

(2013) 07 TP CK 0002

In the Tripura High Court

Case No : W.A. No's. 88, 95 and 96 of 2012

Regional Provident Fund Commissioner and Another Vs Mekhlipara Tea Company Ltd. and Others

Date of Decision : 24-07-2013

Acts Referred:

Citation : (2013) 07 TP CK 0002

Hon'ble Judges : Deepak Gupta, C.J; S.C. Das, J

Bench : Division Bench

Advocate : A. Lodh, for the Appellant; U.K. Biswas, for the Respondent

Judgement

Deepak Gupta, C.J.—These writ appeals are being disposed of by a common judgment in view of the fact that an identical question of law arises in all the appeals and they all arise out of the same judgment.

The moot question which was decided by the learned Single Judge was whether the remuneration received by an employee pursuant to an understanding entered into with the Management of the Tea Estate for plucking tea leaf in the morning, before working hours commenced would form part of the basic wages of an employee as defined in section 2(b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, hereinafter referred to as the Act.

Section 2(b) of the Act reads as follows:

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;

The learned Single Judge relied on the observation of the Apex Court in

Bridge and Roofs Company Limited v. Union of India, : AIR 1963 SC 1474 : 1962 (5) FLR 423 (SC)

wherein the Apex Court held as follows:

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 exception 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 terms "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 may present made by the employer. The fact that the exception 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 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 clause (ii). It excludes dearness allowance, house-rent allowance, overtime allowance, bonus, commission or any other similar allowances payable to the employee in respect of this 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 side before us that it was difficult to find any one 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 allowances and retaining allowances (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 allowances (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 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 concern 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 allowances 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 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 allowances, which has been included through section 6 .

2. The judgment of the Apex Court in Bridge and Roofs Company Limited (supra) has been further explained by the Apex Court in

Manipal Academy of Higher Education v. Provident Fund Commissioner, : 2008 (117) FLR 258 (SC)

wherein it was held as follows:

10. The basic principles as laid down in

Bridge & Roofs case : 1962 (5) FLR 423 (SC)

on a combined reading of sections 2(b) and 6 are as follows:

(a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.

(b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages. By way of example it was held that overtime allowance, though it is generally in force in all concerns is not earned by all employees of a concern. It is 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.

(c) Conversely, any payment by way of a special incentive or work is not basic wages.

The first and foremost principle is that the wage should be universal, that is paid to all employees and across the board. Universality is the most important aspect. Secondly, any payment which is made only to those employees who availed of the opportunity it is not part of basic wages. Lastly, any payment by way of special incentive is also not basic wages.

3. The Employees' Provident Funds and Miscellaneous Provisions Act is welfare legislation and must be given a purposive interpretation. Any ambiguous expression which can be interpreted in two-ways must be given a construction which is beneficial to the workmen. Reference may be made to the judgment of the Apex Court in

Daily Pratap v. Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh, : 1998 (80) FLR 894 (SC)

wherein the Apex Court held as follows:

This takes us to the consideration of the merits of the controversy. In order to resolve this controversy, it is necessary to have a look at the relevant statutory scheme. It has to be kept in view that the Act in question is a beneficial social welfare legislation meant for the protection of weaker sections of society, namely, workmen who had to eke out their livelihood from the meagre wages they receive after toiling hard for the same. We may usefully refer to the observations of a two Judge Bench decision of this Court in

Regional Provident Fund Commissioner v. S.D. College, Hoshiarpur, : 1997 (75) FLR 530 (SC)

wherein it has been observed in para 10 of the Report that:

...The Act is a beneficial welfare legislation to ensure health and other benefits to the employees. The employer under the Act is under a statutory obligation to deduct the specified percentage of the contribution from the employee's salary and matching contribution, the entire amount is required to be deposited in the fund within 15 days after the date of the collection, every month.

It is not in dispute between the parties that the appellants' establishments are governed by the Act. In fact learned Counsel for the appellants stated that they are remitting requisite contributions u/s 6 so far as the amounts of "basic wages" paid by them to their employees are concerned and equally matching contributions from the employees are also deducted from their wages and remitted to the authorities under the Act. It is obvious that these contributions form part of the fund and the provident fund accounts of the workmen maintained by the authorities under the scheme are credited with these amounts from time to time. These funded amounts would be available to the workmen for their requirements as withdrawals can be made from the workers' credit balances in the fund as envisaged by the Act. However, Shri Ranjit Kumar's grievance is a limited one, namely, that the appellants are not liable to contribute with reference to the amounts which are paid to the workmen which are not "basic wages". It was submitted that u/s 6 of the Act, only three types of contributions are required to be effected by the employer along with the corresponding matching contributions by the employees as requisite percentage of the amounts; (i) basic wages, (ii) dearness allowance, and (iii) retaining allowance, if any, paid to the workmen by the employers. It was contended that undisputably the amounts in question were not paid to the workmen by way of dearness allowance and "retaining allowance" as laid down by Explanation 2 to section 6 of the Act. It means "an allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services". Therefore, according to him unless disputed amounts are part of "basic wages", they cannot be made subject matter of contributions. In order to support his aforesaid contention, learned Counsel for the appellants invited our attention to the definition of "basic wages" as found in section 2(b) of the Act.

It, therefore, becomes clear that in order to become a genuine Production Bonus Scheme so as to get covered by exception (ii) to the definition of "basic wages" as found u/s 2(b) of the Act, it must be shown that the scheme in question seeks to offer production bonus to the workmen concerned who put in extra output wherein either bonus be fixed to all of them collectively on the basis of total extra output on a sliding scale or may be paid individually to a given number of workmen who by their own efforts earn such bonus. Thus in each case, payment of bonus cannot be of a fixed or proven nature having no nexus with the quantity of extra output produced by them. As in the present case, the

Scheme relied on by the appellants does not fulfil this legal test it does not attract the exception (ii) to section 2(b) . It remains in the realm of basic extra wage. The decision rendered by learned Single Judge of the High Court as confirmed by the Division Bench decision, cannot, therefore be found fault with. The submission of learned Counsel for the appellants that in the scheme in question, there was no compulsion for the workman to put in extra work and the management could not compel him to do extra work nor can it allege any misconduct on the part of such workman who does not want to do excess work cannot be of any avail to the learned Counsel for the appellants as even if this criterion may be common to the present scheme as well as the genuine Production Bonus Scheme, the further requirement of the Scheme to become a genuine Production Bonus Scheme, namely, that the payment by way of bonus to the eligible workman concerned should vary in proportion to the extra output put up by him beyond the norms of output prescribed for him, is conspicuously absent in the present Scheme, as seen earlier, and on the other hand, this requirement which is the very heart of a genuine Production Bonus Scheme is missing in the present Scheme and therefore, similarity on only one aspect between the genuine Production Incentive Scheme and the present Scheme, namely, that the workman could not have been compelled to carry out extra work pales into insignificance on the facts of the present case. Therefore, the second question has to be answered against the appellants and in favour of the respondent.

4. The learned Single Judge held as follows:

20. In the result and for the reasons discussed above, it is hereby declared and clarified that the process, initiated against the present petitioners, for the purpose of compelling the petitioners to make contribution, u/s 6 of the EPF Act, for the remuneration paid, in cash, to a workman against plucking of green tea leafs, popularly known as cash plucking, is beyond the powers of the respondent No. 2 and respondent No. 2 is, therefore, not entitled to direct the petitioners to make contribution towards provident fund in respect of remuneration paid by the employer to the employee for cash plucking of tea leafs.

21. In the factual scenario, as indicated above, there is considerable force, in the submissions made, on behalf of the petitioners, that it is an age old practice, in tea industries, that in order to augment collection of green tea leafs, those employees, who are interested in putting extra hours of work for the purpose of earning additional amount, are engaged to pluck green tea leaf in the morning before working hour commences. For the plucking of green tea leafs by those workmen, who are willing to earn extra amount, extra remuneration are paid to them at a rate, which may be agreed upon by the employer and the employee concerned. Such cash plucking is rightly contended on behalf of the petitioners, casual and irregular in nature. What can also not be ignored is that, the employer has the option to engage an employee and the employee has the option to choose to work or not to work for cash plucking. In this sense, the

remuneration, paid for cash plucking, cannot be treated to be basic wages inasmuch as it is not universally applicable.

22. However, as can be clearly seen, respondent No. 2 has started an enquiry, u/s 7A of the EPF Act, in order to treat the remuneration, paid on account of cash plucking of tea leafs, as a part of the basic wages and has raised thereby a demand for contribution in terms of the provisions of section 6 of the EPF Act. The process, so initiated, is, in the firm view of this Court, wholly without jurisdiction, highly illegal and " needs to be, therefore, interfered with.

At the same time it may be noticed that in para-17 the learned Single Judge himself held as follows:

17. In view of the fact that the remuneration paid, for cash plucking of tea leafs, is not earned by all across the board, the remuneration so paid, cannot be called basic wages. If, however, cash plucking of tea leafs becomes applicable to all employees and not to a chosen few, who are willing to work, for the purpose of earning extra amount, then, cash plucking of tea leafs would also fall within the term basic wages.

There was no material before the learned Single Judge to show what were the working hours of the workmen. It is not necessary that working hours of workmen should start at 9 am or 10 am. There is nothing in law which debars an employer from deputing his workmen to work from 5 am in the morning till 12 noon or 1 pm. There is nothing on record to show what was the nature of the payment being made to the workmen. Was it an overtime payment? Was it a payment in the nature of production bonus? The Managements of the Tea Estates do not themselves appear to be clear on this point. The Management has been taking conflicting stands from time to time. Sometimes the stand is that the payment is in the nature of overtime and sometime the stand is that the payment is in the nature of production linked bonus. In this regard reference may be made to letters dated 30.12.2010 and 4.2.2011 annexed as Annexures-"B" and "C to the reply. It appears that the earlier stand taken by the Tea Estate was that it was production linked bonus, but vide letter dated 30.12.2010 it was urged before the Regional Provident Fund Commissioner that this may be treated as overtime. Thereafter on 4.2.2011 it was again stated that the production above norms outside the duty hours is production bonus and, therefore, not amenable to the Act.

5. The Regional Provident Fund Commissioner had only issued notice to the petitioners to show cause why the remuneration paid to the workmen for cash plucking should not be included in basic wages. On 4.2.2010 the following order was passed:

Appearance:

(1) Sri Santanu Chakrabarty, Manager;

(2) Sri K. Bhattacharjee, Deptt. E.O.

Sri Santanu Chakrabarty Manager of the Tea Estt. Appears and files the following:

- (1) Written statement vide ref. No. M.P/PF/10-11-Dt. 4.2.2011.
- (2) Month wise Cash plucking expenditure from April 2007 to Dec. 2007, April 2008 to Dec. 2008, April 2009 to Dec. 2009.
- (3) Details of Bonus statements for 2007-2008, 2008-2009 and 2009-2010.
- (4) Supplementary FI & A/R from 5/07 to 3/08 he contract employees Sri Nath.

In the written statement dated 4.2.2001 the representative i.e. the Manager states that Cash plucking expenses is the production bonus and no deduction of P.F. on such earnings of the employee is necessary. He also states that the written com. Vide. Ref. of 48/11 dt. 28.1.2011 of TAI may be included as a part of statement. Sri K. Bhattacharjee Deptt. E.O is directed to verify the correctness of the statement with the basic records of the estt. Deptt. E.O. should also collect the details of the garden workers who were/are engaged for cash plucking during the inquiry period, the written agreement relating to cash plucking if any in respect of the said tea garden, facts regarding timing working hours, copy of standing order, if any.

The employer is also directed to submit their written statement in the form of Affidavit, justification and reasons for their contentions that cash plucking is production bonus if it is production bonus then the detail scheme related to the same should be submitted. They should also submit the copy of the terms and conditions of employment governing the garden employees/workers. Copy of Standing Orders, if any. Copy of wage settlement relevant to the inquiry period. The month wise detail from January 2010 to Aug 2010 shall be submitted. Case is posted to 21.2.2011 at 3.00 pm.

This order does not decide any rights of the parties. It only directed the employer to produce the documents to support the stand taken by the employer. As discussed earlier, if remuneration is universally paid to all the employees than it becomes part of the basic wages. This gives rise to many questions. Were all the workmen in the Tea industries working beyond duty hours? Were they all getting extra wages? If these wages were paid by the Tea Industry universally then they may form part of the basic wages. This issue is an issue of fact to be decided on the basis of evidence. Such evidence cannot be led in writ proceedings and should be produced before the Regional Provident Fund Commissioner.

6. The petitioners were mainly directed to produce various records to decide the question whether the payments made by the petitioners to their employees would be covered by the term "basic wages" for the purpose of deduction towards provident fund subscription.

7. u/s 7A(3) of the Act no orders can be passed unless the employer concerned is given reasonable opportunity of representing its case. Even if an adverse order is passed, the aggrieved employer can file a review u/s 7B of the Act before the

same authority. Thereafter a further appeal lies to the EPF Appellate Tribunal u/s 7(i) of the Act. When there is a hierarchy of authorities in deciding the matters raised therein, it is unimaginable as to how the petitioners can file writ petition even at the stage of show cause notice u/s 7A .

8. Mr. Biswas, learned Counsel urges that the question is a clear question of law and the writ petition can be entertained. He also submits that the Regional Provident Fund Commissioner can only determine the value of compensation and cannot determine such question of law. We are unable to accept such submission. Any employer may try to avoid making payment of provident fund by terming it as some sort of allowance. The Regional Provident Fund Commissioner can hold an inquiry and if it comes to the conclusion that actually the wage is universally payable then mere terming it as an allowance or a bonus is only a facade to avoid payment of provident fund. The Regional Provident Fund Commissioner is duty bound to record evidence and decide whether the remuneration so paid forms part of the basic wages or not. When an authority has the jurisdiction to decide as to what is the amount due, it necessarily has the jurisdiction to determine whether the remuneration paid forms part of the basic wages or not. Otherwise how can he decide what is the amount due? Both go hand in hand and determination of the amount due is dependent on his finding as to whether the remuneration paid forms part of the basic wages or not.

9. The Regional Provident Fund Commissioner can decide this mixed question of fact and law only after relevant material has been placed before him. We are, therefore of the considered view that the original writ petitioners ought to have participated in the inquiry and made the submissions before the concerned authority instead of approaching this Writ Court. We are also of the view that the learned Single Judge erred in coming to the conclusion that the remuneration was not part of the basic wages without having the benefit of all material record being placed before him. In view of the above discussions, we allow the writ appeals set aside the judgment of the learned Single Judge dated 23.7.2012 passed in W.P(C) No. 123 of 2011 and other connected matters and consequently, dismiss the original writ petitions.