

THE HIGH COURT OF TRIPURA
_A_G_A_R_T_A_L_A_

WP(C) No.328 of 2009

Sri Sushil Choudhury,
Son of Lt. Surendra Mohan Choudhury,
Resident of Palace Compound,
P.S. West Agartala, District - West Tripura.

..... *Petitioner.*

- Vs -

1. The Union of India,
Represented by the Secretary, Ministry of Labour,
Government of India, New Delhi.
2. The Regional Provident Fund Commissioner II,
North Eastern Region, Sub-Regional Office,
Near Bholagiri Ashram, Airport Road,
Agartala, 799006.

..... *Respondents.*

_B_E_F_O_R_E_
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA
HON'BLE MR. JUSTICE S TALAPATRA

For the petitioner	:	Mr. A K Bhowmik, Sr. Advocate, Mr. R Datta, Advocate, Ms. A Banik, Advocate.
For the respondents	:	Mr. A Lodh, Advocate.
Date of hearing	:	23.3.2015.
Date of Judgment	:	27.4.2015.
Whether fit for reporting	:	Yes.

JUDGMENT & ORDER

(Deepak Gupta, CJ)

The petitioner is the editor, printer and publisher of a Bengali daily newspaper named Dainik Ganadoot being published from Agartala.

2. Vide order dated 28.7.1998 passed under Section 7A of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952(*hereinafter referred to as the Act*), the dues of the petitioner under the Act were determined at Rs.1,76,206.50 paisa. The petitioner was directed to pay the amount. Aggrieved by the said order the petitioner filed a writ petition being Civil Rule No.475 of 1998 in the Agartala Bench of the Gauhati High Court which then exercised jurisdiction over the State of Tripura. During the pendency of the petition the operation of the order passed under Section 7A of the Act was stayed. The writ petition was finally dismissed on 22.5.2007. Thereafter the petitioner filed Writ Appeal No.52 of 2007 challenging the aforesaid judgment. Stay was granted in respect of the recovery till disposal of the writ appeal. Finally the writ appeal was dismissed on 11.10.2007 and the order of the learned single Judge was affirmed.

3. After the writ appeal had been dismissed the authorities(*respondent no.2*) under the Act issued notice of demand on

17.9.2008 directing the petitioner to make payment of the amount of Rs.1,76,206.50 paisa within 15 days. The petitioner deposited this amount in 4 instalments and the last such instalment was deposited on 27.02.2009. The petitioner was directed to appear before the Regional Provident Fund Commissioner and he then determined the employees' provident fund contribution dues for the period from May, 1998 to September, 2008. The petitioner produced the original pay register. The authorities kept xerox copies of the same and returned the original to the petitioner. Thereafter, demand notice was issued to the petitioner asking him to deposit a sum of Rs.5,15,241/- and a sum of Rs.3,21,352/- as interest up to 21.8.2009. The petitioner filed an application for review of this order which has been rejected. Hence the present petition.

4. Four points have been raised in the petition. Firstly the number of staff had been reduced and since these employees were less than 20, the petitioner was not liable to pay *employees' provident fund*. Secondly, it is contended that because the writ petition was pending and stay order was granted, the petitioner had not collected the contribution of the employees. Therefore, the petitioner cannot be held liable to pay interest for the period when the matter was sub-judice before this Court. Thirdly it is contended that overtime allowance could not have been made part of the wages to determine provident fund liability. Lastly, it is contended that the petitioner

cannot be held liable to pay the amount of the employees' contribution. In this behalf it is also urged that paras 30 and 32 of the Employees' Provident Funds Scheme, 1952 are violative of the provisions of the Act.

5. Mr. A K Bhowmik learned senior counsel for the petitioner has stressed that the impugned order passed is totally illegal and is liable to be set aside. On the other hand, it is urged by Mr. A Lodh learned counsel appearing for the Union of India and the Regional Provident Fund Commissioner that the order is totally valid. Certain judgments have also been cited by both sides.

6. With regard to the first submission that the establishment of the petitioner is not covered under the Act, in view of the earlier decision given against the petitioner no other questions need be gone into except the contention that since the number of employees is less than 20 the Act does not apply. Reference has been made to Sections 1(3) and 1(5) of the Act which read as follows :

“1(3) Subject to the provisions contained in section 16, it applies –

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf :

Provided that the Central Government may, after giving not less than two months' notice of its intention so to do, by

notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification.

1(5) An establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below twenty.”

A bare reading of these provisions makes it clear that once the provisions of the Act have been made applicable to an establishment the same shall continue to apply even if the number of employees falls below 20.

7. In *Gowri Shankar Theatre Vs Assistant Provident Fund Commissioner Vellore, 2009 Legal Eagle (MAD) 233* the Madras High Court dealing with this provision held as follows :

“When once an establishment is covered under the employees provident fund and miscellaneous provisions act, 1952, merely because the number of employees has come down, that will not take away the applicability of that act. The contention of the learned counsel for the appellant that section 1(5) the employees provident fund and miscellaneous provisions act, 1952 speaks only 20, but as far as the appellants case is concerned, the number of employees which was 5, came down to 4 and therefore section 1(5) of the employees provident fund and miscellaneous provisions act, 1952 cannot apply, has no meaning.”

The Act has been enacted as a social welfare legislation to help the employees and, therefore, Parliament in its wisdom thought that employers may try to avoid the provisions of the Act by reducing the number of employees below 20. Therefore, sub-section

(5) was inserted in the year 1960 which provides that if an establishment was once covered under the Act even if the number of employees falls later, the establishment will continue to be covered by the EPF & MP Act. Therefore, I find no merit in this contention.

8. The second contention is that the petitioner had neither collected the employees share nor deposited the employees share because of the stay order granted by the Court. The stay order was granted at the asking of the petitioner. He prayed for stay order with regard to the earlier demand. The stay order was made in the context of earlier demand. The petitioner also prayed that in future also interim relief be granted that the provident fund authorities should stay their hands as far as the establishment of the petitioner is concerned since according to the petitioner his establishment was not covered under the Act. This matter has been finally decided against the petitioner. His writ petition and writ appeal have both been dismissed. Therefore, the petitioner cannot now contend that for the period when the petition was pending in the Court, he is not liable to pay interest or not liable to pay the amount. The stay order stands automatically vacated once the petition and the appeal were dismissed and now the petitioner will have to pay the amount due from him as well as interest thereupon. The petitioner has retained the amount of his contribution for so many years and he cannot now urge that he is not liable to pay interest.

9. However, as far as the calculations are concerned, there is some merit in the case of the petitioner. Even according to the documents produced before this Court, it is apparent that the wages of each one of the employees included an element of additional wages for overtime. This overtime could not have been included in the calculation. In this behalf reference may be made to Section 2(b) of the Act which defines wages reads 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.”

Section 6 of the Act reads as follows :

“6. Contributions and matters which may be provided for in Schemes. – The contribution which shall be paid by the employer to the Fund shall be ten percent. Of the basic wages, dearness allowance 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 percent 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 percent”, at both the places where they occur, the words “12 percent” 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 rounding off of such fraction to the nearest rupee, half of a rupee, or quarter of a rupee.”

A perusal of sub-clause (ii) of clause (b) clearly shows that wages shall not include any amount paid as dearness allowance, house-rent allowance, overtime allowance etc. Therefore, overtime allowance could not be included in basic wages. Under Section 6 dearness allowance and retaining allowance, if any, are to be added to basic wages for the purpose of calculating the contribution under the Act. None of those provisions envisage adding of overtime allowance while calculating the provident contribution. Therefore, the impugned order is liable to be set aside to this limited extent.

10. The last contention of the petitioner is that he cannot be held liable to pay the amount of the employees' contribution. He has urged that paras 30 and 32 of the Employees' Provident Funds

Scheme, 1952 are *ultra vires* the provisions of the Act. Paras 30 and 32 of the Scheme read as follows :

“30. Payment of contributions.-

- (1) The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer’s contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member’s contribution).***
- (2) In respect of employees employed by or through a contractor, the contractor shall recover the contribution payable by such employee (in this Scheme referred to as the member’s contribution) and shall pay to the principal employer the amount of member’s contribution so deducted together with an equal amount of contribution (in this Scheme referred to as the employer’s contribution) and also administrative charges.***
- (3) It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges.***

32. Recovery of a member’s share of contribution.-

- (1) The amount of a member’s contribution paid by the employer or a contractor shall, notwithstanding the provisions in this Scheme or any law for the time being in force or any contract to the contrary, be recoverable by means of deduction from the wages of the member and not otherwise :***

Provided that no such deduction may be made from any wage other than that which is paid in respect of the period or part of the period in respect of which the contribution is payable :

Provided further that the employer or a contractor shall be entitled to recover the employee's share from a wage other than that which is paid in respect of the period for which the contribution has been paid or is payable where the employee has in writing given a false declaration at the time of joining service with the said employer or a contractor that he was not already a member of the Fund:

Provided further that where no such deduction has been made on account of an accidental mistake or a clerical error, such deduction may, with the consent in writing of the Inspector be made from the subsequent wages.

(2) Deduction made from the wages of a member paid on daily, weekly or fortnightly basis should be totalled up to indicate the monthly deductions.

(3) Any sum deducted by an employer or the contractor from the wages of an employee under this Scheme shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it was deducted."

Para 30 provides that in the first instance, the employer shall pay both the contribution payable by himself and also, on behalf of the member employed by him directly or through a contractor, the contribution payable by such member. Para 30(3) says that it shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also the administrative charges.

11. The scheme has been framed in terms of Section 5 of the Act which reads as follows :

“5. Employees’ Provident Funds Scheme. – (1) The Central Government may, by notification in the Official Gazette, frame a scheme to be called the Employees’ Provident Fund Scheme for the establishment of provident funds under this Act for employees or for any class of employees and specify the establishments or class of establishments to which the said Scheme shall apply and there shall be established, as soon as may be after the framing of the Scheme, a Fund in accordance with the provisions of this Act and the Scheme.

(1A) The Fund shall vest in, and be administered by, the Central Board constituted under section 5A.

(1B) Subject to the provisions of this Act, a Scheme framed under sub-section 1 may provide for all or any of the matters specified in Schedule II.

(2) A Scheme framed under sub-section 1 may provide that any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in this behalf in the Scheme.”

Section 6 of the Act lays down the matters which may be provided for in the scheme and it is clearly indicated that the employer shall deposit with the fund 10% of the basic wages, dearness allowance and retaining allowance(if any) for the time being payable to each of the employees’ and the employees’ contribution shall be equal to the contribution payable by the employer in respect of him. The employee is, however, at liberty to deposit more than 10% but this does not cast a corresponding duty on the employer.

12. It is the responsibility of the employer to deposit at least 10% as his contribution and also to deduct 10% from the salary of the employee and deposit it under the fund. The scheme has been framed only with a view to see that it is effectively managed. It would be pertinent to mention that the Employees' Provident Funds Scheme, 1952 has been placed before Parliament to ensure that the delegatee has not exceeded delegated authority. The Parliament has not found anything wrong in the scheme and the scheme only furthers the purpose of the Act by making the employer responsible to deduct the contribution of the employees.

13. The employer is in control of all the finances and he can easily deduct the employees' share and deposit it at the fund. If he fails to do so he becomes responsible to pay this amount. The reason behind this is simple. Poor, illiterate employees who may not be even aware of the provisions of the Act should not be deprived of the benefits under this Act because the employer has been negligent in deducting their shares. The scheme furthers the intention of the Act and I find nothing in the scheme which militates against the provisions of the Act.

14. In view of the above discussion, the writ petition is allowed to the limited extent that while calculating the contribution to the provident fund the element of overtime shall not be included in

wages as held hereinabove. All the other claims made by the petitioner are devoid of any merit and are accordingly rejected.

Petition is disposed of in the aforesaid terms. No order as to costs.

JUDGE

CHIEF JUSTICE

Sukhendu