IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18-11-2019

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THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.9636 of 2012

M/s.TVS Commutation Solutions Ltd.,
58 Eldams Road,
Teynampet,
Chennai-600 018.

...Petitioner

vs.

1. The Presiding Officer,
Employees' Provident Fund Appellate Tribunal
(Ministry of Labour and Employment,
Government of India),
4th Floor, Core 2, Scope Minar
Lakshmi Nagar,
New Delhi 110 092.

2. The Assistant Provident Fund Commissioner (C&R),
Office of the Regional Provident Fund Commissioner,
Employees' Provident Fund Organisation,
Regional Office,
37, Royapettah High Road,
Chennai 600 014.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the first respondent in ATA.No.233(13) of 2011 and quash its order dated 08.02.2012, confirming the order of the second respondent dated 10.03.2011 in proceedings No.CCI/4/TN/54267/ENF/REGL/2010.

For Petitioner : Mr.Ravindran for
for M/s.T.S.Gopalan & Co

For Respondent-1 : Tribunal

For Respondent-2 : Mr.T.R.Sundaram

O R D E R

The order dated 08.02.2012 passed in ATA.No.233(13) of 2011, is sought to be quashed in the present writ petition.

2. The learned counsel for the writ petitioner mainly contended that as per Section 2(B) of the EPF Act, the allowances are exempted from Section 2(B)(ii), and therefore, the action of the respondent in calculating the allowances for deciding the basic wages, is contrary to the provisions of the Act and accordingly, liable to be scrapped.

3. The learned counsel for the writ petitioner contended that as per the Constitutional Bench of the Hon'ble Supreme Court of India, in the case of Bridce and Roof Corporation vs.Union of India reported in 1962 (II) LLJ SC at page 490, the writ petitioner is not liable to pay contributions in respect of such allowances, which are all exempted under Section 2(B)(ii) of the EPF Act.

4. The learned counsel for the writ petitioner reiterated that including the contributions for calculating the basic wages, is in violation of the provisions of the Act, and therefore, the impugned order is liable to be scrapped.

5. The learned counsel appearing on behalf of the second respondent/The Assistant Provident Fund Commissioner disputed the contention by stating that in respect of contributions, Section 6 is relevant and Section 6 includes certain allowances to be calculated for the purpose of deciding the basic wages and for arriving the quantum of contributions to be paid to the employee. This apart, the learned counsel appearing for the second respondent mainly relied on the recent judgment of the Hon'ble Supreme Court of India in C.A.No.6221 of 2011 dated 28.02.2019 reported in 2019 SCC ONLINE SC 291, wherein the supreme Court in clear terms held that the allowances are also to be included for the purpose of calculating the basic wages under the Employees Provident Fund and Miscellaneous Provisions Act, 1952. It is pertinent to note that the Constitutional Bench judgment referred by the learned counsel for the writ petitioner is also relied upon by the Supreme Court, and therefore, this Court has no option, as the recent judgment became binding.

6. The relevant paragraph of the Judgment of the Apex Court of India is extracted here under:

> "12. The term basic wage has not been defined under the Act. Adverting to the dictionary meaning of the same in Kichha Sugar Company Limited through General Manager v. Tarai Chini Mill Majdoor Union, Uttarakhand, (2014) 4SCC 37, it was observed as follows:
>
> "9. According to http://www.merriam-webster.com(Merriam Webster Dictionary) the word 'basic wage' means as follows:

1. A wage or salary based on the cost of living and used as a standard for calculating rates of pay.
2. A rate of pay for a standard work period exclusive of such additional payments as bonuses and overtime.

10. When an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning. In our opinion, those wages which are universally, necessarily and ordinarily paid to all the employees across the Board are basic wage. Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot be included in the basic wage. As for example, the overtime allowance, though it is generally enforced across the board but not earned by all employees equally. Overtime wages or for that matter, leave encashment may be available to each workman but it may vary from one workman to other. The extra bonus depends upon the extra hour of work done by the workman whereas leave encashment shall depend upon the number of days of leave available to the workman. Both are variable. In view of what we have observed above, we are of the opinion that the amount received as leave encashment and overtime wages is not fit to be included for calculating 15% of the Hill Development Allowance". 13. That the Act was a piece of beneficial social welfare legislation and must be interpreted as such was considered in The Daily Partap v. The Regional Provident Fund Commissioner, Punjab, Harayana, Himachal Pradesh and Union Territory, Chandigarh, (1998) 8SCC 90. 14. Applying the aforesaid tests to the facts of the present appeals, no material has been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the Board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. There is no data available on record to show what were the norms of work prescribed for those workmen during the relevant period. It is therefore not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen. The wage structure and the components of salary have been examined on facts, both by the authority and the appellate authority under the Act, who have arrived

at a factual conclusion that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. There is no occasion for us to interfere with th concurrent conclusions of facts. The appeals by the establishments therefore merit no interference. Conversely, for the same reason the appeal preferred by the Regional Provident Fund Commissioner deserves to be allowed.

7. In view of the legal principles settled by the Apex Court of India, this Court is of the opinion that the order dated 08.02.2012 passed by the first respondent in ATA.No.233 (13) of 2011 is sustainable. Consequently, the said order is confirmed and the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

Svn
To
1. The Presiding Officer,
Employees' Provident Fund Appellate Tribunal
(Ministry of Labour and Employment,
Government of India),
4th Floor, Core 2, Scope Minar
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New Delhi 110 092.

2. The Assistant Provident Fund Commissioner (C&R),
Office of the Regional Provident Fund Commissioner,
Employees' Provident Fund Organisation,
Regional Office,
37, Royapettah High Road,
Chennai 600 014.

+1 CC to Mr.T.S. Gopalan & Co, sr 95858
+1 CC to Mr.T.R.Sundaram, Advocate sr 96242.

GMR(CO)
SP(26/12/2019)