

(2009) 09 AP CK 0048

In the Andhra Pradesh High Court

Case No : Writ Petition No. 6732 of 2000

The Regional Provident Fund Commissioner

APPELLANT

Vs

Employees Provident Fund Appellate Tribunal and V.S.T.
Industries Limited

RESPONDENT

Date of Decision : 08-09-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2B, 6, 7A

Citation : (2009) 09 AP CK 0048

Hon'ble Judges : R. Subhash Reddy, J

Bench : Single Bench

Advocate : R.N. Reddy, for the Appellant; G.P. for Labour for Respondent No. 1 and C.R. Sridharan, for the Respondent

Final Decision : Dismissed

Judgement

R. Subhash Reddy, J.—This writ petition, by the Regional Provident Fund Commissioner, Hyderabad, is filed aggrieved by the order dated 22-07-1999 passed by the Employees Provident Fund appellate Tribunal, the first respondent herein, in Appeal No. ATA/1(14)99, under the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "the Act").

2. Facts of the case, in brief, are as under:

The second respondent, M/s. Vazir Sultan Tobacco Company Ltd., which is involved in the business of manufacturing cigarettes, is a covered establishment under the provisions of the Act vide code No. AP/146 While making inspection, the Inspector of Provident Fund had noticed that the said establishment was not paying contributions on ad hoc allowance and monthly productivity incentive payable to its workers. When the management of the second respondent company disputed its liability for contribution towards provident fund, an enquiry was conducted u/s 7-A of the Act. In the enquiry proceedings, it was the plea of

the second respondent management that ad hoc allowance of Rs. 20/- is paid as per the settlement reached between the management and the employees and the settlement itself states that the said allowance shall not be taken into account for the purpose of provident fund deduction; as such, it does not form part of basic wage and dearness allowance so as to contribute on such allowance. So far as production incentive is concerned, it was the case of the management that it is a group incentive scheme where the workmen are paid on pro-rata basis depending upon the production and, as such, in the absence of any fixed benefit conferred on the workmen, the same cannot also be clubbed in the basic wage for the purpose of contribution. The Regional Provident Fund Commissioner, who conducted enquiry, passed order dated 23-10-1984 directing the second respondent management to pay provident fund on ad hoc allowance and monthly productive incentive bonus to the workers during the period from 01-04-1978 to 31-05-1982. The primary authority, in the said order, issued directions for payment of provident fund mainly on the ground that ad hoc allowance was paid only after taking into account the cost of living and further the production incentive is paid under the monthly productivity index plan which is made for within the fixed hours of work. While recording so, it is stated that ad hoc allowance and production incentive are nothing but basic wage and in order to avoid liability under the Act, the employer and the employees have entered into agreement for payment of such amount without subject to contributions payable under the Act.

3. Aggrieved by the order of the Regional Provident Commissioner dated 23-10-1984, the second respondent filed an appeal before the appellate Tribunal, constituted under the provisions of the Act, in Appeal No. ATA/1 (14)99. The appellate Tribunal, relying on the judgment of the Hon"ble Supreme Court in the case of Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI), held that payment under the head of ad hoc allowance is a management skill to give incentive for the employees to be present in their working hours and on working days on voluntary basis. Further, the appellate Tribunal found that the said amounts are not being paid to every worker, as the scheme disentitles payment to the workmen who are absent from the place of work without leave or authority. Similarly, coming to the production incentive, the appellate Tribunal, having found that unless and until the minimum prescribed limit of production is not reached as a whole at the end of the month, none of the employees would be entitled for allowance, has taken a view that the same cannot be considered as a basic wage for the purpose of deduction of provident fund. Aggrieved by the order passed by the appellate Tribunal, the Regional Provident Fund Commissioner, Hyderabad, filed this writ petition.

4. Heard Sri R.N. Reddy, learned Counsel for the petitioner and Sri C.R. Sridharan, learned Counsel appearing for the second respondent management.

5. It is contended by Sri R.N. Reddy, learned Counsel for the petitioner, that though the payments made to the workmen during the period from 01-04-1978

to 31-05-1982 on account of ad hoc allowance and production incentive are liable for contribution of provident fund under the provisions of the Act, the second respondent management has failed to make its contributions. It is submitted that when the same was found, during the inspection of the provident fund inspector, enquiry was conducted and by recording valid reasons, order dated 23-10-1984 was passed directing the second respondent management to pay provident fund on the payments referred above. It is submitted that as much as the said payments made under the headings, namely, ad hoc allowance and production incentive, are not exempted in the definition of basic wage as defined u/s 2-B of the Act, the second respondent management is liable to pay provident fund as per the provision u/s 6 of the Act. It is submitted that as the said amounts are paid only for the work taken by the employer during the working hours of the company, irrespective of phraseology used for such payments, the same are to be considered as a basic wage for the purpose of payments under the provident fund. Learned Counsel for the petitioner, in support of his contention, relied upon judgments in the cases of D.C.M. Limited Vs. Regional Provident Fund Commissioner, , Poompuhar Shipping Corporation Ltd. Vs. Regional Provident Fund Commissioner and Others, and D.C.M. Shriram Consolidated Ltd. v. Regional Provident Fund Commissioner 2004 (3) SCC 396.

6. On the other hand, it has been submitted by Sri C.R. Sridharan, learned Counsel for the second respondent management, that payments made to the workers on account of ad hoc allowance and production incentive are as per the settlement entered into with the workers union and as per the very settlement, no contribution be made towards provident fund; as such there is no illegality in the order passed by the appellate Tribunal. It is contended that the said allowances are subject to certain conditions and as the said amounts are not payable for all the employees, such amounts cannot be considered as a basic wage for the purpose of contribution, u/s 6 of the Act. In support of his contention, the learned Counsel relied on the judgments in the cases of Associated Cement Co. Ltd. v. R.M. Gandhi, Regional Provident Fund Commissioner, Gujarat and Ors. 1992 LLR 192 , Greysham and Co. Vs. Regional Provident Fund Commissioner, , E.I.D. Parry (India) Ltd. Vs. Regional Commissioner EPF Tamilnadu and Another, and in the case of Regional Commissioner, EPF, Tamil Nadu and Pondicherry Vs. Management of Southern Alloy Foundries (P) Ltd.,

7. Before I consider the submissions made by the learned Counsel, I deem it appropriate to refer to the reasons in brief for allowing the appeal preferred by the second respondent management. So far as ad hoc allowance is concerned, the appellate Tribunal found that the said amount is not payable for all employees all times and the same is extended by the management to attract regular attendance of workmen. It is stated that as the said payment will depend on attendance of the workmen and it is extended by way of incentive, it cannot be considered as basic wage, in view of the ratio decided by the Hon"ble Supreme Court in the case of Bridge and Roof. So far as production incentive is concerned,

it is stated that as per the scheme itself, each worker is entitled for the said incentive in proportion to his attendance and also category-wise; as such, the same cannot be treated as basic wage for the purpose of contribution towards provident fund.

8. As per the definition u/s 2-B of the Act, basic wage means all emoluments which are earned by an employee while on duty, but they do not include the cash value of any food concession, dearness allowance, house-rent allowance, overtime allowance, bonus, commission or any other similar allowances payable to the employee in respect of his employment or of work done in such employment. u/s 6 of the Act which deals with the contributions and matters which may be provided for in Schemes notified under the Act, it is obligatory on the part of the employer to pay provident fund on the basic wage at such percentage as prescribed. In the case on hand, ad hoc allowance was paid from 01-04-1978 to 31-05-1982 only pursuant to settlement entered into between the workers union and the respondent management. It is also not in dispute that as per the very terms of the settlement, there is a clear understanding between the workers and the management that no deductions be made on account of provident fund out of the amount paid to the workers on account of ad hoc allowance. So far as provident fund contributions are concerned, it is not a unilateral payment by the management. Whenever there are such deductions, there will be a matching contribution from the side of the management. As per the terms of settlement entered into by the workers union with the management, ad hoc allowance is not payable for all employees irrespective of their attendance. From the very reading of the terms of the settlement, it is clear that each employee is entitled to an amount of Rs. 20/- per month and the said amount will get reduced if any employee is absent during the month. By applying the ratio in the case of Bridge and Roof, it cannot be said that every employee is entitled to a fixed sum, so as to consider the said allowance as basic wage for the purpose of deductions. Further, in the case of Regional Commissioner, EPF, Tamilnadu and Pondicherry (7 supra), a Division Bench of the Madras High Court considered an identical question, namely whether the special allowance paid by the employer as a result of an agreement entered into between the employer and the employees can be said to form part of dearness allowance for the purpose of calculating the contribution payable by the employer under the provisions of the Act, held that when a special allowance was paid as a result of an agreement and they had not agreed to treat it as a part of basic wage or dearness allowance, it cannot be included for computation of contribution of the employer. Even in the present case, there is a settlement which expressly states that payment of ad hoc allowance by the management will be subject to deductions for the purpose of provident fund. When it is not part of dearness allowance and further when it is agreed by the workers union and the management that no deductions can be made towards provident fund, it cannot be said that the said settlement/contract is outside the statute. From the very recitals of the Scheme, it is clear that every employee is not automatically entitled

to the said amount as a matter of course, irrespective of his/her attendance and the payment of the said amount will depend upon the attendance. As such, it cannot be constructed as basic wage for the purpose of deductions u/s 6 of the Act. In the judgment of the Hon''ble Supreme Court in the case of Bridge and Roof, it is held that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose of contribution u/s 6 of the Act, but for 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. Further, in the judgment in the case of E.I.D. Parry (India) Ltd. (6 supra), a Division Bench of the Madras High Court has held that, if in accordance with the terms of the contract of employment the parties agree that a particular sum should be excluded for the purpose of provident fund, it cannot be said that it should be treated as a basic wage for the purpose of deductions u/s 6 of the Act. The ratio decided in the said case supports the case of the second respondent management. Even in the case on hand, there is an identical clause in the settlement arrived at between the management and the workers union. It is to be seen that production incentive, as per the settlement, is not a fixed sum to be earned by every workman. The said incentive, which is in the nature of a bonus, is payable in a particular month to a particular workman, which will be arrived at by multiplying the applicable scheduled hours eligible for payment as described in the productivity incentive scheme at the rate that applies to the particular group, applicable to that month. In that view of the matter, it is clear from the very settlement that the said amount which is payable to the workmen is in the nature of a bonus on the production which varies from one workman group to the other, as applicable to the index slab notified in the productivity incentive scheme. As such, having regard to the nature of the scheme and the bonus; payment of amount towards production incentive wholly depends on the production for a particular month, which is nothing but a bonus and which is exempted and, hence, cannot be called a basic wage, as defined. Further, as every workman cannot claim particular amount as a matter of right, even by applying the ratio decided by the Hon''ble Supreme Court in the case of Bridge and Roof, the said amount cannot be taken into consideration for the purpose of payment of provident fund u/s 6 of the Act. Though learned Counsel for the petitioner relied on a judgment of a learned single Judge of the Rajasthan High Court in D.CM's Case (1 supra), wherein it is held that liability under the Act will depend upon the phraseology used by the employer, but, having regard to the facts of the case on hand and the settlement entered into, the said judgment is not beneficial to the learned Counsel.

9. For the aforesaid reasons, this court is of the view that the appellate Tribunal has rightly allowed the appeal filed by the second respondent management by recording valid reasons and there are no grounds to interfere with the same in this petition filed under Article 226 of the Constitution of India.

10. The writ petition is without merits and is accordingly dismissed, in the circumstances, with no order as to costs.