

(2016) 02 DEL CK 0299

In the Delhi High Court

Case No : LPA 667/2012, C.M. Nos. 13371/2014 & 27751/2015

Oswal Petrochemicals

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-02-2016

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2 (b),
Section 2(b), Section 7A
Income Tax Act, 1961 — Section 89

Citation : (2016) 1 CLR 1036 : (2016) 149 FLR 174 : (2016) LabLR 345 :
(2016) 2 LLJ 142

Hon'ble Judges : S. Ravindra Bhat and Deepa Sharma, JJ.

Bench : Division Bench

Advocate : Sachin Datta, Sr. Advocate, Bharat Arora and Dawal Jain, Advocates,
for the Appellant; Sarat Chandra and Sachin Chandra, Advocates, for the
Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—1. The unsuccessful appellant is aggrieved by the decision of a learned Single Judge, dismissing its writ petition. In those proceedings, the appellant (hereafter "employer") had challenged an order dated 13.04.2010 issued by the second respondent (hereafter "PFC") assessing its liabilities for the sum of Rs. 43,38,921/- as provident fund contribution towards 43 employees for the period from October, 1999 to January, 2004. The appeal to the Provident Fund Appellate Tribunal [hereafter "the Tribunal"] by the present appellant too was dismissed.

2. The dispute in this case stemmed from the employer's order transferring en masse, 43 employees at the Mumbai Unit, to its Punjab Unit. The employees did not report; but instead filed a petition before the (Industrial) Court, Mumbai. During the pendency of that dispute a full and final settlement was arrived at between the appellant and the employees, through their Union, which was also signed by the employees individually. The settlement arrived at clearly stated

that no further amounts were payable by the employer to the employees. However, the fourth respondent complained to the PFC alleging that the employer did not deduct the provident fund and pension fund though it was mandatory and thus, the employees had not received the provident fund and pension fund. On this complaint, notices were issued on 11.12.2008 and an inquiry was conducted. This culminated in the PFC's order, adjudging the appellant's liability. The appellant was not successful in its plea before the Tribunal and approached this Court, in writ proceedings. The impugned judgment dismissed the said writ petition.

3. The appellant had argued, before the learned Single Judge, that adequate and reasonable opportunity to defend itself had not been provided by the PFC which vitiated his order. It was argued, secondly that the workers had accepted a lump sum settlement and consequently could not resile from its terms and demand extra payments based on provisions of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereafter "the Act"). The learned Single Judge turned down each of these contentions.

4. Mr. Sachin Datta, learned senior counsel for the appellant, urges that the learned Single Judge fell into error in not considering the irregularity which stares one in the face, from a consideration of the record. He argued, in this context, that the appellant could not defend itself in the proceedings before the PFC, who conducted the Show Cause Notice proceedings in an arbitrary manner. He attempted to support this submission with reference to the notice, the dates on which the Commissioner held hearings, adjourned dates, etc., and urged that the Commissioner's determination was procedurally flawed. Counsel next submitted that since full and final settlement was arrived at, the employees could not have filed the belated complaint and asked for the provident fund. The terms of the settlement were very clear and no provident fund liability was due to the petitioner. He relied on *M/s. Bridge and Roofs Co. Ltd. v. Union of India*, AIR 1963 SC 1474, to say that by reason of Section 2 (b) of the Employees Provident Funds Act, 1952, only basic wages could be included in the computation of provident fund liabilities, no more. He also submitted that the decision of the Gujarat High Court in *Swastik Textile Engineers Pvt. Ltd. v. Virjibhai Mavjibhai Rathod*, (2008) 1 GLR 670 is an authority for the proposition that there can be no provident fund liabilities for the period employees do not work. In that case, it was held as follows:

"11. As recorded hereinabove, the service of the workman was terminated, which was held to be illegal and the workman had been reinstated in service with continuity in service. Whether, the "continuity in service" ordered by the Labour Court would amount to the period spent on duty. If it is to be treated as the period spent on duty, then necessarily, the workman would be entitled to receive the entire salary; would be liable to make contribution to the provident fund, and in that case, the employer would be liable to make statutory contribution to the provident fund. But, in my view, the "continuity in service" does not carry the

meaning "the period spent on duty". The purpose to allow continuity in service would be that such period would not be treated as break in service for the purpose of service benefits like; pay, increments, leave, allowances, pension, etc. In absence of a specific order that such period should be treated as period on duty, such period cannot be held to be the period spent on duty. Besides, the fact that the Labour Court had awarded only part of the back wages, would also tend to show that the period of absence from duty on account of termination from service was not intended to be treated as the period spent on duty.

12. In my view, when the Court awards backwages for the period the employee was kept away from duty, what the Court does is to award damages assessed in terms of whole or part of the wages the workman would have earned had he been continued in service without interruption. It is not the same as payment of wages for the duties performed or for the period deemed to have been spent on duty. The amount of damages or the compensation awarded by a Court would not constitute the "basic wages" as envisaged by the Act."

5. Counsel also relied on a decision of this Court in *Burmah Shell Oil Storage Co v. Regional Provident Fund Commissioner* 1980 II LLJ 86, where it was held that "emoluments to constitute "basic wages" must be earned by -an employee while on duty. If it is 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". Learned senior counsel's endeavor was to argue that any amount paid by the establishment to its workmen as part of a settlement, in lump sum - even if designated as wages, would not fall within the definition "basic wage" under the Act, if they had not worked for the corresponding period.

6. Mr. Colin Gonsalves, learned senior counsel for the workmen, argued that this Court should not interfere with the impugned order. He submitted that neither before the Tribunal, nor before the learned Single Judge, was the question of denial of effective opportunity canvassed, as is argued by the employer in the present appeal. He stated that sufficient opportunity was granted to the appellant, despite which neither was a reply filed, nor were arguments addressed. The appellant's representative was present and that the inquiry which was ultimately conducted in its absence, correct.

7. Learned counsel points out that Annexure-D to the Memorandum of Settlement was suppressed, and its terms clearly stated that payments to the employees were in lieu of their back wages and unpaid wages. Since the payments were for back wages and unpaid wages, the appellant had a statutory responsibility of depositing the provident fund. Reliance was placed on *Shree Changdeo Sugar Mills & Anr v. Union of India & Anr* , 2001 (2) SCC 519 where it was held that even in case of lump sum payment of full and final settlement of all the claims, the management is required to contribute to the provident fund.

8. The first question, therefore, is whether the learned Single Judge failed or overlooked the submissions as to denial of natural justice and adequate

opportunity to participate in the proceedings before the PFC. This Court notices that the appellant had received several communications in 2007 with respect to payments; it furnished some accounts but without any explanation. This unsatisfactory state of affairs led the Commissioner to issue Show Cause Notice on 11.12.2008 and issue summons on 23.12.2008, calling upon it appear on 09.01.2009. There is no dispute that its representative did appear on that date. However, it never submitted any reply to the Show Cause Notice. The adjourned date of hearing was 13.04.2009. On 13.02.2009, the Commissioner addressed a letter to the parties, proposing a hearing on 27.02.2009. The employer- on 26.02.2009, wrote a letter asking that the proceedings be adjourned and not held, on 27.02.2009. On 27.02.2008, no proceedings took place. That day, the official (Asst. Provident Fund Commissioner) was on leave; he therefore held the hearing on 02.03.2009, when the management was unrepresented. As a consequence, a notice was issued to it, intimating that hearing would take place on 09.03.2009. The employer/management received a notice about the hearing, on that date itself, according to it. It sought for a hearing later. The Commissioner then issued the order dated 13.04.2009, calculating the dues payable by the management. Before the Appellate Tribunal, it merely stated that the procedure applicable for an order under Section 7A was not followed and that the order was ex-parte. However, it did not argue this aspect. Before this Court too, the appellant did not emphasize on the lack of opportunity; rather it argued that the order impugned was a non- speaking one.

9. Every Court, when invited to declare an administrative or statutory order invalid or illegal, on the ground of denial of adequate opportunity, has to rigorously scrutinize the record. One thing stands out prominently from the record: the appellant was given numerous opportunities in 2007 by the Commissioner's office, to explain its omission. It merely furnished some account statement, without explanation. This led to a Show Cause Notice, on 11-12-2008. Undeniably, the Show Cause Notice was never replied; not on 09.01.2009, or 26.02.2009, or on 09.03.2009, when it addressed letters to the Commissioner in connection with convenient date(s) of hearing. No reply was forthcoming, till the Commissioner on 13.04.2009 made the order. The employer's leitmotif was and remains that it was not liable to pay any provident fund amounts at all because it had discharged all liabilities towards the workmen. Such being the case, its claim for denial of natural justice or opportunity is not of a kind that strikes at the root of the Commissioner's determination. This question was gone into concurrently, after the said order, by the Appellate Tribunal and the learned Single Judge. Therefore, this Court is of opinion that the first submission and ground, i.e denial of proper opportunity, is unfounded.

10. As far as the second question goes, it can be noticed from the impugned judgment that Para 6 extracts and extensively quotes the Memorandum of Settlement between the management and the workmen. The relevant part of that document is as follows:

"UNPAID WAGES/ BACK-WAGES

8. The Company hereby agrees to pay to the eligible employees as listed in "Annexure - D" attached hereto, their unpaid gross wages/back wages from 1st January 1990 till 30th April 2003. The year-wise calculation of unpaid wages/back wages are shown in "Annexure-X" for the purpose of claiming relief u/s. 89 of the Income Tax Act, 1961. The employees eligible for the unpaid gross wages/back wages starting from 1st January 1999 till the date of retirement/ or 30th April, 2003 are eligible for maximum of 52 months of wages only. The Company hereby agrees to furnish a copy of "Form 10-E" under the Income Tax Rules, 1962, for the purpose of distribution of unpaid wages over a period of five financial years.

9. xx xx xx xx xx

10. xx xx xx xx xx

GRATUITY / PROVIDENT FUND

11. a. It is agreed by and between the parties that the Company shall pay the gratuity amount Rs. 33,39,840/- (Rupees Thirty Three Lakhs Thirty Nine Thousand Eight hundred Forty only) within 30 days after receiving the resignation from the employees.

b. The Company shall process the Provident Fund formalities so that employees shall receive their Provident Fund dues within 2 months from receiving resignations from the employees.

12. xx xx xx xx xx

13. xx xx xx xx xx

14. xx xx xx xx xx

15. That no claim of the members of the staff association will arise beyond the amount agreed under this Memorandum Of Settlement."

A plain textual reading of the above extracts shows that the management unequivocally accepted its liabilities towards "unpaid wages" as a distinct head, for the period specified. Equally, it agreed to "process" provident fund formalities. It is not contending that employment of the workmen had ceased in 1999. Rather the Memorandum is premised on the severance becoming effective sometime in 2003. In the circumstances, the appellant's argument that what was designated as unpaid wages was in reality something ad-hoc or a lump sum amount. Clause 8 of the settlement clearly belies this submission.

11. As far as the appellant's submission with respect to lump sum amounts paid pursuant to a full and final settlement not resulting in any liability is concerned, the reliance placed by the learned Single Judge on the decision Changdeo (supra) where it was held by the Supreme Court as follows:

"We are unable to accept the submissions. Undoubtedly contribution towards Provident Fund can only be on a basic wage. However, it is not at all necessary that the workman must actually be on duty or that the workman should actually have worked in order to attract the provisions of the Employees' Provident Funds Act. For example, there may be a lockout in a Company. During the period of lockout the workmen may not have worked yet for the purpose of the Employees' Provident Funds Act they will be deemed to have been on duty and Provident Fund would be deductible on their wages. In this case by order dated 12th December, 1988, the High Court (pursuant to directions of this Court) fixed 31st October, 1988 as a date when the services of the employees stood terminated/retrrenched. Thus upto 31st October, 1988 the employees were in service of the Appellant Company. They were, therefore, deemed to be on duty upto 31st October, 1988. As set out above many of these employees had raised claims before the Labour Court and there were Awards of the Labour Court for payment of arrears of wages and retrenchment compensation. All that the Settlement did was that, by Agreement, the total claim of the workmen was reduced to a certain extent. Amongst the claim of the workmen was a claim for wages upto 31st October, 1988. This was a claim for wages for a period during which they were on "deemed duty". Clause 5 of the Settlement, which has been set out herein above, shows that a sum of Rs. 35 lakhs has been paid towards Wages and another sum of Rs. 10 lakhs has been paid towards Retaining (Seasonal) wages. These are amounts which are paid for wages during a period when the workmen are deemed to be on duty. Therefore it is Basic Wage within the meaning of Section 2 (b) of the Employees' Provident Funds Act. All the cases relied upon by Mr. Sharma are of no assistance to him as in those cases the amounts were clearly not Basic Wages. In this case the above mentioned two sums of Rs. 35 lakhs and Rs. 10 lakhs are wages.

Mr. Sharma lastly submitted that the Settlement dated 2nd December, 1995 clearly provided that there were to be no deductions, except Unions contribution of 7%. He submitted that even though the Appellant Company could not deduct Provident Fund from the wages paid to the employees they are now being made liable to pay to the 2nd Respondent even the employees share. He submitted that, even if it is held that the Appellant Company is liable to pay Provident Fund, they should not be made to now contribute the employees share as they could not and have not deducted the same from the wages paid. We are unable to accept this submission also. It is the duty of the employer to contribute. The employers agreement, with the employee, not to deduct does not discharge the employer of his obligation in law to make payment. The term of the settlement which provides that there shall be no deduction only means that the Appellant Company has agreed to take on this liability also. We, therefore, find no infirmity in the order of the learned Single Judge or the Division Bench of the High Court. These Appeals accordingly stand dismissed."

The decision in *Burmah Shell Oil Storage Co (supra)* therefore, is of no assistance. The judgment in *M/s. Bridge and Roofs Co. Ltd. (supra)* was not

directly concerned with the issue which confronts this Court; rather, there the workmen's claim was that bonus had to be included within the calculation of basic wage, for the purpose of contributions to the Act. The Court rejected this submission, holding that Section 2(b) specifically excluded certain payments. Therefore, the judgment is not an authority on an employer's liability when back wages are paid in one lump sum and whether in such circumstances, there is any liability on the part of the employer to contribute amounts towards its share of payments to the provident fund authorities.

12. In view of the foregoing discussion, this Court holds the appeal to be unmerited. It is, therefore, dismissed without any order on costs.