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(2005) 01 CAL CK 0035

In the Calcutta High Court

Case No : M.A.T. No. 410 of 1999

Regional Provident Fund Commissioner (II) and Another — APPELLANT

Vs

Vivekananda Vidyamandir and Others — RESPONDENT

Date of Decision : 13-01-2005

Acts Referred:
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2, 6

Citation : (2005) 2 CHN 307 : (2005) 104 FLR 1042 : (2005) 2 LLJ 721

Hon'ble Judges : Rajendra Nath Sinha, J;Dilip Kumar Seth, J

Bench : Division Bench

Advocate : Shayamal Sarkar and A.K. Gupta, for the Appellant;

Judgement

Dilip Kumar Seth, J.—The learned Counsel for the appellant produces a copy of the letter showing service upon the respondents along with a receipt of Speed Post. Let the same be taken on record.

The question :

The only question involved in this case is as to whether the special allowance, in the facts and circumstances of this case, could be treated as part of the basic wages or dearness allowance in the garb of a nomenclature of special allowance subject to the contribution towards Provident Fund u/s 6 of the Employees'' Provident Fund and Miscellaneous Provisions Act, 1952 (1952 Act).

The order appealed against:

2. The learned Single Judge, relying on a decision in Regional Commissioner, EPF, Regional Commissioner, EPF, Tamil Nadu and Pondicherry Vs. Management of Southern Alloy Foundries (P) Ltd., , was pleased to hold that the special allowance could neither be included in the basic wages nor could it be treated as dearness allowance and, therefore, was pleased to set aside the order passed by the Regional Commissioner, Employees'' Provident Fund holding special allowance as dearness allowance.

The appellants'' contention :

3. The learned Counsel for the appellants pointed out from the definition of ''Basic Wages'' given in Section 2(b) of the 1952 Act that it includes all emoluments excepting those specified Clauses (i), (ii) and (iii). Relying upon Section 6, he points out that the contribution is to be calculated on the basic wages and the dearness allowance and retaining allowance, if any, for the time being payable to each employee. According to him, the special allowance, in the facts and circumstances of the present case, is nothing but dearness allowance. He drew our attention to the agreement between the staff and the employer, which are at pages 21 to 26 of the Paper Book. It appears that those documents were signed by the employers and the employees.

3.1. The learned Counsel for the appellants relied on the decision in Prantiya Vidhyut Mandal Mazdoor Federation Vs. Rajasthan State Electricity Board and others etc. etc., ; The The Daily Partap Vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh, and Mangalore Ganesh Beedi Works v. Assistant Provident Fund Commissioner, Mangalore 2002 Lab. IC 1578 (Karnataka).

The order of the Provident Fund Authority : The finding :

4. It appears from the order passed by the Employees'' Provident Fund Authority (at page 33 of the Paper Book) that the establishment was not paying any amount in the form of dearness allowance on account of rise in the cost of living, which is an ordinary ingredient of monthly pay or wages in all other establishments both under the Government and in the Private Sector. It was also found that this special allowance was undergoing upward revision once in two years. Therefore, the Provident Fund Authority had treated the said special allowance as dearness allowance on account of it''s having the general characteristic of dearness allowance, which is being paid elsewhere. The Special Allowance : Characteristic : Whether Dearness Allowance :

5. The special allowance, as it appears from pages 21 to 26 of the Paper Book, in fact, was substituted for the dearness allowance. A break-up of the different ingredients of the salary agreed to be paid can be had from the said documents. For the purpose of example, we may quote from page 21 of the Paper Book, since in each case the ingredients of the wages or the salary were identical:

"Vivekananda Vidyamandir, Agarpara, North 24-Parganas Revised Pay-Structure of Teaching and Non-Teaching & Official Staff. (To be effective from 1.5.1997) Period of Service

Teaching staff 2.00 yrs. 5.01 yrs. 10.01 yrs. 15.01 yrs. to to to to 5.00 yrs. 10.00 yrs. 15.00 yrs. 20.00 yrs. 1. Basic pay : 800/- 920/- 980/- 1040/- (Fixed) 2. Medical : 30/- 30/- 30/- 30/- Allowances 3. House Rent : 35/- 35/- 35/- 35/- Allowances 4. Special : 550/- 600/- 625/- 750/- Allowances + 50/- + 50/- + 50/- + 50/- Total = 1415/- 1585/- 1670/- 1855/-

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N. B. : On completion of twenty (20) years of services each teacher shall be entitled to special allowance at the rate of Rs. 200/- (Rupees two hundred) only per month after every 5 (five) years."

5.1. It appears from the said break-up and from all the other break-ups contained in the said agreement signed by both the parties that it consisted of the basic pay which was fixed during the span of 5 years and was not subject to any annual increment, medical allowance, house rent allowance and special allowance which was subject to quinquennial increment till 20 years and then Rs. 200/- for every 5 years. Except variance at the rate in the other cases the ingredients were identical. As rightly pointed out by the Provident Fund Authority that no dearness allowance was payable, therefore, it could either be treated as part of the basic pay/wages viz: as part of the emoluments paid on account of services rendered having regard to the period of service performed; or if it is not possible for being treated as basic wages on account of the definition thereof, then in the absence of any ingredients of dearness allowance included in the pay, this allowance though called as special allowance, was, in fact, the dearness allowance.

5.2. As defined in Section 2(b) of the 1952 Act, ''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. However, it does not include (i) the cash value of food concession (ii) (a) dearness allowance viz: cash payments by whatever name called paid to an employee on account of rise in the cost of living, (b) house rent allowance, (c) overtime allowance, (d) bonus, (e) commission, or any other similar allowance payable to the employee; (iii) any presents made by the employer.

5.3. Whereas Section 6 casts a liability on the employer to pay to the fund the employer''s contribution at the rate prescribed therein and the employees'' contribution at the same rate or higher, if the employee so desires. As contemplated in Section 6, the rate is to be calculated on the basic wages, dearness allowance and retaining allowance, if any.

5.4. In the circumstances, in the present case, we are required to examine whether the special allowance paid to employee, in terms of the contract of employment, is basic wages or dearness allowance over which the contribution prescribed in Section 6 is to be calculated. In order to exclude the special allowance from the purview of Section 6, it has to satisfy any of the ingredients of Clause (i) and (iii) of Section 2(b) or of Clause (ii) thereof excepting dearness allowance. Inasmuch as the contribution is based on basic wages, dearness allowance and retaining allowance, if any.

5.5. Admittedly, the special allowance is not a retaining allowance which is payable when the employee is retained without work. It is not a cash payment for food concession. Neither it is overtime allowance, nor house rent, nor bonus,

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nor commission. Neither it comes within Clause (iii) i.e.: presents by employer. Therefore, this special allowance is either some other similar allowance or dearness allowance. If it is not, then, it will be part of the basic wages since it is an emolument paid on account of the employment in terms of the contract therefor, and is payable to each employee.

5.6. In this case, from the break-up as noted above, it appears that no dearness allowance forms component of the pay. This special allowance is also subject to increment on a time-scale. The dearness allowance as is understood in Section 2(b)(ii) is the allowance paid in cash on account of raise in the cost of living in whatever names it may be called. Therefore, this allowance can be linked with the increase in the cost of living. There is nothing to show that this special allowance is linked with the index of cost of living. At the same time, there is nothing to indicate that this allowance is paid for any other purpose to bring it within the purview of similar allowance. Since the dearness allowance do not form a component of the pay and instead this special allowance is allowed, it bears the characteristic and is in the nature of the dearness allowance, though called special allowance. It is the substance of the characteristic that is material for the purpose of determining the nature of the component of the pay.

5.7. Admittedly, this special allowance is paid in terms of the contract of employment. Though called special allowance, since it cannot be treated to be other similar allowance, therefore, it is nothing but dearness allowance. It is definitely related to the pay. Inasmuch as it is an emolument earned by the employee while on duty in terms of the contract of employment. Therefore, in case it is not dearness allowance, then it can very well be included within the basic wages as dearness pay.

5.8. In any event, from the break-up of the components of the pay as noted above, this special allowance satisfies the characteristic and nature of dearness allowance. It cannot but be a dearness pay, though called special allowance.

Emoluments : The concept:

6. The concept of emoluments subject to contribution to the Provident Fund has undergone change from time to time as was pointed out by the learned Counsel for the appellants from the decisions of the Apex Court in Prantiya Vidhyut Mandal Mazdoor Federation (supra). While dealing with the definition of basic wages as defined in the Employees'' State Insurance Act, 1948, the Apex Court relied on the decision in Harihar Polyfibres Vs. Regional Director, ESI Corporation, and held that all emoluments earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and are paid or payable in cash for the time being to each of the employee.

6.1. Whereas in The Daily Pratap (supra) the Apex Court had occasion to deal with production bonus and hold that the production bonus was related to wages and were held to be the part of the basic wages. In the said case, the Apex Court had examined the nature and characteristic of the production bonus paid to the

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employees. The ratio deciphered from the said decision, as it seems to us, is that, in order to ascertain whether the component forms part of the emolument as a component upon which the contribution contemplated in Section 6 of the 1952 Act are payable, the Court is free to examine the nature and characteristic of such component payable in terms of the contract of employment. In the said case, the Apex Court found that the production bonus was not related to incentive allowance nor it was directly linked with the extra-production nor commensurate with the extra-production workman wise or even establishment-wise. It only craved out a category of more efficient workmen or more enthusiastic workmen for being given a flat rate of extra-production bonus to each employee cannot be treated to be in the category excepted under Clause (ii) of the definition of basic wages given in Section 2(b).

6.2. Applying the said principle in the present case, we have examined the nature and character of the component of the pay; and have found that the special allowance is nothing but dearness allowance in whatever name it is being called.

6.3. The Karnataka High Court in Mangalore Ganesh Beedi Works (supra) had held that the special allowance payable in terms of the agreement to the employer and the employee was part of the basic wages since the said amount was being paid for the extra work done. The contribution was payable on the said special allowance. The Karnataka High Court relied on the decision, which we had relied upon and also in Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI), .

6.4. In the facts and circumstance of the case the special allowance can not be treated to be one of the other similar allowances which are otherwise exempted u/s 6 of the 1952 Act. It is either part of the basic wages or it is the dearness allowance itself described or called as special allowance or in the garb of special allowance it is the dearness allowance, which is being wrongly described.

Conclusion :

7. Having regard to the discussion made above, the special allowance in the facts and circumstances of the case appears to be the dearness allowance described by a different name or in the alternative it would be part of the basic wages. By no stretch of imagination, this special allowance paid in this case can be treated to be similar other allowance for the purpose of claiming exemption from contribution u/s 6. Therefore, the learned Tribunal had rightly held that contribution was payable on the said amount. In the present case the special allowance has to be treated as part of the pay subject to the liability of contribution u/s 6 of the 1952 Act.

Order :

8. In the result the appeal succeeds. The order appealed against is hereby set aside. The order passed by the Provident Fund Authority is hereby affirmed.

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8.1. The respondent shall pay or deposit the difference of the respective contribution to or in the fund within three months from the date of this order in accordance with the provisions contained in the 1952 Act.

8.2. There will, however, be no order as to costs.

8.3. Urgent xerox certified copy, if applied for, be given within 7 days, on usual terms.

R.N. Sinha, J.

I agree.

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