

(2007) 10 MAD CK 0173

In the Madras High Court

Case No : Writ Petition (MD) No's. 8045, 8067, 8075 and 8786 to 8789 of 2005
and W.P.M.P. (MD) No's. 8692, 8706, 8616 and 9517 to 9520 of 2005

Thiru Arooran Sugars Ltd. and Others

APPELLANT

Vs

Asstt. Provident Fund Commissioner (ENF) Employees'
Provident Funds Organisation and Another

RESPONDENT

Date of Decision : 12-10-2007

Acts Referred:

Constitution of India, 1950 — Article 14

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 12, 2, 4(2), 6, 7(1)

Factories Act, 1948 — Section 79(1), 79(10), 79(2), 79(3), 79(8)

Citation : (2008) 1 LLJ 806 : (2008) WritLR 859

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : T.S. Gopalan, for the Appellant; P.T.S. Narendravasan, for the Respondent

Final Decision : Allowed

Judgement

K. Chandru, J.—In all these writ petitions, the short question that arises for consideration is whether the contribution for leave encashment expenditure is covered within the definition of basic wages u/s 2(b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "PF Act").

2. Section 2(b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 reads as follows:

2. Definitions - In this Act, unless the context otherwise requires- (Sub-sections (a) and (aa) are omitted)

(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.

3. It is the stand of the respondent/PF Department that the leave encashment given to the workman is covered by the term of basic wages. In support of their stand, they were relying upon the judgment of the Bombay High Court as well as the Karnataka High Court. Therefore, all the petitioners/managements herein are bound to make contribution in terms of the leave encashment given to the workman as part of the basic wages. This was given pursuant to the letter written by the petitioner in W.P. (MD) No. 8075/2005. Therefore, the petitioners have come forward with these Writ Petitions seeking to challenge the various summons issued by the Department for producing their leave encashment register for making appropriate calculation of PF dues to be paid to the Department.

4. A preliminary objection was raised by the respondent by stating that there is an alternative remedy u/s 7(1) of the Act to Appellate Tribunal and therefore, the Writ Petitions are not maintainable and the same should be dismissed.

5. The respondent/PF department has taken a definite stand that the liability of PF will have to be paid even on leave encashment, for which, they relied upon the judgment of the Bombay High Court and Karnataka High Court and that there will be very little scope for the Tribunal to take any independent stand and they are bound by the judgments of the various High Courts. Therefore, this objection is over-ruled.

6. It is brought to the notice of this Court that the Regional Provident Fund Commissioner II (Exem), Chennai giving clarification in the matter of implementation of leave encashment issued a circular dated September 22, 2005, which reads as follows:

Please refer to this Office letter of even number dated July 18, 2005 and July 22, 2005 wherein all the establishments were directed to enforce the recovery of PF contribution on leave encashment paid on or after October 1, 1994.

Consequently, clarification has since been received from the Head Office intimating to enforce the recovery of PF contribution on leave encashment paid on or after May 1, 2005 and the compliance in respect of recovery upto April 30, 2005 has been kept in abeyance for the present.

7. The learned Counsel for the petitioners submitted that the petitioners are all involved in the manufacturing process and their units come within the purview of

the Factories Act, 1948 and they have registered their units. Under Chapter VIII of the Factories Act, 1948, Annual Leave with Wages are provided to the workman. The relevant portion of Section 79(3) to (5) reads as follows:

79. Annual leave with wages-

(Sub-sections 1 and 2 are omitted)

(3) If a worker is discharged or dismissed from service or quits his employment or is superannuated or dies while in service, during the course of the calendar year, he or his heir or nominee, as the case may be shall be entitled to wages in lieu of the quantum of leave to which he was entitled immediately before his discharge, dismissal, quitting of employment, superannuation or death calculated at the rates specified in Sub-section (1), even if he had not worked for the entire period specified in Sub-section (1) or Sub-section (2) making him eligible to avail of such leave, and such payment shall be made-

(i) where worker is discharged or dismissed or quits employment, before the expiry of the second working day from the date of such discharge, dismissal or quitting; and

(ii) where the worker is superannuated or dies while in service, before the expiry of two months from the date of such superannuation or death.

(4) In calculating leave under this Section, fraction of leave of half a day or more shall be treated as one full day's leave, and fraction of less than half a day shall be omitted.

(5) If a worker does not in any one calendar year take the whole of the leave allowed to him under Sub-section (1) or Sub-section (2), as the case may be, any leave not taken by him shall be added to the leave to be allowed to him in the succeeding calendar year:

Provided that the total number of days of leave that may be carried forward to a succeeding year shall not exceed thirty in the case of an adult or forty in the case of a child:

Provided further that a worker, who has applied for leave with wages but has not been given such leave in accordance with any scheme laid down in Sub-sections (8) and (9) or in contravention of Sub-section (10) shall be entitled to carry forward the leave refused without any limit.

8. Statutorily employers are bound to give annual leave with wages. The option is given to workman either to encash or to avail leave depending upon the wishes of the workman.

9. The learned Counsel also submitted that similar provisions for annual leave with wages are also provided under the Tamil Nadu Shops and Establishments Act, 1947 and the Tamil Nadu Motor Transport Workers Act, 1961 and the Tamil Nadu Plantation Labour Act, 1951. In the light of the statutory obligation leave

with wages are granted and either it can be availed as leave or encashed depending upon the volition of the worker and this cannot be treated as basic wage in terms of Section 2(b) of the Act noted above.

10. The learned Counsel also submitted that the term of leave or holidays with wages in either case found in the definition cannot be read in isolation but should be read together with Regulation 29(3) and also 38. Regulation 29(3) reads as follows:

29. Contribution -

(Sub-regulations 1 and 2 are omitted)

(3) The contributions shall be calculated on the basis of basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any) actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis.

Regulation 38 reads as follows:

38. Mode of payment of contribution-(I) The employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable, deduct the employee's contribution from his wages which together with his own contribution as well as an administrative charge of such percentage of the pay basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon for the time being payable to the employees other than an excluded employee, as the Central Government may fix. He shall within fifteen days of the close of every month pay the same to the Fund by separate bank draft or cheques on account of contributions and administrative charge.

11. A conjoint reading of the definition as well as the regulation under the Employees' Provident Fund Scheme 1952 reveals that it was not the intention of the Parliament as well as the regulation making authorities to include the: annual leave with wages as part of basic wage.

12. The learned Counsel also submitted that in respect of the Tamil Nadu State Transport Corporation, Pudukkottai (TN), an appeal was filed before the Employees' Provident Fund Appellate Tribunal, New Delhi and in that appeal in case No. ATA/471(I3) 2000 and batch cases, the Tribunal held as follows:

Therefore, holding that leave encashment is basic wages will create unnecessary disturbance. Therefore, I hold that any payments made as leave encashment is not part of basic wages.

This order of the Tribunal was not taken on appeal by the Department and it has become final. Therefore, there cannot be one law for the State Transport Corporation establishment and one law for the other employees in the very same State.

13. The learned Counsel further submitted a chart showing the definition of wages under various labour enactments such as the Payment of Gratuity Act, 1972, The Minimum Wages Act, 1948, the E.S.I. Act, 1948, Payment of Bonus Act, 1965, the Payment of Wages Act, 1936 including PF Act. He submitted that the definition found in the EPF Act and the Payment of Gratuity Act, 1972 are *pari-materia* and therefore, any interpretation given under the Payment of Gratuity should also be taken note of for the purpose of PF also.

14. Since a strong reliance is placed by the Department on the judgment rendered in *Hindustan Lever Employee's Union Vs. Regional Provident Fund Commissioner and Another*, by the Bombay High Court and in *Regional Provident Fund Commissioner Employees Provident Fund Organisation, Mangalore v. Kasturba Hospital, Manipal and Ors.* in W.P. Nos. 37017 and batch cases dated October 25, 2000 by the Karnataka High Court of the Supreme Court. Therefore, it is necessary to refer to the decision rendered in *Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI)*, wherein the Supreme Court had an occasion to consider the scope of Section 2(b) of the PF Act. The following passage found at page 493 is relevant for the purpose of the case.

The main contention of the Company is that bonus without any qualification has been excepted from the term "basic wages" in the definition in Section 2(b) of the Act. Therefore, all kinds of bonus whether it be profit bonus or production bonus or attendance bonus or festival bonus either as an implied condition of service or as a customary payment, are excluded from "basic wages". Further, Section 6 which provides for contribution only refers to basic wages, dearness allowance and retaining allowance (if any) and contributions have to be made at the appropriate rate on these three payments and not on bonus which is not included in Section 6. It is urged that when the Act was passed in 1952 the legislature was aware of the various kinds of bonus which were being paid by various concerns in various industries and when it decided to exclude bonus without any qualification from the term "basic wages" as defined in Section 2(b), it was not open to the Central Government to direct that production bonus should be included in basic wages for the purposes of contribution u/s 6. Besides this contention based on the interpretation of the word "bonus" in Section 2(b), it is further contended that if the word "bonus" therein excludes production bonus the provision would be unconstitutional as it would be hit by Article 14 of the Constitution inasmuch as production bonus is not a general feature of all industrial concerns but has been introduced only in some. The result of including production bonus within basic wages would be that some concerns where production bonus prevails would be contributing to the provident fund.

15. In fact, the Supreme Court, in order to understand Section 2(b) of the *Employees' Provident Funds and Miscellaneous Provisions Act, 1952* read in conjunction with the regulation read with Section 6 providing for framing of the scheme and other relevant regulations. The Supreme Court in the said judgment did not deal with any question which we are now faced with viz., annual leave

with wages forming part of basic wage. On the other hand, the Supreme Court laid down the law that Section 2(b) will have to be read along with Section 6 of the PF Act whereat the word "dearness allowance" and "retaining allowance" were also included, whereas in the definition of Section 2(b), dearness allowance has been excluded.

16. If in this context, the judgment of the Bombay High Court is looked into, the learned single Judge of the Bombay High Court held that the decision of the Supreme Court in *Bridge and Roofs*" case (supra) may not be helpful in deciding whether the amount of encashment of leave falls within the meaning of basic wage. In fact, that case arose out of a peculiar situation where the department was including the amount of leave encashment as emoluments for the purpose of calculating PF dues from the employer as well as employee. When the employees' union took up the issue to the RPF, Commissioner informed that the provision does not provide for deduction of provident fund on leave encashment. On the strength of the letter dated July 3, 1991, Hindustan Lever Limited decided to make provident fund deduction. It was this direction of the department which was challenged by the Union. It is in this context, the Bombay High Court held that the RPF Commissioner's circular was illegal and that leave encashment wage should be included for PF contribution. In fact, it is the parties' understanding over the period that leave encashment includes part of wages. In the present case, such a contingency did not arise.

17. In fact, the learned single Judge of the Karnataka High Court merely followed the Hindustan Lever's case cited above and did not go beyond the said judgment. Thereafter, the learned Counsel drew the attention of this Court to the Calcutta High Court Division Bench judgment in *Regional Provident Fund Commissioner (II) and Another Vs. Vivekananda Vidyamandir and Others*, . In that judgment, the Division Bench of the Calcutta High Court went into the question whether a special allowance could be treated as part of the basic wage in terms of Section 2(b) of the EPF Act. In para 10 and 18, the following passages are found:

10. Admittedly, the special allowance is not a retaining allowance which is payable when the employee is retained without work. It is not a cash payment for food concession. Neither it is overtime allowance, nor house rent, nor bonus, nor commission. Neither it comes within Clause (iii)¹ i.e. presents by employer. Therefore, this special allowance is either some other similar allowance or dearness allowance, if it is not, then, it will be part of the basic wages since it is an emolument paid on account of the employment in terms of the contract therefore and is payable to each employee.

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

18. The learned Counsel also drew the attention of this Court to Section 9 of the PF Act. As per the Income Tax Act, 1922, the fund also deemed to be a recognised Provident Fund. Then, the Income Tax Act provides as to how the recognised Provident Fund should be borrowed under the Fourth Schedule 4(b) of Part-A reads as follows:

(b) the contributions of an employee in any year shall be a definite proportion of his salary for that year, and shall be deducted by the employer from the employee's salary in that proportion, at each periodical payment of such salary in that year and credited to the employee's individual account in the fund.

19. The learned Counsel also submitted that the deduction of employees contribution is either for a week or a month and the deductions will have to be made for the contribution of employees provident fund from their salary. If within the corresponding period, if deductions are not made, then thereafter, the employer has no right to deduct the contribution of employees from their salary in terms of the provisions of Section 12 of the EPF Act.

20. He also submitted that if the stand of the department is accepted, it will result in an anomalous situation wherein one set of employees who availed the leave will not have any contribution to be made, but people who never availed leave but want to encash at the tail end of their service, they will be punished by deductions being made in terms of the leave encashment. This will result in punishing the punctual employees. This is not the intention of the PF Act.

21. With reference to the definition of the term "basic wage" as found in EPF Act, the learned Counsel submitted that the said term is almost in pari-materia with the definition found in payment of Gratuity Act and for this purpose, the learned Counsel cited the judgment of the Supreme Court, which considered the definition found under the Payment of Gratuity Act in the judgment of T.I. Cycles of India, Ambattur Vs. M.K. Gurumani and Others, . There, the Supreme Court also referred to the Bridge & Roof Company (India) Ltd's case (supra). The learned Counsel drew the attention of this Court at para 10 and 17, which read as follows:

10. A comparison between these two provisions will make it clear that there is no basic difference between the two expressions used in these two enactments insofar as the exclusion of bonus from the emoluments is concerned. The High Court has been carried away by the expression "basic wages" used in the PF Act while the term "wages" is used in the Act but that distinction will not be of any impact, if we closely examine the manner in which the two terms are defined in the respective Acts. The nomenclature of the two expressions will not alter the contents of the two terms. Therefore, the High Court ought to have considered this aspect of the matter. Further this Court in The Straw Board Manufacturing Co. Ltd. Vs. Its Workmen, was concerned with the Gratuity Scheme formulated prior to the Act and this is how this Court interpreted this aspect of the matter: (SCC p. 338, paras 25 & 27)

25. Decisions have been brought to our notice some of which refer to basic wages and others to consolidated wages as the foundation for computation of gratuity. These are matters of discretion and the "feel" of the circumstances prevalent in the industry by the Tribunal and, unless it has gone haywire in the exercise of its discretion the award should stand. We see that in the Payment of Gratuity Act also, not basic wages but "gross wages inclusive of dearness allowance" have been taken as the basis. This, incidentally, reflects the industrial sense in the country which has been crystallized into legislation.

22. We clarify that wages will mean and include basic wages and dearness allowance and nothing else.

(emphasis supplied)

17. The authorities were carried away by considering that the bonus is payable on the basis of output equivalent to certain pieces per man day. But it is made clear in the Scheme that each payment will be made not on the basis of pieces of per man day nor is it a piece-rate work for which wages are paid but it is an additional incentive for payment of bonus in respect of extra work done. The measure of extra work done is indicated by pieces and not wages as such that are paid on that basis. It is not that in respect of each piece any wages are paid but altogether if certain number of pieces are produced, additional incentive will be payable at a particular rate. Therefore, the authorities have completely missed the scope of the scheme and have incorrectly interpreted the same. Inasmuch as both the High Court and the authorities have incorrectly understood the position in law and have wrongly held that the concept of "wages" under the Act would include bonus and that even on facts the Scheme would attract Section 4(2) of the Act. Proviso to Section 4(2) of the Act is to the effect that in case of a piece-rated employee, daily wages shall be computed in a particular manner but that is not the rate at which the wages are paid in the present case at all. Therefore, Section 4(2) of the Act is not attracted in the case of the present Scheme with which we are concerned.

22. In the light of the same, the learned Counsel submits that the action of the respondent in including leave encashment as part of the wages cannot be accepted and writ petition should be allowed.

23. Per contra, P.T.S. Narendravasan, learned Counsel for the PF Department submitted that the EPF Act is a welfare legislation and therefore, the interpretation should be to cover wider areas. In this context, the learned Counsel referred to the judgment of the Supreme Court in *All India Reporter Karamchari Sangh and Others Vs. All India Reporter Limited and Others*, . He drew the attention of this Court to para 19, which reads as follows:

19. The Act in question is a benefit legislation which is enacted for the purpose of improving the conditions of service of the employees of the newspaper establishments and hence even if it is possible to have two opinions on the construction of the provisions of the Act the one which advances the object of the

Act and is in favour of the employees for whose benefit the Act is passed has to be accepted.

24. In the light of the same, the learned Counsel submitted that the judgment of the Bombay High Court in Hindustan Lever Employees Union's case as well the unreported Judgment of the Karnataka High Court in W.P. No. 37017 and batch cases are squarely on the point and therefore, this Court should accept the interpretation given by these two High Courts.

25. With reference to the Appellate Tribunal's order sustaining the objection of the State Transport Corporation, the learned standing counsel did not have any answer and merely stated that it was only the Tribunal's Order but however conceded that the said order has become final.

In the light of the above submission, it has to be seen whether the impugned order is liable to be set aside.

26. If the two decisions of the Supreme Court in Bridge & Roof Company (India) Ltd's case (supra) as well as TI Cycles of India's case (supra) read together, there will be no difficulty in arriving at the conclusion that the basic wage was never intended to include in the leave with wages for which encashment is allowed. 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, it cannot mean it can only mean the weekly holidays, national festival holidays. In many cases, the employees do not take leave and encash it only at the time of retirement or as legal heirs at the time of his death, which is an uncertain contingency. Even though the employer made annual provisions for such contingency unless the contingency of encashing of leave takes place, the question of the actual payment to the workmen never takes place. In case, he avails the entire leave, during his tenure, then the question of payment of any contribution may not arise. Any payment of contribution cannot be based upon different contingencies and uncertainties.

27. Further, the contributions of an employees in any year shall be a definite proportion of his salary for that year. If that's the case, the employer cannot violate the condition prescribed under the Fourth Schedule appended to the Income Tax Act while maintaining a recognised provident fund.

28. Even though the Supreme Court in Karamchari Sangh's case (supra) stated that in case of two opinions on the construction of the provisions of the Act the one which advances the object of the Act and is in favour of the employees for whose benefit the Act is passed has to be taken into account.

29. By allowing the deduction on the encashment of annual leave, in no way, the employees are benefited and at the time of death or retirement or resignation, a lumpsum amount in his hand will give him a greater relief because at that time only, he is receiving the entire PF contributions standing to his credit also.

30. Therefore, this Court respectfully disagrees with the interpretation placed by the Bombay High Court and Karnataka High Court. Further, the department did not challenge the Appellate Tribunal's order in the case of the Tamil Nadu State Transport Corporation also is a point in favour of the petitioners.

31. Under these circumstances, all these writ petitions will stand allowed and the Department is precluded from seeking for contribution in respect of leave encashment paid or payable to the workmen. However, there will be no order as to costs. Connected Miscellaneous Petitions are closed.