(2006) 09 MAD CK 0268

In the Madras High Court

Case No : Writ Petition No. 3299 of 1999

Wipro Ltd. APPELLANT

Vs

Presiding Officer, Employees Provident Fund Appellate Tribunal and Another RESPONDENT

Date of Decision : 22-09-2006

Acts Referred:

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

Citation : (2007) 113 FLR 540

Hon'ble Judges : M.E.N. Patrudu, J

Bench : Single Bench

Advocate : S. Ravindran, for T.S. Gopalan and Company, for the Appellant; V. Vibhishanan, for the Respondent

Judgement

M.E.N. Patrudu, J.—Wipro Ltd., is the petitioner.

The grievance of the petitioner is that the first respondent; has issued a direction to the petitioner to pay the provident fund on cash value of food concession payable by the petitioner to their employees.

2. The petitioner is challenging the same.

3. In short the facts are that there was a settlement between the employer and the employees of the petitioner''s concern u/s 12(3) of the Industrial Disputes Act, 1947, and in pursuance of the same and as per clause G of the settlement the existing scheme of canteen subsidy will remain unchanged till the end of one year from the date of signing of the settlement. Thus there is settlement in this regard. Clause G sub-clause (6) of the settlement says canteen subsidy will not attract provident fund. So as per the settlement, canteen subsidy will not attract the provident fund.

4. Further there was a scheme introduced by the petitioner known as Performance Linked Compensation Scheme and wherein, it is stated that the payments made under the Scheme will not attract provident fund, gratuity, etc. This is also covered under settlement.

5. While so, the respondent''s enforcement officer; inspected the petitioner''s premises and found that the petitioner is paying allowance towards canteen subsidy and the contention of the second respondent is that the said allowance is in lieu of the canteen facility.

6. Therefore, the respondent is of the opinion that it is equivalent to the cash value of food concession gained to workers and it will attract the provisions of the Provident Fund and the same is to be paid u/s 6 of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952, (hereinafter referred to as Act). Accordingly, the order has been issued u/s 7-A and directed the petitioner to pay the amount.

7. Sri S. Ravindran, learned Counsel appearing for the petitioner forcibly contended that the plain reading of Section 2(b) of the Act clarifies what is basic wage and Sub-section (i) of Section 2(b), the cash value of any food concession is excluded from the basic wages, therefore, the respondent has no authority to demand any provident fund. The other contention is that canteen subsidy cannot be treated as a cash value of any food concession because the food concession is for the purpose of payment of any cash whenever an employee is on tour, therefore, the cash value of food concession is not equivalent to the subsidy of the canteen.

8. The other forcible contention of the Counsel for the petitioner, is when there is a settlement u/s 12(3) of the Industrial Disputes Act which is an award in terms of the industrial law and it is binding on both parties for all purpose and when the said settlement clarifies that the canteen subsidy is excluded from the payment of provident fund, the respondents cannot demand any amount under the same.

9. Sri V. Vibhishanan, learned Counsel appearing for the second respondent contended that though, the cash value of any food concession is excluded u/s 2(b), the same is clearly included u/s 6. Explanation 1 and Section 6 is a specific provision for contribution. Therefore, the same has to be accepted.

10. The points for determination is whether the respondent is entitled to demand provident fund on canteen subsidy and on Performance Linked Compensation?

Point:

11. Any settlement entered into between the employee and the employer u/s 12(3) of the Act is having power of award and the same has to be implemented.

12. There are two judgments on the point of payment of provident fund on cash value of food concession and on incentives and with regard to settlements.

(1) Employees'' State Insurance Corporation, Madras v. E.I.D. Parry (India), Ltd.

1984 (1) LLN 159 the Division Bench of this Court had gone in detail about the nature and the power of settlements.

(2) While quoting from Braithwaite and Co. (India) Ltd. Vs. The Employees'' State Insurance Corporation, . that the scheme of payment of reward was in no way connected with or part of wages and it was on these condition that the employees were receiving the inam. Thus, though there was a payment to the employees'' and since the payment depended on their achieving certain targets, it has to be held as a remuneration and this payment of inam cannot be held to have become a term of the contract of employment.

13. While relying on the said observation of the Supreme Court, the Division Bench of this Court further held that it was perfectly legitimate for the employees, while settling their dispute, to come to a settlement, that such payment shall not be reckoned for the purposes of provident fund, bonus, gratuity, E.S.I, contributions, etc., and to clarify the matter when the provisions of the Industrial Disputes Act do not forbid such a settlement or makes such a provision in a settlement; invalid.

14. Thus, the Division Bench has clarified that when there is a legitimate settlement between the employee and the employer settling all their disputes and execute a settlement and any payment in pursuance of the settlement shall not be account for the purpose of Provident Fund apart from E.S.I. contributions, etc.

15. In the instant case there was a settlement u/s 12(3) of the I.D. Act. There is clear clause that the canteen subsidy given to the employees is excluded from the Provident Fund. Therefore, I find considerable force in the argument of the Counsel for the petitioner that the respondent is not entitled to demand in Provident Fund on the canteen subsidy.

16. Further, in Para. 11. at page 162 of 1984 (1) L.L.N. 159 (vide supra), of the above judgment, it has been further observed as follows:

We are, therefore, unable to accept the contention raised by the learned Counsel on behalf of the appellant that the incentive earnings and ad hoc allowance received by the employees must be taken into account as part of the wages for the purpose of the Employees'' State Insurance Act, even if the employees and the employer specifically agreed in a settlement duly arrived at u/s 18 of the Industrial Disputes Act, not to treat ad hoc allowance and incentive earnings for purposes of Employees'' State Insurance Act. It also cannot be held to be a separable condition of settlement as these payments were specifically made subject to those conditions.

This observation of the Division Bench is in favour of the petitioner.

17. The respondents relied on Sri Krishna Lunch Home case. The facts and circumstances of the said case are not applicable in the instant case. It is a case arising out of the Tamil Nadu Catering Establishments Act, 1958, and Section 2

Sub-section (13-A) of the said Act defines "wages" includes basic wages, dearness allowance, 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. Since the cash allowance for food items are included in the definition of wages of the said Act this Court has made an observation. Unfortunately the authorities have relied on the said decision in order to make a demand from the petitioners.

18. Whereas, in the instant case, there is a specific settlement, between the employee and the employer that fact has been ignored. Therefore, the above case of Sri Krishna Lunch Home relied by the authorities is no application in the instant case.

19. In the impugned order, the judgment of the Supreme Court is discussed. Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI), .

20. Their Lordships were pleased to observe in detail about Section 2(b) and Section 6 of the Act. The Apex Court held that there is no doubt that "basic wages" as defined 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 certain things will not be included in the term of "basic wages" and these are contained in three clauses and the first clause mentions the cash value of any food concession.

21. It is further observed that 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 and the exceptions therefore do not seem to follow any logical pattern which would be in consonance with the main definition.

22. This observation of the Supreme Court is that the exceptions u/s 6(ii) is not in consonance with the main definition. At this stage it is relevant for this Court to note that the main Act 19 of 1952 has come into force in 1952. While so, Explanation 2 of Section 6 is substituted by Act 28 of 1963 and it is brought into the statute subsequent to the main Act. In the main Act, a definition has clarified that food concession is not included for provident fund while so, u/s 6, the Explanation is added and the definition has been totally ignored while adding this explanation to Section 6.of the Act. This is how the Legislature is making laws and it is sorry to say this.

23. While discussing in detail, their Lordships of the Supreme Court has finally observed that the production bonus of the typical kind in force in the company is exempted from the term "basic wages" and therefore the decision of the Central Government to pay the Provident Fund contributions is not good.

24. Therefore, while allowing the case of the petitioner (Bridge and Roof Company (India), Ltd.) in the said case, the Supreme Court has clearly held that

though the bonus or the clearness allowance which are also included in Explanations 2 of Section 6 is disallowed.

25. Since the definition is clarifying that a value of any food concession is excluded from the payment of provident fund and even though the same is included in Explanation 1 of Section 6, the same cannot be demanded because there is a settlement between both the parties u/s 12(3).

26. During the course of argument, the Counsel for the petitioner stated that at the time of filing the writ petition, there was a direction by this Court in W.P.M.P. No. 9669 of 2004 to pay the amount as demanded by the respondents and accordingly, the petitioner has deposited the same. Since the writ petition is allowed, quashing the impugned order the petitioner is at liberty to withdraw the said amount. The respondents are directed to pay the same forthwith. No costs.