

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WP(C) No.3237/2010 & CM Nos. 6466/2010, 12233/2010 &
16169/2011

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Reserved on: 18th July, 2012

Decided on: 24th July, 2012

OSWAL PETROCHEMICALS

..... Petitioner

Through: Mr. Jayant Mehta with Mr. Gaurav
Goel, Advocates.

versus

UNION OF INDIA & OTHERS

..... Respondents

Through: Mr. Darpan Wadhwa with Mr. Arjun
Goel, Advocates for R-1
Mr. Gaurang Kanth, Advocate for R-
2.
Mr. Colin Gonsalves, Senior
Advocate with Ms. Ritu Kumar and
Mr. Tariq Adeeb, Advocates for R-3
& 4.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The Petitioner is aggrieved by an order dated 13th April, 2010 passed by Respondent No.2 assessing the Petitioner to pay a total sum of Rs.43,38,921/- as provident fund contribution towards 43 employees for the period from October, 1999 to January, 2004 and the order of the Employees' Provident Fund Appellate Tribunal dated 13th April, 2010 dismissing the appeal of the Petitioner against the order of assessment passed by Respondent No.2.

2. Learned counsel for the Petitioner contends that since it could not accommodate its 43 employees at Mumbai Unit, they were transferred to its Punjab Unit. However, instead of joining the services at Petitioner's Punjab Unit, these 43 employees remained absent from their services without any sanction from the Petitioner and without any justifiable reason. The employees filed a petition before the Industrial Court, Mumbai and during the pendency of the said petition, a full and final settlement was arrived at between the Petitioner and the said employees through the office bearers of their Union, which was also signed by the employees individually. The said settlement was voluntary and employees were free to accept or not accept the same. Despite the settlement arrived at, which clearly stated that there was no further amount payable by the Petitioner to the employees, Respondent No.4 made a complaint to the Provident Fund Commissioner stating that the Petitioner did not deduct the provident fund and pension fund though it was mandatory and thus, the employees had not received the provident fund and pension fund. On the said complaint, notices were issued belatedly on 11th December, 2008 malafidely and an inquiry was conducted. No adequate notice of inquiry was given to the Petitioner and thus, principles of natural justice were violated. The proceedings were fixed for a holiday and rescheduled. It was informed that the matter was fixed for 13th April, 2009. However, further notices were sent intimating the date of hearing to be preponed. Since the Petitioner could not be properly represented, the order directing the Petitioner to deposit the provident fund as stated above was passed. The conduct of Shri A.D. Rajkuwar, Assistant Provident Fund Commissioner was mala fide. It is further contended that since full and final settlement was arrived at, the employees could not have filed the belated

complaint and ask for the provident fund. Terms of settlement were very clear and no provident fund liability was due to the Petitioner. Reliance is placed on *Manipal Academy of Higher Education v. Provident Fund Commissioner*, (2008) 5 SCC 428, *B.S.N.L. & Ors. v. M/s Subhash Chandra Kanchan & another*, 2006(9) SCALE 217, *M/s Bridge and Rools Co. Ltd. v. Union of India and others*, AIR 1963 SC 1474, *Burmah Shell Oil Storage and Distributing Co. Ltd. v. Regional Provident Fund Commissioner, Delhi*, 1981-II L.L.J.86, *R.V. Shanbhag v. The Federation of Karnataka Chamber of Commerce and Industries and others*, 2002(1) KCCR32, *Swastik Textile Engineers Pvt. Ltd. v. Virjibhai Mavjibhai Rathod and another*, LIS/GujHC/2007/10428.

3. Learned counsel for the Respondents 3 and 4 on the other hand contends that in the present petition Annexure-D to the Memorandum of Settlement has been withheld deliberately, as per which the payments made to the employees were in lieu of their back wages and unpaid wages. Since the payments were for back wages and unpaid wages, statutory liability of depositing the provident fund was on the Petitioner. Relying upon *Shree Changdeo Sugar Mills and another v. Union of India and another*, (2001) 2 SCC 519 it is stated that even in a case of lump sum payment of full and final settlement of all the claims, the management is required to contribute to the provident fund.

4. Learned counsel for Respondent Nos. 1 and 2 states that ample opportunity was granted to the Petitioner to appear before the authority. However, despite opportunity, neither reply was filed nor arguments addressed. The representative of the Petitioner was always present and thus

the claim of the Petitioner that the inquiry was conducted at his back is incorrect. Though in the impugned order it is stated that the Petitioner failed to remit the provident fund, family pension and insurance fund contributions and administrative charges towards provident fund and insurance fund for the period from June, 2003 to November, 2008, however, the same was a typographical error as in the tabulation prepared below, period from October, 1999 to January, 2004 has only been considered. Thus, there is no merit in the petition and the same be dismissed.

5. I have heard learned counsel for the parties.

6. Briefly the facts of the present case are that the Petitioner transferred 43 of its employees/workmen including Respondent Nos. 3 and 4 to its Punjab Unit, however, they did not join the services and remained absent from service. Litigation ensued thereafter between the parties when they finally arrived at a settlement and a memorandum of settlement (MOS) dated 12th September, 2003 was entered into between the parties. The salient terms of the MOS relied upon between the parties read as under:-

“2. In December, 2000 all hourly rated workmen employed in the Company’s factory at Chembur accepted V.R.S. 2000 as per agreement dt. 06.07.2000 entered into between the Company and the recognized union in terms of which order was passed by the Hon’ble Industrial Court in Complaint (ULP) No.1481 of 1998. All the remaining employees asked for a V.R.S. and various cases filed in different courts against the Company regarding pension, increment, transfer, charter of demand etc. are still pending in various courts. Meanwhile, the company and Association on 2nd May, 2003, signed a “Memorandum of Understanding” in which the Company has offered an amount of Rs.4.75 crores, (excluding 50%

of gratuity amount payable to employees on pay-roll), towards the rights, claims and dues arising from employment of all employees who are members of Association other than those covered by the VRS of 2000 which offer is accepted by the Association.

This amount is inclusive of following dues.

- (a) Pension due or payable,
 - (b) Leave of any kind due,
 - (c) Leave encashment,
 - (d) L.T.A.
 - (e) Lumpsum domiciliary benefits,
 - (f) Bonus,
 - (g) Medical re-imbursement due or payable,
 - (h) Increments due or payable,
 - (i) Salary due or payable,
 - (j) All claims which are due or may become due in present/in future.
- (a) A copy of the Memorandum of Understanding/Consent Terms between “Oswal Petrochemicals Staff Association” through Shri P.K. Gosh President and others AND “Oswal Petrochemicals (A Div. of Oswal Agro Mills Ltd.) Anik Chembur, Mumbai : 400 074 through Shri R.S.. Gill, Advocate Duly Authorized by the Company on 2nd May, 2003 is annexed to this Memorandum of Settlement as “Annexure-‘B’”. The parties hereto agree to complete the formalities as mentioned in the MOU as per law. It is agreed that no claim of any employee shall arise beyond the total amount agreed as per the above said M.O.U. The parties to this MEMORANDUM OF

SETTLEMENT, shall file application for withdrawal/disposal of cases pending before various courts immediately upon the receipt of final payment (i.e. , on or before 5th December, 2003) as agreed between the parties to this “MEMORANDUM OF SETTLEMENT”, the association undertakes not to proceed with the various cases.

- (b) In view of above understanding the Company has prepared a comprehensive scheme for
 - (i) Voluntary Retirement Scheme’ 2003 (Annexure C-1 & Annexure C-2 enclosed herewith)
 - (ii) and a statement of Unpaid Wages/Back wages, (“Annexure D” enclosed herewith)

(c)	xx	xx	xx	xx
(d)	xx	xx	xx	xx

IT IS NOW AGREED BY AND BETWEEN THE PARTIES HERETO AS UNDER:

1. The Memorandum of Understanding dated 2nd May, 2003 shall form part and parcel of this settlement, subject to any change/ modification in the same under the terms of this Memorandum Of Settlement (M.O.S).
2. In terms of the understanding reached between the Association and the Company the Association has decided to create a trust for the Pension fund for the benefit of its 91 members who are eligible in respect of the pension due and payable to them for the services rendered by them to the Company in the past. As decided by the Association and on the instruction to the Company, the Company will issue the cheques in favour of “LIC of India – OPC Staff Association Pension Fund” out of the settlement amount without any future involvement and participation of the Company in the

same trust for which association has its approval from all the members of the association. Accordingly it has been advised to the Company to issue the cheque for Rs.1,89,35,127/- (Rupees One Crore Eighty Nine Lakhs Thirty Five Thousand One hundred Twenty Seven Only) in favor of “LIC – OPC Staff Association Pension Fund” in the following manner:--

- (i) The First payment of Rs.1,00,00,000/- (Rupees One Crore only) is made vide Cheque No.032870 dated 05-07-2003 drawn on ABN AMRO Bank, in favour of the “Life Insurance Corporation of India – OPC Staff Association Pension Fund”.
- (ii) The balance payment of Rs.89,35,127/- (Rupees Eighty Nine Lakhs Thirty Five Thousand One Hundred Twenty Seven only) shall be made to “Life Insurance Corporation of India – OPC Staff Association Pension Fund” by the Company on or before the 5th day of December, 2003.
- (iii) Mr. S.R.K. Reddy, who has expired on 19-5-2003 was one of the eligible members of Association to get the pension, but not included in the list of 91 members due to his death. Hence as per the instructions of the association his corpus dues Rs.2,24,850/- (Rupees Two lacs Twenty Four Thousand Eight Hundred Fifty only) will be paid to his wife (Smt. Padma Reddy)/Legal heir, directly, after completion of due process of law.
- (iv) All the legal and professional expenses of the formation of the Trust will be borne by the Association and the Trust will be the sole responsibility of the association without any involvement/ obligation of the company.

3. xx xx xx xx xx

4. The Association after examining the “Voluntary Retirement Scheme’ 2003” and having understood its meaning and contents thereof has accepted the terms of the said “Voluntary Retirement Scheme’ 2003” (as per “Annexure – C-1”). The employees who opt for this Scheme shall in terms of the said “Voluntary Retirement Scheme’ 2003” retire from the service of the company with effect from the date on which they submit their application under the said “Voluntary Retirement Scheme’ 2003.
5. The payment under the said Voluntary Retirement Scheme shall be subject to the following conditions:-
 - a) The Company shall deduct from the payment under the said “Voluntary Retirement Scheme’ 2003” all loans/ advances and other statutory deductions if any from outstanding dues paid/payable to the retirement employees from the period from 1st January 1999 till 5th July, 2003.
 - b) The Company shall also deduct Income Tax at the applicable rates as per the provisions of the Income Tax Act, 1961 or any other modifications thereof for the time being in force, during the period of this payment. The deduction of Income Tax will be effected after taking into consideration, the Income Tax exemption limit within conditions therein as may be permitted by Income Tax Authorities under the Income Tax Act, 1961 on the application if necessary by the Company to that effect, with “Voluntary Retirement Scheme’ 2003” Terms “Annexure C-1”
 - c) (i) “Voluntary Retirement Scheme’ 2003 is open from the date of execution of this Memorandum Of Settlement and shall remain open for 7 days from the date of signing of this MEMORANDUM OF SETTLEMENT, i.e. 12th September, 2003.
(ii) The Company agrees to extend the Voluntary Retirement Scheme for the further period at its discretion,

so as to give opportunity to the maximum employees covered as listed in “Annexure C-2” to opt for the same.

(iii) The Total amount after the deductions finally payable to the employees under the “Voluntary Retirement Scheme’2003” is worked out and a statement specifying the name of the employee and the amount payable to each of the 40 employees as listed in “Annexure C-2” who are the members of the Association, in the event of their opting for “Voluntary Retirement Scheme’2003” will be exchanged between the Company and the Association. The said statement after the verification by the Association is found to be correct and is accepted by the Association and the same is not open to dispute and has been signed by the parties in token of the correctness and acceptance of the same. The payment to the retiring employees as per the said settlement shall be in full and final Settlement of all their rights and claims including those arising from the order of Industrial Court dated 15-03-2001 and on receiving the payment, no rights, claims, dues of whatsoever nature of the retiring workmen will be left as against the Company.

(iv) The Company further agrees that it will furnish to the Association/Employees who have retired under the “Voluntary Retirement Scheme’2003” the Approval received from the Income Tax Authority as per the provisions of Income Tax Act, 1961, in order to avail exemption of Rs.5,00,000/- under the Income Tax Act, 1961.

6.	xx	xx	xx	xx	xx
7.	xx	xx	xx	xx	xx

UNPAID WAGES/ BACK-WAGES

8. The Company hereby agrees to pay to the eligible employees as listed in “Annexure – D” attached hereto, their unpaid gross wages/back wages from 1st January 1990 till 30th April 2003. The year-wise calculation of unpaid wages/back wages are shown in “Annexure-X” for the purpose of

claiming relief u/s. 89 of the Income Tax Act, 1961. The employees eligible for the unpaid gross wages/back wages starting from 1st January 1999 till the date of retirement/ or 30th April, 2003 are eligible for maximum of 52 months of wages only. The Company hereby agrees to furnish a copy of "Form 10-E" under the Income Tax Rules, 1962, for the purpose of distribution of unpaid wages over a period of five financial years.

9. xx	xx	xx	xx	xx
10.xx	xx	xx	xx	xx

GRATUITY / PROVIDENT FUND

11. a. It is agreed by and between the parties that the Company shall pay the gratuity amount Rs.33,39,840/- (Rupees Thirty Three Lakhs Thirty Nine Thousand Eight hundred Forty only) within 30 days after receiving the resignation from the employees.

b. The Company shall process the Provident Fund formalities so that employees shall receive their Provident Fund dues within 2 months from receiving resignations from the employees.

12. xx	xx	xx	xx	xx
13. xx	xx	xx	xx	xx
14. xx	xx	xx	xx	xx

15. That no claim of the members of the staff association will arise beyond the amount agreed under this Memorandum Of Settlement."

7. The said agreement was signed by the office bearers of the Association of Respondent Nos. 3 and 4, Respondent Nos. 3 and 4 and all other workmen individually. The workmen were free to accept the scheme if they so desired and there was no coercion. All the workmen accepted the

settlement and obtained voluntary retirement. However, Respondent No.4 made a belated complaint dated 13th November, 2006 to the Provident Fund Commissioner stating that though the provisional income tax at source was deducted of each employee, however, the provident fund and insurance fund though mandatory were not deducted. Thus, the employees are not receiving the provident fund and pensionary fund. Pursuant to that complaint, a notice was sent to the Petitioner by the Assistant Provident Fund Commissioner on 11th December, 2008 asking it to show cause why the assessment for an amount of Rs.43,37,821/- be not made in respect of 43 employees.

8. Learned counsel for the Petitioner has stressed that the proceedings were kept for 8th January, 2009 but postponed to 9th January, 2009 as the same was a holiday and thereafter were posted for 13th April, 2009, however, Respondent No.2 preponed the hearing, notice whereof was not received by the Petitioner. Thus, it is the case of the Petitioner that the proceedings were conducted at its back. Learned counsel for Respondent Nos. 1 and 2 has taken me through its counter affidavit denying the unscheduled inquiry and showing the order sheets where the representatives of the Petitioner were present on 27th February, 2009, however, on 2nd March, 2009 none appeared on behalf of the Petitioner company. Despite the inquiry went on for more

than 15 months, no reply was filed by the Petitioner. A perusal of the proceeding sheets placed on record along with a notice of the Respondent No.2 shows that repeated adjournments were taken by the Petitioner's representative. Though he was present on most of the dates, no reply was filed. Thus, merely because the date was preponed from 13th April, 2009, I do not find that there is violation of principles of natural justice and the Petitioner had no adequate notice.

9. Regarding the allegation that the conduct of Shri A.D. Rajkuwar was mala fide, as noted above though the date was preponed however the Petitioner's representative was present on the succeeding dates and it cannot be said to be mala fide. Further Shri A.D. Rajkuwar has not been made a party in the present petition, hence this allegation cannot be gone into.

10. The next serious contention of the Petitioner is that since the amount given to the employees was in full and final settlement of all their claims and pursuant to the settlement, the same could not be termed as "basic wages", no provident fund thereon was liable to be paid. A perusal of the MOS shows that the amounts paid to the employees under the Voluntary Retirement Scheme (VRS) were on account of all claims due or may become due in present or in future salary due or payable, increment due or payable,

medical reimbursement due or payable, bonus, lumpsum domiciliary benefits, leave encashment, LTA, leave of any kind due and pension due or payable. Along with the MOS a statement of unpaid/back wages was annexed as Annexure-D. Though the Petitioner has not annexed the Annexure-D with the writ petition, learned counsel for the Respondents has handed over the same during the course of hearing, which is not disputed. In view of Annexure-D to the MOS and Clause 8 of the MOS, it is amply clear that the Petitioner had agreed to pay to all the eligible employees their unpaid gross wages/back wages from 1st January, 1999 till 30th April, 1993. Learned counsel for the Petitioner states that Annexure-D was only made for income tax purposes, however, the said contention of the Petitioner is unfounded as even Clause 9 says that the Petitioner agreed to deduct a sum of 2.5% from the net amount payable under the VRS scheme' 2003 and unpaid wages/back wages and remit the same amount to the association by cheque. Thus, all through it has been the stand of the Petitioner that while arriving at the settlement besides paying all incidental benefits, the claim of unpaid wages/back wages was also specified.

11. In *M/s Bridge and Roofs Co. Ltd. v. Union of India & Ors.*, AIR 1963 SC 1474 while dealing with an issue whether 'bonus' could be included in basic wages their Lordships held:

“(10) “Re-Bonus for the year 1947” - It seems therefore that when reference was with respect to profit bonus, the term “bonus” though not qualified by the word “profit” had always been limited by specifying the year for which the bonus was being claimed. Though therefore, it may be true that literally speaking, the word “profit” was not used to qualify the word ‘bonus’ when references were made with respect to profit bonus, the matter was put beyond controversy that the use of the word “bonus” without any qualification was with reference to profit bonus by adding the year for which the bonus was being claimed. It would therefore be not right to say that in industrial adjudications before 1952, bonus without any qualifying word meant profit bonus and nothing else. Further though the word “profit” was not used to qualify the word “bonus”, the intention was made quite clear when profit bonus was meant by using the words “For the year so and so” after the word “bonus”. We are, therefore, not prepared to accept that where the word “bonus” is used without any qualification it only means profit bonus and nothing else. On the other hand, it seems to us that the use of the word “bonus” without any qualifying word before it or without any limitation as to year after it must refer to bonus of all kinds known to industrial law and industrial adjudication before 1952. The reason for the exclusion of all kinds of bonus is also in our opinion the same which led to the exclusion of house-rent allowance, overtime allowance, commission and any other similar allowance, namely, that payment of bonus may be occur in all industrial concerns or it may not be made to all employees of an industrial concern (as, for example, attendance bonus) and that is why bonus of all kinds was also excluded from the definition of the term “basic wages”. The Act is an all India Act applicable to all Industries mentioned in Schedule I and to all concerns engaged in those industries, and the

intention behind the exclusion seems to be to make the incidence of provident fund the same in all industrial concerns, which are covered by the Act so that it was necessary to exclude from the wide definition of “basic wages” given in the opening part, all such payments which would not be common to all industries or to all employees in the same concern. We have already pointed out that to this principle, only dearness allowance, in clause (ii) is an exception but that exception has been corrected by the inclusion of dearness allowance in Section 6. We are therefore, of opinion that there is no reason why when the word “bonus” is used in clause (ii) without any qualifying word, it should not be interpreted to include all kinds of bonus which were known to industrial adjudication before 1952 and which must therefore, be deemed to be within the knowledge of the legislature.

11. This brings us to the consideration of the contention raised on behalf of the respondents that wages are the price for labour and arise out of contract and that whatever is the price for labour and arises out of contract, was intended to be included in the definition of “basic wages” in Section 2(b), and that only those things were excluded which were a reward for labour not arising out of the contract of employment but depending on various other considerations like profit for attendance. It may be, as we have pointed out earlier, that if there were no exceptions to the main part of the definition in Section 2(b), whatever was payable in cash as price for labour and arose out of contract would be included in the term “basic wages”, and that reward for labour of which did not arise on of contract might not be included in the definition. But the main part of the definition is subject to exceptions in clause (ii), and these exceptions clearly show that they include even the price for labour. It is, therefore, not possible to accept the contention on behalf of the respondents that whatever is price for labour and arises out of contract is included in the definition of “basic wages” and therefore production bonus which is a kind of incentive wage would be included.

12. This Court had occasion to consider production bonus (1950) Supp 2 SCR 1012 : (AIR 1959SC 1095). It was pointed out that “the payment production bonus depends upon production and is in addition to wages. In effect, it is an incentive to higher production and is in the nature of an incentive wage”. The straight piece-rate plan where payment is made according to each piece produced is the simplest of incentive wage plans. In a straight piece-rate plan, payment is made according to each piece produced and there is no minimum and the worker is free to produce as much or as little as he likes, his payment depending upon the number of pieces produced. But in such a case payment for all that is produced would be basic wage as defined in Section 2(b) of the Act, even though the worker is working under an incentive wage plan. The difficulty arises where the straight piece-rate system cannot work as when the finished product is the result of the co-operative effort of a large number of workers each doing a small part which contributes to the result. In such a case, the system of production bonus by tonnage or by any other standard is introduced. The core of such a plan is that there is a base or a standard above which extra payment is earned for extra production in addition to the basic wages which is the payment for work up to the base or standard. Such a plan typically guarantees time wage up to the time represented by standard performance and gives workers a share in the savings represented by superior performance. The scheme in force in the Company is a typical scheme of production bonus of this kind with a base or standard up to which basic wages as time wages are paid and thereafter extra payments are made for superior performance. This extra payment may be called incentive wage and is also called production bonus. In all such cases however the workers are not bound to produce anything beyond the base or standard that is set out. The performance may even fall below the base or standard but the minimum basic wages will have to be paid whether the base or standard is reached or not. When however the workers produce beyond the base or standard what they earn is not basic wages but production bonus or incentive wage. It is this production bonus

which is outside the definition of “basic wages” in Section 2(b), for reasons which we have already given above. The production bonus in the present case is a typical production bonus scheme of this kind and whatever therefore is earned as production bonus is payable beyond a base or standard and it cannot form part of the definition of “basic wages” in Section 2(b) because of the exception of all kinds of bonus from that definition. We are, therefore, of opinion that production bonus of this type is excluded from the definition of “basic wages” in Section 2(b) and therefore the decision of the Central Government which was presumably under Section 19 A of the Act to remove the difficulty arising out of giving effect to the provisions of the Act, by which such a bonus has been included in the definition of “basic wages” is incorrect. In view of this decision, it is unnecessary to consider the effect of Article 14 in the present case.”

12. The reliance of the learned counsel for the Petitioner on *Burmah Shell* (supra) is misconceived. In the said case this Court was dealing with ad hoc payments made in lieu of bonus for the year 1973 in terms of the settlement which was not to be treated as a precedent. Considering the terms of settlement, this Court held that if a payment was made to anyone who was not on duty and not paid to some who were on duty it cannot be regarded as basic wages, thus entailing to deduction of provident fund.

13. In *Shree Changdeo Sugar Mills and another* (supra) their Lordships held-

“11. We are unable to accept the submissions. Undoubtedly contribution towards provident fund can only be on a basic

wage. However, it is not at all necessary that the workman must actually be on duty or that the workman should actually have worked in order to attract the provisions of the Employees' Provident Funds Act. For example, there may be a lockout in a company. During the period of lockout the workmen may not have worked yet for the purpose of the Employees' Provident Funds Act they will be deemed to have been on duty and provident fund would be deductible on their wages. In this case by order dated 12-12-1988, the High Court (pursuant to directions of this Court) fixed 31-10-1988 as a date when the services of the employees stood terminated/retrrenched. Thus up to 31-10-1988 the employees were in service of the appellant Company. They were, therefore, deemed to be on duty up to 31-10-1988. As set out above many of these employees had raised claims before the Labour Court and there were awards of the Labour Court for payment of arrears of wages and retrenchment compensation. All that the settlement did was that, by agreement, the total claim of the workmen was reduced to a certain extent. Amongst the claims of the workmen was a claim for wages up to 31-10-1988. This was a claim for wages for a period during which they were on "deemed duty". Clause 5 of the settlement, which has been set out hereinabove, shows that a sum of Rs 35 lakhs has been paid towards wages and another sum of Rs 10 lakhs has been paid towards retaining (seasonal) wages. These are amounts which are paid for wages during a period when the workmen are deemed to be on duty. Therefore it is basic wage within the meaning of Section 2(b) of the Employees' Provident Funds Act. All the cases relied upon by Mr Sharma are of no assistance to him as in those cases the amounts were clearly not basic wages. In this case the abovementioned two sums of Rs 35 lakhs and Rs 10 lakhs are wages.

12. Mr Sharma lastly submitted that the settlement dated 2-12-1995 clearly provided that there were to be no deductions, except unions' contribution of 7%. He submitted that even though the appellant Company could not deduct provident fund from the wages paid to the employees they are now being made

liable to pay to the 2nd respondent even the employees' share. He submitted that, even if it is held that the appellant Company is liable to pay the provident fund, they should not be made to now contribute the employees' share as they could not and have not deducted the same from the wages paid. We are unable to accept this submission also. It is the duty of the employer to contribute. The employer's agreement with the employee, not to deduct does not discharge the employer of his obligation in law to make payment. The term of the settlement which provides that there shall be no deduction only means that the appellant Company has agreed to take on this liability also.”

14. Learned counsel for the Petitioner has strenuously contended that since in terms of clause 26A of the Provident Fund Scheme since the accounts of the workmen had been closed after the workmen withdrew the amounts so deposited, the provident fund accounts could not be reopened. Clause 26A of the Provident Fund Scheme is procedural in nature. It provides for the retention of membership until the amount standing to his credit is not withdrawn by the workmen. The procedure of closing account of the provident fund cannot forfeit the substantive claim of the workmen for being entitled to the amount due to the workmen which may come to notice later on.

15. In view of the fact that in the present case the amount was paid in lieu of the claim of unpaid/back wages, I find no merit in the contention of

learned counsel for the Petitioner. The petition and applications are dismissed.

(MUKTA GUPTA)
JUDGE

JULY 24, 2012
VKM