

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.08.2016

DELIVERED ON: 09.09.2016

CORAM

The HON'BLE MR.SANJAY KISHAN KAUL, CHIEF JUSTICE
AND

The HON'BLE MR.JUSTICE R.MAHADEVAN

W.A.No.1578 of 2006

Poompuhar Shipping Corporation Ltd.
Tuticorin, through its
Managing Director. ... Appellant/Petitioner

Vs.

1. The Regional Provident Fund Commissioner
Bhavishyanidhi Bhavan, P.B.No.1
Lady Doak College Road
Chokkikulam, Madurai - 625 002.
2. The Assistant Provident Fund Commissioner
Employees Provident Funds
Lady Doak College Road
Chokkikulam, Madurai - 625 002.
3. The Workmen, rep. by the
General Secretary,
Poompuhar Shipping Corporation,
Employees' Union No.282, WTC Road
Tuticorin. ... Respondents/Respondents

PRAYER: Appeal under Clause 15 of the Letters Patent
against the order dated 14.8.2003 passed by the learned
Single Judge in W.P.No.8810 of 1996.

Petition filed Under article 226 of the Constitution of
India praying to issue a Writ of Certiorari to Call for the
records from the file of Assistant Provident Fund
Commissioner, Employees Provident Funds Madurai on his
No.D2/77/MD/29351/ENF/MDU/SRO/96 5/19.01.96 as confirmed
the order of the 1st Respondent herein on his No.
D2/TN/MD/29351/ ENF/96 dated 17/4/96 and quash the same.

For Appellant : Mr.K.V.Subramaniam,
Sr.Counsel
for Mr.M.A.Abdul Wahab

For Respondents : Mr.V.Vibhishnan
for respondents 1 and 2
Mr.S.Arivazhagan
for 3rd respondent

J U D G M E N T

THE HON'BLE CHIEF JUSTICE

The benefit extended to workmen in the appellant/Corporation in the form of incentive payment for extra performance during regular working hours is sought to be included as part of basic wage in terms of the impugned order giving rise to the present appeal.

2. The factual position is really not in dispute. The Appellant Corporation is engaged in the business of transportation of coal by sea and unloading the coal in Tuticorin for the Tamil Nadu Electricity Board to generate power for supply of electricity. The appointment orders show that the initial appointment as trainees for a period of two months is on stipendiary basis and after confirmation, they are appointed in the appropriate scale of pay with dearness allowance admissible under the Rules of the Appellant Corporation. In addition to these emoluments, the workmen are eligible for monthly incentive payments on the basis of the appellant's scheme of incentive payments in force at the time. This incentive payment is to be on the basis of the output from the cranes during each shift. For clarity, this incentive is payable not for any extra hours work, but in the regular working time period. Thus, the incentive would vary from workman to workman dependent on the output being more than the benchmark for such incentive payment. The incentive would thus be payable to some and not to the others and even to the ones to whom it is payable, it would be dependent on the work done.

3. We are concerned with the effect of this incentive payment in the context of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter to be referred to as "the said Act"). Section 6 of the said Act provides for contributions to be paid by the employer to the fund under the provisions of the Provident Fund Scheme and has to be calculated as percentage of the basic wages.

4. The "basic wages" are defined under Section 2(b) of the said Act, which reads as under:

"Section 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."

5. The calculation of the provident fund contribution is on the basic wages and in that context, the question which arises is as to whether the incentive payment is part of such basic wages.

6. It is the view of the employees that since incentive payment is not specifically excluded from the basic wages, it forms a part of it. On the other hand, it is the contention of the appellant that bonus has been specifically excluded from the basic wages and such incentive payment is nothing else but a production bonus.

7. The employees' union took up the matter with the office of the Provident Fund Commissioner and, thus, a notice was issued from the said office to the appellant for deciding the issue with regard to reckoning of incentive bonus for purposes of provident fund deduction in respect of the appellant. The Assistant Provident Fund Commissioner held an enquiry under Section 7-A of the said Act and came to the conclusion that the incentive paid to the employees was to be reckoned for purposes of calculation of the provident fund, as per the order dated 19.1.1996.

8. The appellant, however, took up the matter with the Regional Provident Fund Commissioner in pursuance of the order passed by the Assistant Provident Fund Commissioner raising various issues and requesting for reconsideration of the decision taken by the Assistant Provident Fund Commissioner. The Regional Provident Fund Commissioner, however, passed an order on 17.4.1996 referring to the definition of "basic wages" under Section 2(b) of the said Act and opined that the 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 are to be reckoned for provident fund. The incentive payment was held to be a part of the wages inasmuch as it is earned during the prescribed working eight hours and only what is specifically excluded is house-rent allowance, overtime allowance, bonus, commission, etc.

9. The appellant, aggrieved by these orders, preferred a writ petition before this Court bearing W.P.No.8810 of 1996. The said writ petition was dismissed by the impugned order of the learned Single Judge (as he then was) dated 14.8.2003. Hence, the present appeal.

10. The learned Single Judge framed the following question for determination:

"Whether the incentive paid to the employees belonging to the third respondent union could be construed as basic wages as defined under Section 2 (b)(ii) of the Act and consequently, whether the petitioner is liable to contribute its shares towards provident fund?"

11. The learned Single Judge then proceeded to the definition under Section 2(b) of the said Act and referred to the Constitution Bench judgment of the Supreme Court in Bridge & Roof Co. (India) Ltd. v. Union of India and others, AIR 1986 SC 1474, for ratio that in respect of bonus, in view of its specific exclusion, the employer is not liable to contribute provident fund on the said amount, but incentive payment had not been specifically excluded. In this context, a reference was made also to the Division Bench judgment in Regional Commissioner, EPF v. Management of Southern Alloy Foundries (P) Ltd., (1981) 2 MLJ 185 : (1980) 93 LW 797, in respect of dearness allowance which had been specifically excluded, and the judgment in R.Ramanathan Chettiar Jewellers, Madurai v. Regional Commissioner, Employees' Provident Fund, Madurai, 1998 II LLJ 945, in respect of a special allowance which was specifically excluded from the provisions of the said Act.

12. The learned Single Judge noticed the submission of the learned counsel for the appellant herein that the incentive payment was nothing but a productivity bonus and should be excluded. In appreciating the submission, the learned Single Judge opined that the said Act being a social welfare legislation, a beneficial rule of construction should be followed and, thus, unless something is specifically excluded, the amount would be included as part of basic wages. The view expressed by the learned Single Judge is that the Court should not expand the scope of categories of payments which are to be

excluded from the basic wages definition for purposes of calculation of the provident fund contributions.

13. We have given our thoughtful consideration to the pleas advanced by the learned counsel for the parties.

14. In the limited nature of the controversy arising, the law as settled by the Constitution Bench in Bridge and Roofs Company Ltd. case, supra, undoubtedly applies. The significant aspect emphasized in paragraph (8) of the judgment is that the basis for inclusion in Section 6 of the said Act and exclusion in clause (ii) of the exceptions to Section 2(b) of the said Act is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose of contribution under Section 6, but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution.

15. It is also significant to note that in paragraph (9) of the said decision, the effect of exclusion of bonus from the definition of basic wages has been examined and the conclusion is it would not be improper to infer that when the word "bonus" was used without any qualification in the clause, the legislature had in mind every kind of bonus that may be payable to an employee. In this behalf, reference has been made to production bonus as an illustration of the same, apart from festival or puja bonus, customary bonus, profit bonus, etc. The contention on behalf of the workmen that the term "bonus" referred only to profit bonus was specifically negated.

16. The Constitution Bench looked to the intent of excluding bonus in the context of the other exclusions and concluded that a common thread ran through all of them. The said Act is an all India Act applicable to all industries mentioned in Schedule I and to all concerns engaged in those industries and, thus, the exclusion seems to be to make the incidence of provident fund the same in all industrial concerns, which are covered under the said Act. Thus, all such payments which would not be common to all the industries or to all employees in the same concern were found necessary to be excluded from the wide definition of "basic wages".

17. In the context of the plea of wages being price for labour, it was opined that it was not possible to accept the contention of the workmen 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.

18. The Constitution Bench referred to the judgment in *Titaghur Paper Mills Co. Ltd. v. Workmen*, AIR 1959 SC 1095, where it was pointed out that payment of production bonus depended upon production and is in addition to wages and it was in effect an incentive for higher production and was in the nature of an incentive wage. The production bonus can be by tonnage or by any other standard introduced. The core concept is that the extra payment is earned for extra production in addition to basic wages, which is the payment for work up to the base or standard. We can usefully refer to the following extract:

"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."

19. In *Jay Engineering Works Ltd. and others v. Union of India and others*, AIR 1963 SC 1480, the employer and the employees had agreed upon a scheme, which provided that a certain proportion of the production was to correspond to the

minimum basic wages and dearness allowance fixed by certain awards, which was termed as "quota". The production above the "quota" was paid for at piece-rate. There was "norm" also fixed which was much higher than the "quota" and every workman was expected to produce the "norm" as the minimum production. If a workman did not produce the "norm", he was guilty of misconduct and would be liable to dismissal, as the agreement provided that any deliberate deviation from production "norm" would amount to go-slow tactics. On behalf of the workers, it was canvassed that the production bonus scheme in force in the company, as understood in industry, only started after the "norm" and that payment for production between the "quota" and the "norm" was nothing more than the "basic wages" as defined in the said Act. The Supreme Court agreed with that contention and held that in a typical production bonus scheme, the worker was not bound to produce more than the base or standard, though he might do so in order that his earnings might go up. However, the worker could not stop at the quota; he must produce up to the "norm" on pain of being charged with misconduct in the shape of go-slow and being liable to be dismissed. Thus, it was held that the portion of the payment which is made by the management for production up to the "quota" as well as production between the "quota" and the "norm" would come within the term "basic wages" as defined in the said Act and the portion of the payment which is made by the management above the norm would be "production bonus" and not the basic wages.

20. We also notice that the definition of "wages" under the Employees' State Insurance Act, 1948 is distinct from the definition under the said Act. Section 2(22) of that Act indicates that it must be remuneration or additional remuneration other than that referred to in the earlier part of the definition and, thus, incentive bonus was certainly an additional remuneration, if paid at intervals not exceeding two months.

21. In this context, we may also note the earlier judgment of the Supreme Court in *Harihar Polyfibres v. The Regional Director, ESI Corporation*, (1984) 4 SCC 324 : AIR 1984 SC 1680, which once again dealt with the Employees' State Insurance Act.

22. The learned counsel for the third respondent sought to rely upon the judgment of the Supreme Court in *The Daily Partap v. The Regional Provident Fund Commissioner, Punjab*, (1998) 8 SCC 90. The question raised was whether the disputed amounts paid to the workmen were paid by way of production bonus or not. The argument was that the allowance was paid for extra work by way of incentive. The Two-Judges' Bench opined that this contention would have to be examined in the light of the production bonus scheme in question. There were two kinds of such production bonus - (a) Less than normal number of people

doing the normal work of a working shift, in which case the production bonus is paid according to the deficiency in the numerical strength of the staff; and (b) extra output given by any workmen in any shift. Insofar as the first category is concerned, the extra effort undertaken by the workmen discharging extra load of work over and above the usual work expected of them normally is to ensure maintenance of the requisite normal level of production and thus, this situation is entirely different from the one where more than normally expected turnover is made available by the workmen who would get production bonus by way of incentive to valid total production beyond its normal level. This was opined not to be introduction of any production bonus scheme in the real sense of the term and it was an insurance against shortfall in normal production per shift due to shortage of available staff at a given point of time.

23. In the second category, the extra output for the concerned workman is to be ascertained for being eligible for the extra payment by way of incentive. The extra output given by the workman concerned would thus depend upon the basic norm fixed for the output which would have to be given by the workmen concerned during the shift and if it was found that any extra output is put up by them beyond the requisite norms of workload, then only the same would make them eligible to get benefit of the production bonus as envisaged by the category. The prerequisite for this, it was opined, was that it had to be shown that the workmen concerned had put in extra work in a shift beyond what was normally required by them and without this basic data, it would be impossible to workout the extra output put up by the workman in a given shift on a particular day. In the given facts of the case, it was opined that there was no data available on record to show what were the norms of work prescribed for the workmen during the relevant period.

24. The legal principle, in our view, emerging from the judgments of the Supreme Court is really not in doubt, i.e., if certain aspects of payments had to be excluded from basic wages, then the same cannot be included for purposes of calculation of the provident fund contribution. One of the categories excluded from basic wages is bonus. This, in turn, would imply that all kinds of bonus would be excluded and this issue has been abundantly elucidated in the judgment in Bridge and Roofs Co. Ltd. case, supra. It is also equally clear from the said judgment that production bonus is a category of such bonus and has to be excluded. Since in the facts of the present case it is an incentive payment, we may note that the said judgment of the Supreme Court also excluded incentive payments specifically which are in the nature of production bonus. The judgment relied upon by the learned counsel for the respondents also, in fact, does not take a different line and if one may say so,

cannot take a different line, as it is an opinion of Two Hon'ble Judges as against the Constitution Bench judgment of Six Hon'ble Judges.

25. It is, thus, opined in The Daily Pratap case, supra, also that production bonus and incentive payments have to be excluded. However, the judgment goes on to analyze the particular production bonus scheme and in respect of one category of the same, not applicable to the facts of the present case, it was opined that the same could not be considered production bonus. It is the second aspect of the production bonus scheme in the judgment which bears analogy to the scheme in the present case and thus, it was opined that the same would have to be excluded in principle. However, it was finally not so excluded on account of inability of the basis of calculation.

26. There is no dispute that the Act in question is a beneficial piece of legislation and thus must be given its widest amplitude for the benefit of the workmen. However, this cannot change the very legislation made by the Parliament which excludes certain specific categories. Thus, once bonus is excluded, production bonus or incentive bonus, being part of the same, has to also be excluded - an opinion which runs through all the Supreme Court judgments. Bonus being an unqualified expression used would include all kinds of bonus.

27. The intent of exclusion of some of the payments from the said Act has also been enunciated by the Constitution Bench as whatever is payable in all concerns and is earned by all permanent employees is included, but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution.

28. We are, thus, not able to accept the rationale for permitting the orders passed by the Provident Fund Commissioner and the learned Single Judge that a beneficial construction should be based on the statute; or that the said incentive is not specifically excluded, would imply that they form part of the basic wages. In our view, this reasoning would run contrary to the judgments of the Supreme Court referred to aforesaid.

29. The incentive amount may not, however, be excluded in a situation where it is not possible to calculate the same, as was stated in the judgment in The Daily Pratap case, supra. In fact, that was the rationale for non exclusion and not any other aspect. The Constitution Bench judgment was explained to imply that there should be genuine production bonus scheme. The production bonus scheme referred to in the Constitution Bench judgment being linked with the total output given by the entire

body of workmen after their total output reached a certain level was, thus, held to be a genuine production bonus scheme.

30. As to what is a genuine production bonus scheme has been discussed in The Daily Pratap case, supra, and it has been opined that it should be a scheme for payment to be made to meritorious workmen who put in extra output and has to have a direct nexus and linkage with the amount of extra output produced by the eligible workmen, so that the scheme can work as a real incentive scheme equally to them to make extra efforts. Such a scheme may have sliding scales of bonus amount based on total extra quantity of production for which all workmen can uniformly be paid bonus on the basis of their co-operative efforts. More the extra production, more the available surplus of bonus to be divided amongst all eligible workmen uniformly. Other type of incentive bonus scheme may be made available to an individual meritorious workman, extra payment for extra work having direct linkage with the extra production out-turned by him. In neither case such distributable bonus can be a static figure as in the case of that judgment. The particular scheme in question was held not a scheme of sliding scale bonus having real nexus with the amount of extra output produced by the workmen concerned either individually or collectively. Once the workmen crossed even slightly the norm of work expected of them in a given shift, they all fall in the same category of eligible workmen entitled to get on uniform basis extra amount of 1.5 times the basic daily wage. The scheme of paying extra remuneration to more eligible and efficient workmen was held to be a scheme of super wage fixation, which is not a genuine scheme of incentive bonus, which has to be earned by the workmen by showing their capabilities for earning such extra bonus linked with the quantity of extra production.

31. Now turning to the scheme in question, which has been placed on record, it provides incentive rate for discharging coal. A benchmark is provided, whereafter for every extra unit there is an incentive given. The higher the unit, the higher the incentive at a prescribed scale. Thus, this scheme fits into the definition of a scheme which is based on an incentive for individual meritorious workman, who would get extra payment for extra work on a scale of the extra work, which each person does in the given work period time. Thus, it is a genuine production bonus scheme.

32. We having come to the conclusion that the incentive payment is a genuine production bonus scheme, the natural corollary is that it has to be excluded from the calculation of basic wages for purposes of provident fund contribution in terms of Section 6 read with Section 2(b) of the said Act.

33. The result of the aforesaid is the impugned order is set aside and it is held that on the given basis of incentive payment, akin to a production bonus, the amount of such variable incentive amount for different workmen cannot form part of the basic wages for the calculation of provident fund contribution.

The appeal is accordingly allowed leaving the parties to bear their own costs.

Sd/-
Assistant Registrar(CS VII)

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Sub Assistant Registrar

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To:

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