
(2012) 05 BOM CK 0005

In the Bombay High Court

Case No : O.O.C.J. Appeal No. 33 of 2009 in Writ Petition No. 2500 of 2005

Tata Co.'s Employees Union

APPELLANT

Vs

Tata Power Co. Ltd.

RESPONDENT

Date of Decision : 03-05-2012

Acts Referred:

Constitution of India, 1950 — Article 12

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2, 2(b), 6, 6(1), 7(A)

Citation : (2012) 133 FLR 958 : (2012) 4 LLJ 33

Hon'ble Judges : P.B. Majmudar, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : A.D. Shetty and Ms. Rita K. Joshi, for the Appellant; K.M. Naik, instructed by S.P. Salkar, Sahil Mullick and Suresh Kumar, for the Respondent

Judgement

P.B. Majmudar, J.—This appeal is directed against the judgment and order of the learned single Judge dated July 16, 2008 in writ petition No. 2500/2005.

By the impugned order, the learned single Judge has allowed the writ petition filed by the respondent Company and set aside the orders which were impugned before the learned single Judge viz. The orders dated July 28, 2000 and July 6, 2005. The learned single Judge has held that the respondent Company is not liable to contribute any amount towards provident fund contribution on the basis of agreement dated May 10, 1995. A memorandum of settlement was entered into between the appellants and respondents on May 10, 1995 by which the Company has agreed to pay Rs. 1200/- p.m. towards food allowance. As per the said agreement, it is agreed by both the parties that with effect from June 1, 1995 food allowance of Rs. 900/- per month (through salary) is to be paid in a division where canteen exists. In addition, coupons worth Rs. 310/- would be issued every month for which a deduction of monthly contribution of Rs. 10/- will be made from the salary of each employee. It is also provided in the agreement that in the divisions where there are no canteen facilities, employees would be paid food allowance of Rs. 1200/-(through salary). It is pointed out by both the

learned Counsel that "through salary" would mean over and above salary, Rs. 1200/- will be paid per month meaning thereby Rs. 1200/- will be added in the salary component. The appellant Union thereafter wrote a letter to the Chairman of the respondent Company on August 10, 1995 pointing out that as per the memorandum of settlement dated May 10, 1995 Rs. 1200/- p.m. is being paid towards food allowance and on the said allowance, provident fund contribution should be deducted at source. It was therefore requested that such deduction should be made from the food allowance towards the provident fund. Since the respondent Company did not respond to the said request, the appellants approached the Regional Provident Fund Commissioner who in turn conducted enquiry u/s 7(A) of the Employees' Provident Funds and Miscellaneous Provisions Act 1952. The Regional Provident Fund Commissioner came to the conclusion that the food allowance paid to the employees of the establishment in terms of memorandum of settlement entered into between the Management and the Union is attracted by provisions of Explanation I of Section 6 of the Act and therefore, the respondent Company is required to contribute the provident fund. The Regional Provident Fund Commissioner thereafter directed to hold enquiry regarding amount due and payable by the employer in relation to its establishment. The respondent Company being aggrieved by the said order, preferred an appeal before the Employees' Provident Fund Appellate Tribunal being Appeal (ATA) No. 463(9)/2003. The Tribunal by its order dated July 6, 2005 came to the conclusion that the cash value for food concession would fall within the ambit of Explanation I to Section 6 of the Act. It is also held by the Tribunal that even otherwise, food allowance paid to each and every employee would otherwise form part of the wages as defined u/s 6 of the Act and would attract the provident fund contribution even if this allowance for the sake of argument does not fall within the ambit of Explanation I to Section 6 of the Act. The respondent Company being aggrieved by the aforesaid order of the Appellate Tribunal as well as the order of the Regional Provident Fund Commissioner preferred writ petition before the learned single Judge being writ petition No. 2500/2005. The learned single Judge came to the conclusion that the cash value for food concession cannot be said to have been covered by Explanation I to Section 6 of the Act and it could not have been treated as dearness allowance. The learned single Judge accordingly set aside the orders passed by the Regional Provident Fund Commissioner as well as the order of the Appellate Tribunal against which the appellants have filed this appeal.

On behalf of the appellants, Mr. Shetty, learned Counsel vehemently argued that the learned single Judge erred in setting aside the order passed by the authority as according to him, by way of agreement, the Management has agreed to pay Rs. 1200/- p.m. To all workmen in lieu of providing food in the canteen where there is no canteen facility. It is submitted that the amount paid through salary should be construed as the cash value for food concession. It is submitted that since the said amount is therefore to be treated as cash value for food concession, the same is covered by Explanation I to Section 6 of the Act and

therefore the provisions of the Act are applicable and the learned single Judge therefore erred in setting aside the decision of the Tribunal as well as Regional Provident Fund Commissioner. It is submitted by Mr. Shetty that when canteen facility is there in the establishment, the employees are given coupons of Rs. 310/- and Rs. 900/- is to be borne by the Management and provisions of Provident Funds Act are applicable in relation to those employees to whom fixed amount of Rs. 1200/- is given for the purpose of benefit of food while the person is in the employment during employment hours and therefore, subsidized amount is to be construed as cash value for food concession for taking food. It is submitted by Mr. Shetty that the actual value of food which the employee may be required to spend might be much higher but an amount of Rs. 1200/- p.m. is compensated by the Management and therefore, that amount should be treated as concession which is to be treated as cash value for food concession and Rs. 1200/- p.m. Be treated as cash value for such concession. It is submitted by Mr. Shetty that food allowance which is paid as per the agreement is to be treated as cash value of such food concession. It is submitted by Mr. Shetty that even otherwise alternatively if such allowance of Rs. 1200/- is not to be treated as cash value for food concession, then it should be treated as part of basic wages as per provisions of Section 2(b) of the Act. The submission of Mr. Shetty is that even otherwise the amount is to be treated as basic wages and on that basis also provisions of the Act are applicable so far as the aforesaid amount of Rs. 1200/- p.m. is concerned. It is submitted by Mr. Shetty that this being a beneficial provision, even if two views are possible, the view which is in favour of the employee is required to be taken. In order to substantiate this argument Mr. Shetty has relied upon the provisions of Section 2(b) of the Act as well as provisions of Section 6 of the Act. Mr. Shetty submitted that the amount of food allowance is nothing but cash value for food concession. It is submitted that the concession can be in kind also and even in a given case, if the Management is not giving actual food at; subsidized rates in canteen, then also such payment should be construed as concession which concession can be said to be cash value of such food concession. It is submitted by him that even otherwise, the Tribunal has placed the case on alternative basis that even if Explanation I of Section 6 of the Act is not attracted, then also the amount can be treated to be one under "basic wages" itself. The learned single Judge has not dealt with that point. It is submitted that when all the workmen as a class get Rs. 1200/- p.m. without exception and when such food allowance is available to all the employees, such amount be treated as emolument and should be treated as part of basic wages itself. It is argued by Mr. Shetty that either the case falls u/s 2(b) or Explanation I to Section 6 of the Act. It is submitted by Mr. Shetty that some of the allowance which are not payable to all the employees like house rent allowance or bonus or over time allowance, such allowance or payment cannot be treated as part of basic wages as it is not payable to all but in a case when allowances are payable to all the employees as a whole, nature of such allowance forms part of basic wages. The learned Counsel appearing for respondent No. 2-Mr. Suresh Kumar supported the arguments of Mr. Shetty. He submitted that the department has

rightly taken the view that the provisions of Provident Funds Act are attracted. It is submitted by him that Rs. 1200/- p.m. is paid to all the workmen uniformly and therefore, it is treated as emolument as contemplated by Section 2(b) of the Act. It is submitted by Mr. Suresh Kumar that whenever there is a canteen facility, Rs. 900/- p.m. is paid to all the employees who are serving with the establishment where canteen facility is not there Rs. 1200/- p.m. is paid to all the employees. It is submitted by Mr. Suresh Kumar that food allowance is payable to all unlike some of the allowances which are not payable to all such as house rent allowance, overtime allowance, bonus etc. Mr. Suresh Kumar has also relied upon some of the judgments on which Mr. Shetty has also relied.

2. The learned Counsel Mr. Naik appearing for respondent No. 1 vehemently submitted that before the Regional Provident Fund Commissioner, the only issue which was debated was applicability of sub-section (1) of Section 6 of the Act. According to Mr. Naik, the Regional Provident Fund Commissioner has not considered the aspect as to whether the amount of food allowance is falling under the definition of "basic wages". It is submitted by Mr. Naik that while considering the said aspect, the learned single Judge has rightly considered as to whether the case falls under Explanation I to Section 6 of the Act. It is further submitted by Mr. Naik that the Tribunal's observation about basic wages by making passing reference in its order is without jurisdiction and the Court therefore is required to consider whether the matter falls under Explanation I to Section 6 of the Act and not beyond that. It is submitted by Mr. Naik that no allowance whatsoever either house rent allowance, bonus or tiffin allowance can be included in the definition of "basic wages". It is submitted by Mr. Naik that in any case the foundation of the appellants' case is that it is cash value for food allowance and therefore, there is no question of considering the aspect as to whether such amount can be said to be food allowance which may attract the definition of "basic wages". It is submitted that even if the Tribunal has observed something suo motu, it cannot be treated as decision on the said point. It is also submitted by Mr. Naik that even otherwise food concession cannot be treated as part of basic wages. It is also submitted that all allowances are excluded from consideration of basic wages. It is also submitted that it cannot be said that the amount paid is arising out of work and employment. Mr. Naik also relied upon Circular issued by the Provident Fund Commissioner by which certain allowances are excluded from the applicability of the Act. It is submitted that as per the Circular, if the allowance cannot be included in the matter of applicability of the Provident Fund Act and if the respondents have relied upon the said Circular by not deducting the amount, no fault can be found with the respondent--Management. It is also submitted by Mr. Naik that whether the food allowance paid to the workmen falls within the definition of "basic wages" or not is a mixed question of law and facts. There is no evidence in this behalf and so straightaway no finding can be given on issue. It is submitted by Mr. Naik that there are so many Officers in the company who are given such food allowance but no provident fund contribution has been paid so far as Officers are concerned.

Therefore, straightaway it cannot be said that Rs. 1200/- is payable to all. He however conceded the fact that Rs. 1200/- is paid to all the workmen uniformly. He has also reiterated the argument that the observations of the Tribunal are without jurisdiction and the respondents were not put to answer on the aspect whether the case may fall within the definition of basic wages. It is also submitted by Mr. Naik that even otherwise food allowance is to be considered as similar allowance as per the definition of basic wages and therefore, all allowances are excluded from the definition of basic wages.

3. In the rejoinder, it is argued by Mr. Shetty that the petitioners' case is on stronger footing so far as sub-section (b) of Section 2 is concerned. He submitted that in any case, the application of the workmen to the Regional Provident Fund Commissioner was only in connection with the applicability of Provident Fund Act and no reference was made to any particular Section. It is submitted by him that for the first time, the Management has taken the plea in their reply before the Regional Provident Fund Commissioner wherein in paragraph 3 they have stated that the component of food allowance which is paid to all employees of the Company do not have its original nor has any connection to the dearness allowance which is necessarily linked to the cost of living index. The said allowance is therefore cash value of food concession. Reliance is to be placed on the commonly accepted meaning and as available in other statutes. It is submitted by Mr. Shetty that the Company for the first time has taken such defence on the basis of Explanation I to Section 6 of the Act. It is not the case of the employees that the amount should be treated as cash value for food concession. It is submitted that whether a particular case falls u/s 2 or u/s 6 is a pure question of law and there is no question of applicability of mixed question of law and facts. Mr. Suresh Kumar, learned Counsel for respondent No. 2 in his rejoinder has submitted that so far as the Circular of the Department is concerned, it is merely for administrative guidance and when an issue of law is to be decided by authority, such Circular is not binding as the point raised by the appellants and respondents is to be decided as per the Provident Fund Act and the Scheme thereunder.

4. We have heard the concerned advocates at great length. We have gone through the provisions of the Act as well as the order passed by the Regional Provident Fund Commissioner as well as by the Appellate Tribunal as well as the order of the learned single Judge. Reference is required to be made to Section 2(b) of the Employees' Provident Funds and Miscellaneous Provisions Act 1952 which provides as under:

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 named 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." Section 6(1) of the Act provides as under:

"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 per cent) 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, dearness 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);

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.)

The basic point which is required to be decided is to whether the amount of Rs. 1200/- which is paid to all the workmen by the Company by way of food allowance is to be considered as cash value for food concession or not and if not whether the same can be treated as part of basic wages as per Section 2(b) of the Act. It is also required to be considered as to whether the amount of Rs. 1200/- which is paid towards food concession can be said to be as allowance which cannot be treated as part of basic wages at all and accordingly, it should be treated as food concession u/s 2(b) and Explanation I of Section 6 of the Act.

5. As pointed out earlier, an amount of Rs. 1200/- is given to each and every workman. In view of the fact that for want of canteen facility, the workman is required to take his food outside the premises and in order to compensate him, the amount of Rs. 1200/- is given which may or may not be adequate so far as the cost of food which is required to take during lunch hour is concerned. Though it is argued by Mr. Suresh Kumar that in the amount of Rs. 1200/- one may not be able to get food for a month and therefore it should be treated only as concession or part of the amount which is required to be borne by the employee concerned. However, since on this aspect as there is no evidence on record, it is not possible at this stage for us to consider that the amount of Rs. 1200/- which was paid to the employees was to be treated as food concession which may attract the definition of cash value for food concession. It is not in dispute that so far as Rs. 1200/- is concerned, it is paid to the employee where there is no canteen facility and a lump sum amount of Rs. 1200/- is given. Whenever there

is no canteen facility, food allowance is paid at the rate of Rs. 1200/- p.m. by way of settlement which is irrespective to any rise in the cost of food in any manner. In a canteen which is run by the Management, the food is provided by the canteen and while offering the food, the Management is contributing part of the amount towards the total cost of such food. In our view, concession can be said to be given when something is offered by the person by giving some deduction in the cost when such article is offered. When no food is offered by the Management on their own and if fixed amount is given without offering any food, such amount can be said to be allowance and therefore rightly it is described as food allowance in the agreement. In the agreement, it is not provided as cash value of any food concession. When the article such as food is not offered to the employee, there is no question of giving any concession in providing such article, therefore, if any fixed amount is given, in our view that can be considered as allowance but cannot be treated as cash value for food concession as made out in this case. So far as the aforesaid aspect is concerned, we agree with the learned single Judge that if the food is not supplied, there is no question of giving concession while supplying the food to the employee.

6. During the course of arguments, it is argued by the respondents that for example there are some places where concession has been given like in some hotels where some food coupons are given but one has to take food in that hotel and if the chargeable amount is less, such amount is deducted and remaining amount is paid to the person. In the instant case, the Management and the Union agreed to have fixed amount of Rs. 1200/- p.m. irrespective of cost of the food. In a given case, whether the employee take benefit of food outside or not or brings food from home, fixed amount of Rs. 1200/- is paid per month. Considering the same, in our view, the aforesaid amount therefore can be treated as an amount paid towards food allowance but cannot be considered as cash value for food concession as by giving Rs. 1200/- the Management is not providing food and if one is not providing anything, there is no question of giving concession for part of the amount for the things which he has offered. The Union has agreed to accept Rs. 1200/- p.m., the said amount therefore, in our view can be treated as food allowance which is provided in the agreement and is termed as food allowance. Both the learned Counsel Mr. Shetty and Mr. Suresh Kumar submitted that they are mainly relying upon the definition of basic wages as according to them, the case would fall u/s 2(b) and the said amount should be treated as basic wages itself and in that eventuality, it is not necessary to consider provisions of Explanation I of Section 6 of the Act. As per the agreement, the employee is permitted to take food in the canteen where canteen facility is there or outside where there is no canteen facility. Accordingly, two separate clauses are incorporated in the agreement viz. one where canteen facility is there and another where canteen facility is not there. In order to appreciate whether the amount in question is falling within the definition of basic wages, whether provisions of Section 2(b) of the Act can be attracted and whether such point can be considered while deciding the present controversy,

reference is required to be made to various decisions cited by both the sides. On behalf of the petitioners as well as on behalf of the respondents, strong reliance is made to the decision of the Supreme Court in the case of Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI), . In the said case, the Supreme Court has considered the aspect of basic wages.

7. On behalf of the appellants, Mr. Shetty has also relied upon the decision of the Supreme Court in the case of Bridge and Roof Co. (India) Ltd. and Others v. Union of India and Others (supra). In the aforesaid case, the Constitution bench of the Supreme Court has considered the provisions of Sections 2(b), 6 and 19-A of the Employees' Provident Funds Act 1962. The Supreme Court has observed in the said Judgment thus:

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. The exception suggests that even though the main part of the definition includes 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 1/2 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 purposes of contribution. Dearness allowance (for example) is payable in all concerns either as an addition to basis 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 concerns 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 a concern is excluded from basis 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 "basis wages" is included for the purpose of contribution by Section 6 and the real exceptions therefore in Clause (ii) are the other exceptions besides, dearness allowance, which has been included through Section 6.

8. Mr. Shetty has also relied upon the decision of the Supreme Court in the case of Jay Engineering Works Ltd. and Others Vs. The Union of India (UOI) and Others, . It has been held by the Supreme Court that the payment for work done between the quota and norm cannot be treated as any other similar allowance. The allowance mentioned in Clause (ii) of Section 2(b) of the Act are dearness allowance, house rent allowance, over time allowance, bonus and commission, any other similar allowance must be of the same kind. It is also held that the payment in the aforesaid case for production between the quota and norm is 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 the terms of the contract of employment.

9. Reference is also made by Mr. Shetty to the decision of the Supreme Court in the case of Prantiya Vidhyut Mandal Mazdoor Federation Vs. Rajasthan State Electricity Board and others etc. etc., . The Supreme Court has held that basic wages means all emoluments which are earned by employee while on duty or leave. It has been held by the Supreme Court that considering the provisions of Section 2(b) and Section 6 of the Act, "basis wage" means (i) all emoluments which are earned by an employee while on duty or on leave; (ii) with wages in accordance with the terms of the contract of employment; (iii) which are paid or payable in cash; and (iv) are payable for the time being to each of the employees. Mr. Shetty has also relied upon the; decision of the Supreme Court in

the case of *The Daily Partap Vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh*, . In the aforesaid case, the supreme Court has considered the aspect of production bonus scheme. It has been held by the Supreme Court that in order to become a genuine production bonus scheme, it should offer production bonus to the workmen who put in extra output, either collectively on the basis of total extra output on a sliding scale or individually to a given number of workmen who by their own efforts earn such bonus. It is held that in each case the payment of bonus cannot be of a fixed nature having no nexus with the quantity of extra output produced by them. Relying upon the same, it is submitted by Mr. Shetty that if an amount is uniformly paid to all employees, such payment should be considered as a part of basic wage under Sections 2(b) and 6 of the Act. Mr. Shetty has also relied upon the judgment of the Supreme Court in the case of *Shree Changdeo Sugar Mills and Another Vs. Union of India and Another*, wherein it is held that the amount paid under settlement between employer and employees as wages for a period when the employees were deemed to be on duty was basic wages within the meaning of Section 2(b) of the Act. Mr. Shetty also relied on the decision of the learned single Judge of the Gujarat High Court in the case of *Gujarat Cypromet Ltd. v. Assistant Provident Fund Commissioner*, 2004 III CLR 485 : LNIND 2004 GUJ 331 : 2005-I-LLJ-484 (Guj). In the said judgment, the learned single Judge of Gujarat High Court has held that except house rent allowance, other allowances are included in the definition of "basic wages". In the aforesaid case, lunch allowance was paid. It was held that lunch allowance paid to the employees is covered by Section 2(b) of the Act and is to be treated as part of basic wages. Mr. Shetty also relied on the judgment of the Allahabad High Court in the case of *Jaunpur Electric License 1934 v. Regional Provident Fund Commissioner, U.P.*, 1973 (26) FLR 354. In the said judgment, it is held that the provident fund contribution is to be made by the employer not only in respect of basic wages but also in respect of dearness allowance and food allowance. Mr. Shetty also relied on the judgment of this Court in the case of *Hindustan Lever Employees' Union v. Regional Provident Fund Commissioner and Another*, 1995 I CLR 696: 1995-II-LLJ-279 (Bom) wherein the learned single Judge of this Court has held that the amount payable on account of encashment of leave forms part of basic wages and therefore, it is liable for provident fund deduction. Mr. Shetty also relied on the judgment of the learned single Judge of Karnataka High Court in the case of *Mangalore Ganesh Beedi Works v. Assistant Provident Fund Commissioner, Mangalore*, LNIND 2001 KANT 661 : 2002-III-LLJ-132 (Kant). In the said judgment, it is held that in a case where special allowance is payable under the settlement falls within the definition of "basis wages" and demand for contribution in respect thereof is proper.

10. Mr. Suresh Kumar, learned Counsel appearing for the department has relied upon various judgments, some of which are the same on which Mr. Shetty has relied. Mr. Suresh Kumar relied upon the decision of the Madhya Pradesh High Court in the case of *Montage Enterprises Pvt. Ltd. v. Employees Provident Fund*

Commissioner, Indore and Another, decided by the Division Bench in writ petition No. 1857/2011 on March 24, 2011. It has been held that when a special allowance is payable to all the workers, the same can be construed as part of basic wages. Mr. Suresh Kumar also relied upon the judgment in the case of Harihar Polyfibres Vs. Regional Director, ESI Corporation, . In the said case, the Supreme Court has considered definition of "wages" under the Employees' state Insurance Act 1948, the Supreme Court has held that the social welfare legislation should receive liberal and beneficent construction. Relying on that, it is argued by Mr. Suresh Kumar that even if two views are possible, one in favour of the employees should be upheld. Mr. Suresh Kumar has also relied upon the decision of the Delhi High Court in the case of Regional Provident Fund Commissioner, New Delhi v. The Presiding Officer, Employees' Provident Fund Appellate Tribunal, New Delhi and Others, in writ petition (C)2022/1998 and C.M., Appl 16051/2008, decided on February 23, 2010 In the facts of that case, it has been held that housing and medical subsidy is given to all the employees of the respondent and the same would be therefore included in the definition of "basic wage" in terms of the judgment of the Supreme Court in Bridge and Roof Co. (India) Ltd. and Others v. Union of India and Others (supra). Mr. Suresh Kumar has also relied upon the decision of the Supreme Court in the case of L.N. Gadodia and Sons and Another v. Regional Provident Fund Commissioner in SLP (Civil) No. 11230/2008 wherein the dispute was regarding applicability of provisions of Employees' Provident Funds and Miscellaneous Provisions Act 1952. The Supreme Court has held that when two units are run by the same family under a common management and this being a welfare enactment, the interpretation should be made on the basis of considering the object of the Act being a welfare legislation. The learned Counsel lastly relied upon the decision of the Supreme Court in the case of Commissioner of Central Excise, Bolpur Vs. Ratan Melting and Wire Industries, wherein the Constitution Bench of the Supreme Court has held that the Circular issued by the Department is no doubt binding on the authorities under the respective statutes but when the Supreme Court or High Court declares the law in question arising for consideration, it would not be appropriate for the Court to direct that the Circular should be given effect to.

11. Mr. Naik, on the other hand, has relied upon the decision of the Supreme Court in the case of The Manager, Bengal Nagpur Cotton Mills Ltd. Vs. J. Bastian, . It has been held that new point should not be allowed to be raised in appeal for the first time which is not raised at first stage. Relying upon the same, Mr. Naik argued that since the issue before the authority was applicability of Section 6 of the Act, it is not open for the appellants now to argue that even otherwise the case falls in the definition of "basic wages" u/s 2(b) of the Act In order to substantiate the same, he has referred to decision of the Supreme Court in the case of Rajiv Sarin and Another Vs. State of Uttarakhand and Others, . The matter before the Supreme Court was under the tenancy law. It is held that when there is no pleading either in the High Court or in the Supreme Court

regarding applicability of the appropriate provision, the issue as to whether any particular provision will apply or not is not maintainable. Mr. Naik also relied upon the decision of the Supreme Court in the case of *Ganeshi Ram, Etc. Vs. The District Magistrate and Another*, . There it is held that it is the usual practice of the Court not to allow to take new point which was not even taken in the statement of case before the Court. The learned Counsel Mr. Naik has also relied upon the decision of the Supreme Court in the case of *Bridge and Roof Co. (India) Ltd. and Others v. Union of India and Others* (supra). Mr. Naik relied upon the decision of the Supreme Court in the case of *Manganese Ore (India) Ltd. Vs. Chandi Lal Saha and others*, . It is held that grain supplied at concessional rate to workmen is in the nature of amenity or additional facility or service. The said case was regarding considering the aspect of wages under the; Minimum Wages Act 1948. Mr. Naik also relied on the decision of the Supreme Court in the case of *Commissioner of Customs, Mumbai Vs. Toyo Engineering India Limited*, . The said case was under the Customs Act and in paragraph 11 of the judgment, it has been held by the Supreme Court that the Revenue could not be allowed to raise submissions for the first time in second appeal before the Tribunal. Mr. Naik relied on the decision of the Supreme Court in the case of *Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal and Others*, in order to substantiate his say that for the first time the applicability of Section 2(b) of the Act should not be allowed to be raised. The said judgment is of course on the point of State as defined under Article 12 of the Constitution of India. Mr. Naik has also relied upon the decision of the Supreme Court in the case of *Beed District Central Co-operative Bank Ltd. Vs. State of Maharashtra and Others*, . The said matter was under Payment of Gratuity Act 1972. The Supreme Court has considered the doctrine of blue pencil in the said case. The Supreme Court has held that it is no doubt true that Payment of Gratuity Act is a beneficial statute and when two views are possible, having regard to the purpose, the Act seeks to achieve being a social welfare legislation, it may be construed in favour of the workman. However, it is also true that only because a statute is beneficent in nature, the same would not mean that it should be construed in favour of the workmen only although they are not entitled to benefits thereof. Mr. Naik has also relied upon the decision of the Supreme Court in the case of *Manipal Academy of Higher Education Vs. Provident Fund Commissioner*, . In the aforesaid case, the Supreme Court has considered the principles laid down by the Supreme Court in *Bridge and Roof Co. (India) Ltd. and Others v. Union of India and Others* (supra) and it is held in paragraph 10 of the judgment that basic principles laid down in the aforesaid case on a combined reading of Sections 2(b) and 6 of the Act 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 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 our view, on the basis of aforesaid judgments, it can be said that if a particular allowance or amount is payable to all employees uniformly, such payment or emolument can be treated as part of basic wages but if it is not payable to all and payable to some of the employees, it may not fall under the definition of "basic wages" under the Act.

12. Considering the scheme of the Act and considering the observations of the Supreme Court in the case of *Bridge and Roof Co. (India) Ltd. and Others v. Union of India and Others* (supra) it is clear that there are some allowances which are payable to all the employees or to the class of employees such as overtime allowance, bonus, house rent allowance or deputation allowance. Such allowances are payable only to those who are entitled to get it but there are some allowance which can be said to be payable uniformly to all. The allowances which are uniformly paid to all, in our view, can definitely be falling under the definition of basic wages u/s 2(b) of the Act. The reference in Section "such other allowances" is to be read alongwith allowances mentioned in sub-section meaning thereby that the allowances which are not payable to all uniformly to entire class of employees is to be excluded from the definition of basic wages. We are not impressed by the argument of Mr. Naik that the Circular of the Department would be binding in a case where question of law is to be decided by authority and nor such Circular will be binding to the appellants or the respondents when legal point is to be decided by the Court. A reference is also required to be made to the provisions of Section 6 of the Act. Section 6 itself provides the aspect of basic wages. The Tribunal therefore while deciding the issue, has made a reference to basic wages while interpreting Section 6 itself. The aspect of basic wages therefore is finding place in Section 2(b) as well as in Section 6 also. In a given case, if any particular allowance is covered u/s 2(b) itself, then there is no question to go further to Section 6 at all. However, in the instant case, since this point was not considered by the learned single Judge and considered the case on the basis of cash value for food concession, in our view the matter is required to be sent back to the learned single Judge to consider whether the allowance payable to the workmen can be treated as part of basic wages as per Section 2(b) of the Act. If the answer is yes, then naturally the order of the Regional Provident Fund Commissioner is required to be upheld. Since the learned single Judge has not addressed himself on this aspect and even though the Tribunal has considered the case by making passing observations, we remand the matter back to decide whether the amount in question can be said to have been falling under basic wages though the issue as to whether the amount in question can be considered as cash value for food

concession is said to have been concluded as held by the learned single Judge. However, we find substance in the argument of appellants that in any case it may fall u/s 2(b) of the Act. The learned single Judge has not considered this aspect whether the allowance in question may fall u/s 2(b) in view of the judgment of the Supreme Court in *Bridge and Roof Co. (India) Ltd. and Others v. Union of India and Others* (supra) and in view of the fact that the amount is payable to all the permanent workmen without exception. Since the matter relates to the Provident Fund, we request the learned single Judge to decide the matter within three months from today. The petition is partly allowed to the aforesaid extent by setting aside the order of the learned single Judge and remitting the matter back to decide the issue whether the amount would be falling within the definition of basic wages u/s 2(b) of the Act. It is clarified that the decision taken by the learned single Judge that the amount in question cannot be said to be falling within the ambit of cash value for food concession shall be treated as concluded issue and the only question is required to be considered is whether the food allowance in the instant case can be said to be falling u/s 2(b) of the Act as basic wages and the issue be treated only in the line of Section 2(b) of the Act. At this stage, the learned Counsel for respondents prays for staying this order for some time. In our view, the said prayer is not required to be granted as ultimately the learned single Judge may take some time to decide the matter in view of this order. Since the matter is in connection with provident fund, we request the learned single Judge that he may try to dispose off the petition expeditiously and preferably within a period of four months from today. Rule is accordingly partly made absolute with no order as to costs.