

(2011) 03 MP CK 0067
In the Madhya Pradesh High Court
Case No : Writ Petition No. 1891 of 2011

Surya Roshni Ltd.

APPELLANT

Vs

Employees Provident Fund and Another

RESPONDENT

Date of Decision : 24-03-2011

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2, 6, 7A

Citation : (2011) 129 FLR 1116 : (2011) 2 JLJ 84 : (2011) 3 LLJ 797 : (2011) LLR 568 : (2011) 3 MPHT 285 : (2011) 2 MPLJ 601

Hon'ble Judges : S.K. Gangele, J;Brij Kishore Dubey, J

Bench : Division Bench

Judgement

S.K. Gangele, J.

Petitioner-Company has filed this petition against the order dated 9-3-2011, Annexure P-I passed by Employees Provident Fund Appellate Tribunal and the order dated 22-4-2008, Annexure P-2 passed by Assistant Provident Fund Commissioner, Gwalior.

The Petitioner is a Company, registered under the provisions of the Companies Act, 1956. Its establishment is governed under the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, hereinafter referred to as the "1952 Act" and also under the provisions of the Employees' Provident Fund Scheme, 1952, hereinafter referred to as the "1952 Scheme". The Petitioner - Company has been allotted a Provident Fund Code No. MP/IN/9826. The Petitioner has three categories of employees, i.e. Firstly, Workman Category, which includes - Unskilled, Semi-skilled, Skilled and Highly Skilled, secondly, Staff Category which includes - Supervisor and Officer and thirdly, Management category, which includes - Senior Officer, Manager, General Manager and Vice President.

The Petitioner - company in accordance with the management policy has been paying Variable Dearness Allowance (for brevity, "VDA") which is payable to first

category of employees i.e. Workmen-category and they are getting package of salary, which includes Basic + VDA + HRA + Transport allowance + Canteen allowance + Lunch incentive. The Petitioner company has been remitting the provident fund contribution of eligible employees in accordance with the 1952 Act and the 1952 Scheme and it has been deducting provident fund contribution on two components of salary i.e. Basic + VDA. However, it has not been deducting provident fund contribution on other components i.e. Transport Allowance + Attendance incentive + Special allowance + Lunch Incentive.

The Assistant Provident Fund Commissioner noticed that the Petitioner -Company was paying wages to its workers in guise of allowances to avoid the EPF liability, hence it issued a summon on 9-2-2007 u/s 7A of the 1952 Act for determination of provident fund dues against the Petitioner -company for the period from June, 2003 to December, 2006.

The Petitioner-company contended before the Assistant Provident Fund Commissioner that it was not liable to pay provident fund contribution of its workers on other heads of wages except basic wage + VDA. The Authority vide order dated 22-4-2008 has held that the Special allowance is being paid to the workers as a part of monthly salary and, in order to reduce the provident fund liability the management has separated this amount from the basic wages. The Authority has further held that the Petitioner-company is not liable to pay provident fund contribution and deduct provident fund of the workers on washing allowance because it has been given to workers for maintaining the uniform clean.

In regard to other allowances, the Authority has held that other allowances are part of basic wages for the purpose of provident fund contribution. Hence, the Authority has held that the Petitioner is liable to deposit provident fund contribution for the period from June, 2003 to March, 2006 of Rs. 69,09,534/-.

Against the aforesaid order the Petitioner-company filed an appeal before the Employees' Provident Fund Appellate Tribunal, New Delhi u/s 7-A of the 1952 Act. The Appellate Authority dismissed the appeal.

Learned Counsel for the Petitioner-Company has contended that the impugned orders passed by the Assistant Provident Fund Commissioner and the Appellate Authority are against the provisions of the 1952 Act. The Petitioner-company is not liable to deduct provident fund from the wages of the workers except basic wages + VDA and it has been depositing the provident fund contribution with the department accordingly. Hence, it is not liable to deposit any additional amount. In support of his contentions learned Counsel relied on the judgment of the Hon'ble Supreme Court in the case of Manipal Academy of Higher Education Vs. Provident Fund Commissioner,

Contrary to this learned Counsel for the Respondents has contended that basic wages includes all emoluments earned by the workers under all circumstances. He further contended that as per the test laid down by the Hon'ble Supreme

Court in the case of Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI), the principle of universality has to be applied in determining the basic wages and on the basis of the aforesaid principle the orders passed by both the Authorities are in accordance with law.

In deciding the controversy involved in this case, in our opinion, certain provisions of the 1952 Act have to be taken into consideration. Section 2(b) of the 1952 Act defines "basic wages", which is, as under:

Section 2. Definitions....

(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 clearness allowance (that is to say, all cash payments by whatsoever names called/paid to an employee on account of a rise in the cost of living), house-rent allowance, over-time 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.

Section 6 of the 1952 Act provides contribution and matters which may be provided for in Schemes. The provision is as under:

Section 6 Contribution and matters which may be provided for in Schemes. The Contribution which shall be paid by the employer to the Fund shall be (ten percent) of the basic wages, (dearness allowance and retaining allowance (if any), for the time being payable to each of the employees (whether employed by him directly or by or through a contractor,) and the employee's contributions shall be equal to the contribution payable by the employer in respect of him and may, (if any employee so desires, be an amount exceeding (ten per cent) of his basic wages, clearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section:

Provided that in its application to any establishment or class of establishments which the Central Government, after making such enquiry as it deems fit, may, by notification in the Official/Gazette specify, this section shall be subject to the modification that for the words (ten per cent), at both the places where they occur the words (twelve per cent) shall be substituted.

Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for the rounding off of such fraction to the nearest rupee, half of a rupee or quarter of a rupee.

Explanation 1. -- For the purposes of this (section) dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

Explanation 2. -- For the purposes of this (section) "retaining allowance" 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.

Hon"ble the Supreme Court in the case of Manipal Academy of Higher Education Vs. Provident Fund Commissioner, has considered the provisions of Section 6 and definition clause of "basic wages" in Section 2(b) of the 1952 Act and also considered the earlier cases of the Hon"ble Supreme Court on the aforesaid subject, especially, the Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI), ; Jay Engineering Works Ltd. and Others Vs. The Union of India (UOI) and Others, and T.I. Cycles of India, Ambattur Vs. M.K. Gurumani and Others, and held as under:

6. In Bridge Roofs case (supra) it was inter alia observed as follows: Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI), , Paras 7 and 8:

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 that 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.

Then we come to Clause (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 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 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 examples) 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 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 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 allowance, which, has been included through Section 6.

Similarly in Jay Engineering's case (*supra*) it was observed as follows: Jay Engineering Works Ltd. and Others Vs. The Union of India (UOI) and Others, , Paras 8 and 9:

8. Finally, it was urged that even if the payment for production between the quota and the norm is not production bonus which can be taken out of definition of basic wages in the Act, it should be treated as payment in the nature of "other similar allowance" appearing in Section 2(b)(ii). We are of opinion that this payment for work done between the quota and the norm cannot be treated as any "other similar allowance". The allowances mentioned in the relevant clause are dearness allowance, house-rent allowance, overtime allowance, bonus, and commission. Any "other similar allowance", must be of the same kind. The payment in this case for production between the quota and the norm has nothing of the nature of an allowance, it is a straight payment for the daily work and must be included in the words defining basic wage i.e., "all emoluments which are earned by an employee while on duty or on leave with wages in accordance with terms of the contract of employment.

In the view we have taken of the scheme in this case, the petition succeeds partly. We direct that the payment of the payment which is made by the Petitioner for production above the "norm" would be production bonus and would be covered by the judgment of this Court in Bridge and Roof Company, but that portion of the payment which is made by Petitioner for production up to the quota as well as production between the "quota" and the "norm" is basic wage within the meaning of that term in the Act. The petition is therefore partially allowed as indicated above. In the circumstances we pass no order as to costs. Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI),

It is to be noted that in the case before the Bombay High Court the factual scenario was somewhat peculiar. There the employer was including the amount of leave encashment as emoluments for the purpose of calculating provident fund dues from the employer as well as employee's contribution. When the Employees' Union took up the issue to the Commissioner it was informed that the provision does not provide for deduction of provident fund on leave encashment.

On the strength of the letter dated 3-7-1991 of the Commissioner, Hindustan Lever Ltd. decided to make provision for deduction. It was this direction of the department which was challenged by the Union. In this context the High Court has held that the Commissioner's letter/circular was illegal and leave encashment dues should be included for provident fund contribution. In fact it

was the understanding of the parties over the period that leave encashment will be included in the wages.

The basic principles as laid down in Bridge Roofs case (supra) on a combined reading of Sections 2(b) and 6 are as follows: Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI),

(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 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.

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

In T.I. Cycles of India, Ambattur Vs. M.K. Gurumani and Others, it was held that incentive wages paid in respect of extra work done is to be excluded from the basic wage as they have a direct nexus and linkage with the amount of extra output. It is to be noted that any amount of contribution cannot be based on different contingencies and uncertainties. The test is one of universality. In the case of encashment of leave the option may be available to all the employees but some may avail and some may not avail. That does not satisfy the test of universality. As observed in The Daily Partap Vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh, the test is uniform treatment or nexus under-dependent on individual work. AIR 2001 SCW 3202 : AIR 1999 SCW 1721.

The term "basic wage" which includes all emoluments which are earned, by an employee while on duty or on leave or on holidays with wages in accordance with the terms of the contract of employment can only mean weekly holidays, national holidays and festival holidays etc. In many cases the employees do not take leave and encash it at the time of retirement or same is encashed after his death which can be said to be uncertainties and contingencies. Though provisions have been made for the employer for such contingencies unless the contingency of encashing the leave is there, the question of actual payment to the workman does not take place. In view of the decision of this Court in Bridge Roofs case (supra) and TI Cycles's case AIR 1968 SC 1474 : AIR 2001 SCW 3202 (supra) the inevitable conclusion is that basic wage was never intended to include amounts received for leave encashment.

In the decision of the Hon''ble Supreme Court, quoted above, and earlier judgments the Hon''ble Supreme Court has held that on combine reading of Section 2(b) and Section 6 of the 1952 Act, the wages" which is universally,

necessarily and ordinarily paid to all across the board, such emoluments are "basic wages" and where the payment is available to be specially paid to those who avail of the opportunity is not the "basic wages". On the basis of aforesaid principle of law laid down by the Hon"ble Supreme Court in regard to calculating the basic wages, we have to analyze the factual aspect of the case. In the present case, the Petitioner-company has been paying the salary to the workers, which includes, basic wage + VDA + HRA + transport allowance + Attendance incentive + Special allowance + Washing allowance + Canteen allowance and Lunch allowance. It has been deducting the provident fund contribution on two components of salary i.e. basic wage + VDA. It is an admitted fact that it has been paying transport allowance i.e. conveyance allowance all its employees. It is not a case that some employees are not getting the aforesaid allowance. Similarly, in regard to canteen allowance, it has been contended that the aforesaid allowance has been paid, to Operators and those employees, who are required to remain on machines during lunch period. The aforesaid amount has been introduced with the object that at the time of lunch period the production should not be stopped and certain employees volunteered themselves for the aforesaid purpose and they have been paid this amount. It is an optional amount. Hence, in our opinion, in accordance with principle of law laid down by the Hon"ble Supreme Court in Manipal Academy of Higher Education Vs. Provident Fund Commissioner, the aforesaid amount could not be included in "basic wages" and there is no liability of the Petitioner-Company to deduct provident fund of the employees against the aforesaid amount. Except this component, in our opinion, the rest of the special allowances paid by the Petitioner-company to the workers are liable to be included under the "basic-wages" and the Petitioner-company is not entitled to deduct the provident fund under the head "lunch allowance".

Consequently, the petition filed by the Petitioner is partly allowed to the above extent. The impugned orders, Annexures P-1 and P-2 passed by both the Authorities are hereby quashed in regard to inclusion of lunch allowance in basic wages for the purpose of payment of provident fund contribution. However, in regard to rest of the components of basic wages, as held by both the Authorities in the impugned orders, are upheld. The Authorities are at liberty to calculate the liability of the Petitioner-company in regard to payment of provident fund contribution in accordance with the provisions of the 1952 Act and the Petitioner-company shall deposit the same accordingly. No order as to costs.