratuity, Leave, Salary encashment etc.,

3. According to him, it is clear from Clause No. 1.5 reproduced above that the Tiffin Allowance paid to each worker, based on his actual attendance, was not to be reckoned for the purpose of any statutory benefit such as Provident Fund, Bonus, Gratuity, Leave, Salary encashment etc. The respondent/Provident Fund Authorities interpreted the said clause to mean an amount payable to each workman as a part of wages and presumed it to be so. Based on such assumption, the respondent Authorities concluded in its Section 7A enquiry under the Employees' Provident Funds and Misc. Provisions Act, 1952 (Hereinafter referred to as Act of 1952) that an amount of Rs. 68152/- was recoverable from the petitioner.

4. Mr. Dankh contends that though the said amount may appear to be a meagre amount, issue is as to whether the Tiffin Allowance under Clause 1.5 of the settlement would attract Provident Fund Contribution.

5. Mr. Dankh further submits that the impugned order u/s. 7A of the Act of 1952 was passed on 30/01/2009. A review petition u/s. 7B was preferred, which came to be rejected on 26/06/2009 without giving any proper hearing to the petitioner. The petitioner, therefore, deposited the amount of Rs. 68,152/- under protest and preferred an appeal before the Employees' Provident Fund Appellate Tribunal at New Delhi u/s. 7I of The Act of 1952 which was registered as ATA. No. 582(9) 2009. By its order dated 08/03/2011, the said appeal of the petitioner was dismissed.

6. The learned Advocate for the petitioner, without going into too much of details as regards the factory, its operations, the workers and its Union, has straight away drawn my attention to the view taken by this Court in the matter of The Tata Power Company Limited Vs. The Regional Provident Fund Commissioner, and others in Writ Petition No. 2500/2005, which was decided by this Court on 16/07/2008.

7. Placing reliance on the said judgment, he further contends that in the said case as well, food allowance was being given to the workers and the Provident Fund Office included the food allowance for the purpose of computing Provident Fund Contribution. This issue has been dealt with by this Court in the said case.

8. Mr. Dankh states that from paragraph no. 10 onwards, this Court has considered every aspect attending to the issue as to whether food allowance can be treated to be a part of wages so as to attract Provident Fund Contributions.

9. Paragraph Nos. 15, 16, 17, 18 of the said judgment squarely cover the instant case, which read thus:-

15. One thing that is clear from the decision is that there has been a practice in industrial employment in this country where the cash value of various benefits concessional supply of food grains is computed while reckoning the charges

payable. Under the Minimum Wages Act the cash value of a concession always means the amount by which the value of an essential supply is reduced when supplied. Therefore the term "cash value of any food concession" allowed to the employee means such value of the component by which the price of the item is reduced. This necessarily postulates the provision of the supply of an amenity such as food grain for, without such supply, it would not be possible to calculate the value of any food concession allowed to the employee. There being no supply of any food by the petitioner, the payment of food allowance cannot be treated as the cash value of food concession allowed to the employee.

16. Indeed if the Parliament intended to include food allowance which is not related to the supply of any food as dearness allowance it could have simply said so by adding that any food allowance would be treated as part of the dearness allowance.

17. At this juncture, the learned counsel for the respondent submitted that the petitioner supply some food at a concessional rate and the cash value of the concession would be liable to be included. There is no material produced by the respondents and the petitioner vehemently denies this fact.

18. In this view of the matter, the petition succeeds. The impugned orders dated 28/07/2000 and 06/07/2005 are hereby set aside. The petitioner is not liable to contribute on the basis of the food allowance under the Agreement dated 10/05/1995. There shall be no order as to costs. Petition disposed of.

10. Mr. Dankh, therefore, concludes his submissions by stating that the issue is no longer re-integra. The judgment in the case of The Tata Power Company (supra) was pressed into service but in vain. He, therefore, submits that both the impugned orders deserve to be quashed and set aside.

Date: March 6, 2014

11. Mr. N.K. Chaudhary, the learned Advocate for the respondent submits that the "Tiffin Allowance" was pursuant to the canteen to be provided by the employer. Since a canteen is to be provided, any alternative created by an employee in lieu of canteen has to be construed, as being a *modus-operandi* to avoid statutory payments. If the option is left to the employer to subvert the provision of a canteen and instead pay food or Tiffin allowance, it has to be considered as a part of monthly wages and therefore, it attracts Provident Fund Contributions.

12. The A.P.F.C./Assessing Authority as well as the Appellate Tribunal at Delhi as correctly appreciated the facts of the case. The mischief of the respondent is exposed. Tiffin allowance, being a monetary component, has therefore, rightly been considered as a component of wages and therefore the learned Authorities have committed no error in assessing the outstanding Provident Fund dues against the petitioner.

13. I have, with the assistance of the learned Advocates, gone through the

petition paper book.

14. It is an admitted position that the settlement dated 15/05/2005 is signed under the Industrial Disputes Act, 1947 and the Industrial Disputes (Bombay) Rules, 1957. Clause 1.5 pertaining to Tiffin Allowance clearly indicates that the amount of Tiffin Allowance shall not be reckoned for the purpose of any statutory benefits like Provident Fund, bonus, gratuity, leave, salary encashment etc.

15. In this factual matrix, the judgment of the Madras High Court in the matter of Wipro Ltd. Vs. Presiding Officer, Employees Provident Fund Appellate Tribunal and Another, becomes relevant. A similar situation arose before the Madras High Court. Contention of the Provident Fund Authorities was that the food concession payable by the employer was by way of cash value. The canteen subsidy and performance linked compensation was squarely covered for provident fund contributions. Cash allowance for food items were included in the definition of "Wages". Therefore, explanation u/s. 6 of the Act of 1952 brought cash value of food concession within the provident fund contributions.

16. The Madras High Court negated the contention of the Provident Fund Authorities and observed in paragraph No. 11, 12, 25 and 26 as under:

11. Any settlement entered into between the employee and the employer u/s 12(3) of the Act is having power of award and the same has to be implemented.

12. There are two judgments on the point of payment of provident fund on cash value of food concession and on incentives and with regard to settlements.

(1) The Employees State Insurance Corporation Vs. E.I.D. Parry (India) Ltd., the Division Bench of this Court had gone in detail about the nature and the power of settlements.

(2) While quoting from Braithwaite and Co. (India) Ltd. Vs. The Employees" State Insurance Corporation, . That the scheme of payment of reward was in no way connected with or part of wages and it was on these condition that the employees were receiving the inam. Thus, though there was a payment to the employees" and since the payment depended on their achieving certain targets, it has to be held as a remuneration and this payment of inam cannot be held to have become a term of the contract of employment.

25. Since the definition is clarifying that a value of any food concession is excluded from the payment of provident fund and even though the same is included in Explanation 1 of Section 6, the same cannot be demanded because there is a settlement between both the parties u/s 12(3).

26. During the course of argument, the Counsel for the petitioner stated that at the time of filing the writ petition, there was a direction by this Court in W.P.M.P. No. 9669 of 2004 to pay the amount as demanded by the respondents and accordingly, the petitioner has deposited the same. Since the writ petition is allowed, quashing the impugned order the petitioner is at liberty to withdraw the

said amount. The respondents are directed to pay the same forthwith. No costs.

17. In the case at hand, a settlement was arrived at between the petitioner and its Union of Workers excluding Tiffin Allowance from contributions under Provident Fund Act. This aspect, having been upheld by the Madras High Court, settles the issue. Moreover, the Tiffin Allowance was not a consolidated item. It varied on the actual attendance of a worker and was payable only if the worker remained present and worked in the factory. Wipro Ltd., case (supra), therefore, squarely applies to the case of the petitioner.

18. The High Court of Gujarat in the case of Indian Petrochemicals Corporation Ltd. Vs. Regional Provident Fund Commissioner and Another, concluded that the nature of payment of Canteen subsidy to its employees was totally different and was not cash value of any food concession as understood and explained in explanation (1) to Section 6 of the Act of 1952. Payment of Canteen Subsidy was not either increasing or decreasing on quarterly basis or yearly basis and so it could not be linked with Dearness Allowance. Moreover, Canteen Subsidy was basically provided to employees to help them in getting food of their choice, either from their own home or by purchasing it from Canteen, wherever available on limited basis. Hence, Canteen Subsidy could not be deemed to be Dearness Allowance, was not liable for deductions towards provident fund contributions.

19. In the instant case, there existed a settlement which provided for Tiffin allowance under clause 1.5. The Tiffin allowance was not to be reckoned for the purpose of provident fund contributions. The judgment of this Court in the case of the Tata Power Company (supra) has laid down the law that payment of food allowance cannot be treated as cash value of food concession. So also, the petitioner was not duty bound to provide a Canteen facility u/s 46 of the Factories Act, 1948 since it engaged less than 250 workers on any given working day on an average in twelve calendar months.

20. The view taken by the Madras High Court in the Wipro Ltd. Case (supra) lays down the law that food concession or cash allowance would not be subjected to PF contributions. Signing of a settlement forbidding food allowance to be included for PF contributions was not held to be invalid by the Division Bench of the Madras High Court in the case of The Employees State Insurance Corporation Vs. E.I.D. Parry (India) Ltd., . This conclusion of the Division Bench of the Madras High Court was based on the observations of the Honourable Supreme Court in the case of Braithwaite and Co. (India) Ltd. Vs. The Employees" State Insurance Corporation, .

21. For the reasons stated above, the respondent APFC and the appellate Tribunal have grossly erred in rejecting the contention of the petitioner company. The impugned orders, therefore, are rendered unsustainable and perverse. In the result, the petition is allowed. The impugned orders are quashed and set aside. The amount of Rs. 68,152/- deposited by the petitioner be adjusted in the Provident Fund account of the petitioner as regards PF contributions being

deposited by it. Rule is, accordingly, made absolute. No order as to costs.