

(2009) 04 MAD CK 0280

In the Madras High Court

Case No : W.A. No. 706 of 2008

The Regional Provident Fund Commissioner and Pondicherry
State Employees' Provident Fund Organisation

APPELLANT

Vs

Wipro Limited and The Presiding Officer, Employees'
Provident Fund Appellate Tribunal

RESPONDENT

Date of Decision : 17-04-2009

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2, 6, 7A
Industrial Disputes Act, 1947 — Section 12(3), 18(1)
Tamil Nadu Catering Establishments Act, 1958 — Section 2(1), 2(13A)

Citation : (2009) 4 MLJ 972

Hon'ble Judges : P. Jyothimani, J; Aruna Jagadeesan, J

Bench : Division Bench

**Advocate : K. Ramu, for the Appellant; S. Raveendran, for T.S. Gopalan and Co.
for 1st respondent, for the Respondent**

Final Decision : Dismissed

Judgement

P. Jyothimani, J.—This appeal is directed against the order of the learned Single Judge dated 22.9.2006 made in W.P. No. 3299 of 1999, by which the learned Single Judge has allowed the writ petition filed by the first respondent herein, while setting aside the order of the Employees' Provident Fund Appellate Tribunal dated 24.11.1998 in Appeal No. ATA-13(83)98 and also the order of the appellant dated 14.7.1998.

2.1. Between the employees of the first respondent and the first respondent/ employer there was a settlement entered into u/s 12(3) of the Industrial Disputes Act, 1947, under which the then existing canteen subsidy was agreed to remain unchanged till the end of one year from the date of settlement, which was entered on 7.8.1990, 21.10.1994 and 1.12.1997. As per one of the Clauses of the settlement, it was agreed that the canteen subsidy would not attract provident fund and the said canteen subsidy was stated to be an alternate to providing canteen and that the benefit of the canteen subsidy would be

withdrawn at the will of the writ petitioner/first respondent herein.

2.2. Further, in the first respondent's factory, a Performance Linked Compensation Scheme was introduced in the year 1992 for the employees who are covered under the settlement dated 7.8.1990 and such other workmen as the first respondent/employer may decide from time to time. It is also stated that the payment made under the scheme would not attract the provident fund contribution.

2.3. The appellant called for the particulars about the canteen subsidy from the first respondent/employer by notice dated 5.6.1996, which was replied on 11.7.1996 and thereafter, the appellant proceeded u/s 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for brevity, "the EPF Act"). Ultimately, the appellant, by order dated 14.7.1998, decided that the canteen subsidy and performance linked compensation would attract provident fund contribution and directed the first respondent to pay provident fund dues from their respective due dates and also decided that the grade allowance will not come within the definition of "basic wages" or "dearness allowance" and will not attract the provident fund deduction.

2.4. The appeal filed by the first respondent/employer against the said order has also been dismissed by the Employees' Provident Fund Appellate Tribunal in its order dated 24.11.1998, concurring with the appellant, as against which the first respondent has filed the writ petition, insofar as it relates to the direction to pay provident fund contribution in respect of canteen subsidy and performance linked compensation. The finding of the appellant in respect of the grade allowance in favour of the first respondent has become final.

2.5. The learned Single Judge, having agreed with the contention of the first respondent that the cash value of any food concession is excluded from "basic wages"; that the canteen subsidy cannot be treated as a cash value of any food concession and the concession is not equivalent to the subsidy of the canteen; and that the settlement entered u/s 12(3) of the Industrial Disputes Act is binding on the parties and when such settlement excluded canteen subsidy, the appellant cannot make a demand for contribution under the EPF Act, has ultimately held that the impugned order of the appellant dated 14.7.1998, as confirmed by the second respondent, by order dated 24.11.1998, is not valid.

3.1. It is the contention of Mr. K. Ramu, learned Counsel appearing for the appellant/Department that the EPF Act, being a social welfare legislation, should be liberally interpreted, especially in the context of Section 6 of the Act, which has overriding effect. It is his further submission that by virtue of Explanation to Section 6 of the EPF Act, "dearness allowance" is deemed to include with the term "basic wages", and the value of any food concession allowed to the employee also should be included. Therefore, according to him, the said Explanation takes away the ambit of Section 2(b)(i) of the EPF Act, which specifically excludes the cash value of any food concession.

3.2. His further submission is that Section 2(b) of the EPF Act is a definition section, while Section 6 of the EPF Act is a charging Section and therefore, Section 6 of the EPF Act has to be given effect to. To substantiate his contention, he relies upon the judgment of the Supreme Court in *Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI)*, .

3.3. According to him, the concession is treated as an amount paid in cash and so it is deemed to be earned and therefore, the appellant was well within its authority in directing the first respondent to make contribution under the EPF Act.

3.4. He also vehemently contends that a settlement entered into u/s 12(3) of the Industrial Disputes Act cannot go against the statute, especially when it is a beneficial legislation.

4.1. On the other hand, Mr. S. Raveendran, learned Counsel appearing for the first respondent contends that what is contemplated is the amount paid or payable in cash or in sum assured.

4.2. He would submit that by reading Explanations 1 and 2 to Section 6 of the EPF Act, it is clear that in respect of permanent employees, who are in seasonal establishment, during non-season, when they are retained, the allowance paid during that time should be treated as basic wage. He would submit that cash value of any food concession could arise only in an establishment like catering establishment, wherein cash value of any food concession may be taken as wages, as per Section 2(13-A) of the Tamil Nadu Catering Establishments Act, which is a State Act and where the canteen is a statutory requirement, and not to the first respondent factory, where canteen is not a statutory requirement at all.

4.3. He would further submit that even under the Factories Act, there is no compulsion for providing food, much less subsidized food. The cash value of any food cannot be paid nor is payable to all employees. It is only in cases where there is a compulsion on the part of the employer to provide food on concession, the question of applicability of Explanation (1) to Section 6 of the EPF Act would arise.

4.4. He would refer to the provisions of the settlement entered into u/s 12(3) of the Industrial Disputes Act and contend that using of canteen is only optional and there is no compulsion and it is not forming part of the employment. He would also rely upon the judgment in *E.I.D. Parry (India) Ltd. Vs. Regional Commissioner EPF Tamilnadu and Another*, to substantiate his contention in respect of the settlements entered either u/s 12(3) or 18(1) of the Industrial Disputes Act.

5. Section 6 of the EPF Act, which is as follows, mandates an employer to contribute 10% of the basic wages, which includes dearness allowance and retaining allowance, if any, and the employees contribution shall be equal to that and so on.

Section: 6. Contributions and matters which may be provided for in the Scheme:

The contribution which shall be paid by the employer to the Fund shall be ten per cent of the basic wages, dearness allowances 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 employees' contribution 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:

Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry 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.

6. Explanation (1) to Section 6 of the EPF Act, which is certainly the charging Section of the EPF Act, includes cash value of any food concession allowed to the employee as forming part of dearness allowance. Likewise, an important term under the said section, namely "retaining allowance" is defined as an allowance payable during the period for which the establishment is not working, but, at the same time, retaining the services of the employees.

7. The term "basic wages" explained u/s 6 of the EPF Act is defined u/s 2(b) of the EPF Act, 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.

8. It states in exhaustive terms that basic wages are the emoluments earned by an employee in terms of the contract of employment paid or payable in cash. However, it excludes the cash value of any food concession. The basic wages does not also include dearness allowance u/s 2(b) of the EPF Act. The dearness allowance shall be in cash payments by any name on account of rise in the cost of living.

9. But, u/s 6 of the EPF Act, the obligation of the employer to make contribution under the scheme is not only on the basic wages, but also dearness allowance and retaining allowance. Since the dearness allowance also includes the cash value of any food concession allowed to any employee as per Explanation (1) to Section 6 of the EPF Act, there is an apparent conflict between Section 2(b) and Section 6 of the EPF Act in respect of the cash value of any food concession. But, a harmonious construction of the said provisions should be, in our considered view, that in respect of basic wages, the cash value of any food concession or dearness allowance may not be included, but for the purpose of obligation of the employer to contribute under the scheme, the dearness allowance has to be taken into consideration along with the basic wages, the dearness allowance is deemed to include the cash value of any food concession allowed to the employee and in that view of the matter, the cash value of any food concession given should also be taken into consideration for the purpose of contribution by the employer under the scheme.

10. As far as the retaining allowance is concerned, there is no difficulty since it may apply to the seasonal employment, wherein permanent employees are appointed and during non-seasons they are paid allowances and they should form part of the obligation of the employer to make contribution under the scheme.

11. In *Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI)*, , the Constitutional Bench of the Supreme Court had an occasion to discuss about the said apparent conflict between Section 2(b) and Section 6 of the EPF Act, with particular reference to Section 2(b)(ii) of the EPF Act relating to dearness allowance, house rent allowance, over-time allowance, bonus, etc. In fact, the Constitutional Bench of the Supreme Court had made an observation about Section 2(b)(i) of the EPF Act, viz., cash value of any food concession, and Section 2(b)(iii) of the EPF Act, viz., any presents made by the employer, and observed that the term "emoluments" must be paid or payable in cash and the cash value of any food concession excluded from wages was observed to be not payable in cash. Of course, before the Hon"ble Supreme Court, the issue was relating to the production bonus earned by an employee. While making

observation regarding Section 2(b)(i) and 2(b)(iii) of the EPF Act, the Supreme Court has held as follows:

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 any 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.

(emphasis supplied)

12. While holding that the production bonus of the kind in force in the said Company was excepted from the term "basic wages" and therefore, there cannot be a compulsion on the employer therein to contribute under the scheme on the production bonus, the Supreme Court, in the above said decision, has held as follows:

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 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 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.

13. In the context of the judgment of the Supreme Court, we have to make a reference to some of the provisions of the settlement entered into u/s 12(3) of the Industrial Disputes Act, especially with reference to the canteen subsidy. In the settlement entered on 21.10.1994, in the presence of the Assistant

Commissioner of Labour (Conciliation) I, Madras-6, the following is the Clause regarding canteen subsidy:

J. Canteen Subsidy:

The issue of providing a canteen in the factory was discussed between the parties.

In view of the fact that majority of the workmen carry their own lunch to the factory, it was mutually agreed that the Management shall continue to pay canteen subsidy in lieu of providing a canteen.

1. Effective date of settlement, each workman will be eligible for canteen subsidy of Rs. 7/- (Rupees seven only) per day actually worked by the workman.

2. Further, effective the date of completion of a period of one year from the above date, each workman will be eligible for a canteen subsidy of Rs. 8/- (Rupees eight only) per day actually worked by the workman.

3. Further, effective the date of completion of a period of two years from the above date, each workman will be eligible for a canteen subsidy of Rs. 9.05 (Rupees nine and paise five only) per day actually worked by the workman.

4. Canteen subsidy will not be payable when workman does not attend duty for any reason.

5. Canteen subsidy will be payable only if a workman puts in actual work of minimum 4 hours in a day.

6. Canteen subsidy payable to any workman shall be paid along with monthly salary.

7. Canteen subsidy will not attract house rent assistance, bonus, provident fund, gratuity overtime or any other benefit.

8. Both the parties explicitly understand and agree that the canteen subsidy has been provided in lieu of canteen. In the event of the Management being required to provide a canteen for any reasons, the canteen subsidy paid as above shall be withdrawn.

14. The above said Clause clearly stipulates that the canteen subsidy provided is in lieu of the canteen. It also states that in cases where the management is compelled to have canteen the subsidy will be withdrawn.

15. Again in the settlement entered into u/s 12(3) of the Industrial Disputes Act before the Assistant Commissioner of Labour (Conciliation) I, Chennai-600 006, dated 1.12.1997, Clause "J", is as follows:

J. Canteen Subsidy:

The issue of providing a canteen in the factory was discussed between the parties. Both the Management and the Union agreed to continue the canteen

subsidy, with some modifications, instead of providing canteen. Consequently, the canteen subsidy has been modified as under:

1. Effective from the date of signing of this settlement each worker will be paid canteen subsidy of Rs. 245/- per month.
2. From the second year of the date of signing of this settlement each worker shall be paid canteen subsidy of Rs. 255/- per month.
3. From the third year of the date of signing of this settlement each worker shall be paid canteen subsidy of Rs. 265/- per month.
4. Canteen subsidy will be paid proportionate to the number of days worked by each workman during the calendar month.
5. Canteen subsidy payable to any workman shall be paid along with the monthly salary.
6. Canteen subsidy will not attract PF, Bonus, Gratuity, Overtime or any other benefit or allowance.
7. Both the parties explicitly understand and agree that the canteen subsidy has been provided in lieu of canteen. In the event of the Management being required to provide a canteen for any reasons, the canteen subsidy paid as above will be withdrawn.
8. The Management reserves the right to amend, adjust or withdraw this canteen subsidy in the event of any legislation or Government notification that may come in to force requiring the Company to pay Dearness Allowance, House Rent Allowance, Conveyance Allowance and/or any other allowance.
16. The parties have agreed that the management has a right to withdraw the subsidy in the event of a notification by the Government requiring the company to pay dearness allowance, etc.
17. It is also the specific case of the first respondent/Management that, if the canteen is to be run by the management, by supplying the food stuffs and beverages, the amount spent by way of subsidy for running the canteen is not to be treated as wages and while so, the canteen subsidy, which is provided under the settlement entered into u/s 12(3) of the Industrial Disputes Act, is only the division of the amount to be spent for the canteen facility to those who use it, among all workmen. When there is no compulsion on the part of the first respondent/ Management to provide canteen and such compulsion is not available in all industries also, except in few cases where there are statutory provisions, like the catering establishments, and use of such canteen is also not compulsory to all workmen and it is only optional, there is sufficient force in the contention of the learned Counsel for the first respondent/employer that no value of food concession can be made in the form of money, especially in the circumstances that running of canteen is not a statutory requirement.

18. As submitted by the learned Counsel for the first respondent, the Tamil Nadu Catering Establishments Act, 1958, which applies to "catering establishment" defined u/s 2(1) of the said Act, defines "wages" in different terms when compared to the definition under the EPF Act. Section 2(13-A) of the Tamil Nadu Catering Establishments Act, 1958, which defines "wages" makes it clear that it includes the concessional supply of food grains and other articles, which can be computed in terms of money. Section 2(13-A) of the Tamil Nadu Catering Establishments Act, 1958 reads as follows:

Section 2(13-A): "wages" means the basic wages, dearness allowances, the cash equivalent of the meals and tiffin supplied to the employees free of charge and the value of any other amenity or of service or of any concessional supply of food grains or other articles which can be computed in terms of money, but does not include a bonus.

19. In Tata Power Company Limited Vs. Regional Provident Fund Commissioner and Others, , it was held that in respect of supply of an amenity, such value of concession can be deduced only when such goods are supplied without which it is not possible to calculate the value. Of course, while referring to the Minimum Wages Act, 1948 in that case, the High Court has relied upon the judgment of the Supreme Court in Manganese Ore (India) Ltd. Vs. Chandi Lal Saha and others, and held as follows:

15. One thing that is clear from the decision is that there has been a practice in industrial employment in this country where the cash value of various benefits concessional supply of food grains is computed while reckoning the charges payable. Under the Minimum Wages Act the cash value of a concession always means the amount by which the value of an essential supply is reduced when supplied. Therefore the term "cash value of any food concession" allowed to the employee means such value of the component by which the price of the item is reduced. This necessarily postulates the provision of the supply of an amenity such as food grain for, without such supply, it would not be possible to calculate the value of any food concession allowed to the employee. There being no supply of any food by the petitioner, the payment of food allowance cannot be treated as the cash value of food concession allowed to the employee.

20. The learned Judge, in the impugned judgment, has held correctly, in our view, that such amount which is capable of earning must be as per the contract of employment, by referring to the Division Bench judgment of this Court in the Employees State Insurance Corporation, Madras v. E.I.D. Parry (India) Limited 1984 Lab. I.C. 122 and the judgment of the Supreme Court in Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation, ; and that it is legitimate for the employees, while settling the disputes, to come to a settlement that certain payments shall not be reckoned for the purpose of provident fund, etc.

21. We are of the considered view that the reasons given hereinabove, insofar as

canteen subsidy is concerned, are equally applicable to the performance linked compensation and such compensation also would not attract provident fund contribution.

For the reasons aforesaid, we do not see any reason to interfere with the order of the learned Single Judge. The writ appeal fails and the same is dismissed. No costs.