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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.09.2020

CORAM

THE HON'BLE MR. JUSTICE P.D. AUDIKESAVALU

W.P. No. 6191 of 2020

and

W.M.P. No. 7273 of 2020

M/s Computer Access Private Limited,
No.1, Dr. Ranga Road, 2nd Street,
Alwarpet,
Chennai - 600 018.
Rep. by its Director K.Ravichandran

... Petitioner

-vs-

1. The Secretary (L&S),
Ministry of Labour & Employment,
Govt. of India,
Shram Shakthi Bhawan,
Rafi Marg,
New Delhi - 110 001,
India.

2. The Central Provident Fund Commissioner,
Employee Provident Fund Organisation,
Head office,
Bhavishya Nidhi Bhawan,
14 - Bhikaji Cama Place,
New Delhi - 110 066.

3. The Regional Provident Fund Commissioner - II (C&R),
Employees Provident Fund Organisation,
Regional Office,
37, Royapettah High Road,
Chennai.

... Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for records of the Third Respondent in Proceedings No. TN/CHN/CC-I/15/TN-30685/Enf/2015 dated ___/05/2015 for the period April 2013 to July 2014 quash the same and direct the Respondents to uniformly implement the provisions of the EPF Act in claiming provident fund contribution on allowances from a uniform date.



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

For Respondents: Ms. R.Durga Rani
Central Government Standing Counsel (for R1)

Mr. T.R.Sundaram,
Standing Counsel (for R2 & R3)

O R D E R
(through video conference)

Heard Mr. Anand Gopalan, Learned Counsel for the Petitioner and Ms. R.Durga Rani, Learned Central Government Standing Counsel appearing for the First Respondent and Mr. T.R.Sundaram, Learned Standing Counsel appearing for the Second and Third Respondents and perused the materials placed on record, apart from the pleadings of the parties.

2. The Petitioner had earlier approached this Court in the Writ Petition in W.P. No. 4536 of 2015 on service of Notice No. CHN/TN/30685/D/15/Enf/Regl/2014 dated 21.10.2014 issued by the Assistant Provident Fund Commissioner, Chennai in a proceeding under Section 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'Act' for short), seeking to forbear the continuance of that proceeding and initiation of enquiry. The grievance sought to be ventilated by the Petitioner therein was that a question of law relating as to whether special allowance paid by an establishment to its employees would fall within the expression 'basic wages' under Section 6 read with Section 2(b)(ii) of the Act for computation of deduction towards Provident Fund was pending before the Hon'ble Supreme Court of India in Surya Roshni Ltd., -vs- Employees Provident Fund (Civil Appeal Nos. 3965-3966 of 2013 etc., batch), and that the outcome of those cases should be awaited. This Court by an order dated 20.04.2018 disposed that Writ Petition holding as follows:-

"11. Admittedly, the challenge in the present writ petition is the summons issued to the writ petitioner to appear in person for the purpose of submissions of their documents and records enabling the competent authorities to conduct enquiry and arrive a conclusion in respect of all the contributions to be made. However, in view of the pendency of the writ petition the exercise is not done for the past three years.

12. Under these circumstances, this court is of an opinion that the writ petitioner is at liberty to appear before the competent authorities as per the notice issued to them and place their records and



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documents and their statements so as to defend their case in accordance with law. The respondent is also at liberty to proceed with the enquiry proceedings conclude the same in all respects and pass orders.

13. It is made clear that the competent authorities are bound to follow the Act and Rules scrupulously, while undertaking the process in such matters. However, in respect of the disputed allowances shall not be demanded or effected till the final disposal of the cases pending before the Hon'ble Supreme Court of India. The final decision in respect of the disputed allowances shall be kept in abeyance till such time.

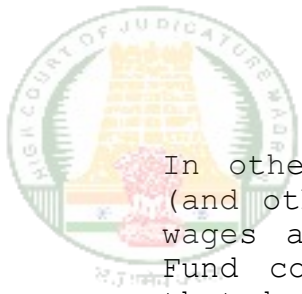
14. With these observations, the writ petition stands disposed of. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed."

3. Thereafter, the Hon'ble Supreme Court of India in Surya Roshni Ltd., -vs- Employees Provident Fund (Order dated 28.02.2019 in Civil Appeal Nos. 3965-3966 of 2013 etc., batch) while highlighting that for the purpose of computation of deduction towards Provident Fund under Section 6 read with Section 2(b)(ii) of the Act, the dictionary meaning of the term 'basic wage' as interpreted in Kiccha Sugar Company Limited through General Manager -vs- Tarai Chini Mill Majdoor Union, Uttarakhand [(2014) 4 SCC 37] has to be taken into consideration, has reiterated the principles laid down in the previous judgments in Bridge and Roof (India) Ltd., -vs- Union of India (AIR 1963 SC 1474) and Manipal Academy of Higher Education -vs- Provident Fund Commissioner [(2008) 5 SC 428], as to what constitutes basic wages, as follows:-

- (i) where a payment is universally, necessarily and ordinarily paid to all employees across the board, it constitutes basic wages;
- (ii) where a payment is available only to those who avail of the opportunity, it does not constitute basic wages; and
- (iii) where a payment is linked to a special incentive or extra work, it does not constitute basic wages.

This would mean that the special allowances which formed part of the employees' basic wages are subject to Provident Fund contributions on the premise:

- (a) that they are not variable in nature;
- (b) that they were not linked to an incentive to perform extra work; and
- (c) that they are paid across the board to all employees in a particular category.



In other words, it has been clarified that special allowances (and other similar allowances) which form part of an employee's wages are considered basic wages and are subject to Provident Fund contributions, and special incentive or production bonus that have a direct link with an employee's output fall outside the scope of basic wages.

4. It is evident from the materials placed that subsequently, the Third Respondent by notice in Ref. No. TN/CHN/CC-I/15/TN-30685/Enf/2015 dated __.05.2015 under Section 8-C of the Act, has called upon the Petitioner to remit the sum of Rs. 10,06,648/- towards Provident Fund dues assessed for the period from April 2013 to July 2014, which leads to the inference that the liability of the Petitioner for contribution for that period has been determined in the interregnum, but has not been questioned by the Petitioner in a manner recognized by law and has thereby attained finality. While the matter stands as narrated supra, the Petitioner has made a representation dated 02.01.2020 to the First Respondent stating that discrimination has been meted out to seek Provident Fund contribution from some establishments alone like the Petitioner for the period earlier to 28.02.2019 when the aforesaid judgment was delivered by the Hon'ble Supreme Court of India, and it was requested to ensure that no claim for Provident Fund contribution was demanded on allowances paid to the employees prior to that date. In that backdrop, the present Writ Petition has been filed challenging the aforesaid notice of demand and to forbear the First Respondent from claiming contribution on allowances from the Petitioner for the period earlier to 28.02.2019 pursuant to the aforesaid representation dated 02.01.2020 that has been made by the Petitioner.

5. As already noticed, this Court in the order dated 20.04.2018 in the Writ Petition in W.P. No. 4536 of 2015 filed by the Petitioner has held that the final decision in respect of disputed allowances shall be kept in abeyance till the disposal of the cases before the Hon'ble Supreme Court of India in which that question of law had fallen for consideration then. Since the Hon'ble Supreme Court of India has determined that legal issue, it would necessarily follow that the inclusion of the disputed allowances for ascertaining the contribution towards Provident Fund payable by the Petitioner would have to be made in the light of the principles laid down in that binding decision for the relevant periods of assessment made. It is not the case of the Petitioner that the amounts demanded by the Respondents from the Petitioner towards contribution for Provident Fund in the impugned notice comprises of the allowances that ought to have been excluded for that purpose. On the other hand, what is now canvassed is that the principles



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laid down in the aforesaid decision of the Hon'ble Supreme Court of India would have to be applied by the Respondents only for the period after 28.02.2019, when it was pronounced. Such contention raised is not only factually untenable, but also militates against the fundamentals of jurisprudence for several reasons.

6. In the first place, the said decision of the Hon'ble Supreme Court of India is the re-affirmance of the same principles in the earlier rulings as pointed out supra and as such, it is not possible to countenance the claim portrayed as if an entirely different proposition of law has been evolved from what was earlier holding the field.

7. Nextly, even if it is assumed without accepting that there has been a change in the legal position by that decision, it has been emphatically held by the Hon'ble Supreme Court of India in M.A.Murthy -vs- State of Karnataka [(2003) 7 SCC 517], as follows:-

"8.Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in L.C. Golak Nath -v- State of Punjab (AIR 1967 SC 1643) . In Managing Director, ECIL -v- B. Karunakar [(1993) 4 SCC 727] the view was adopted. Prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted to by this Court while superseding the law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. (See Ashok Kumar Gupta -v- State of U.P. [(1997) 5 SCC 201] and Baburam -v- C.C. Jacob [(1999) 3 SCC 362]. It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and



consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs...."

This view has been restated by the Hon'ble Supreme Court of India in P.V.George -vs- State of Kerala [(2007) 3 SCC 557], Ashok Kumar Sonkar -vs- Union of India [(2007) 4 SCC 54] and Alka Ojha -vs- Rajasthan Public Service Commission [(2011) 9 SCC 438].

8. Finally, it is settled position of law that a wrong decision granting benefit to one person does not give a right to claim parity or equality by extending such wrong order to others and it would suffice to quote from the decision of the Hon'ble Supreme Court of India in State of Odisha -vs- Anup Kumar Senapati (Order dated 16.09.2019 in Civil Appeal No. 7295 of 2019) as extracted below:-

"30. It was lastly submitted that concerning other persons, the orders have been passed by the Tribunal, which was affirmed by the High Court and grants-in-aid has been released under the Order of 1994 as such on the ground of parity this Court should not interfere. No doubt, there had been a divergence of opinion on the aforesaid issue. Be that as it may. In our opinion, there is no concept of negative equality under Article 14 of the Constitution. In case the person has a right, he has to be treated equally, but where right is not available a person cannot claim rights to be treated equally as the right does not exist, negative equality when the right does not exist, cannot be claimed. In Basawaraj -v- Special Land Acquisition Officer, [(2013) 14 SCC 81]], it was held thus:

"8. It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of



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individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a similarly wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim benefits on the basis of the wrong decision. Even otherwise, Article 14 cannot be stretched too far for otherwise it would make functioning of administration impossible. (Vide Chandigarh Admn. -vs- Jagjit Singh [(1995) 1 SCC 745], Anand Buttons Ltd. -vs- State of Haryana [(2005) 9 SCC 164], K.K. Bhalla -vs- State of M.P [(2006) 3 SCC 581] and Fuljit Kaur -vs- State of Punjab [(2010) 11 SCC 455]."

In Chaman Lal -vs- State of Punjab [(2014) 15 SCC 715], it was observed as under:

"16. More so, it is also settled legal proposition that Article 14 does not envisage for negative equality. In case a wrong benefit has been conferred upon someone inadvertently or otherwise, it may not be a ground to grant similar relief to others. This Court in Basawaraj -vs- Land Acquisition Officer [(2013) 14 SCC 81] considered this issue and held as under: (SCC p. 85, para 8) "8. It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a similarly wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim benefits on the basis of the wrong decision. Even



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otherwise, Article 14 cannot be stretched too far for otherwise it would make functioning of administration impossible. (vide Chandigarh Administration -vs- Jagjit Singh [(1995) 1 SCC 745], Anand Buttons Ltd. -vs- State of Haryana, [(2005) 9 SCC 164], K.K. Bhalla -vs- State of M.P [(2006) 3 SCC 581] and Fuljit Kaur -vs- State of Punjab [(2010) 11 SCC 455]."

In Fuljit Kaur -vs- State of Punjab [(2010) 11 SCC 455], it was observed thus:

"11. The respondent cannot claim parity with D.S. Laungia -v- State of Punjab (AIR 1993 P&H 54), in view of the settled legal proposition that Article 14 of the Constitution of India does not envisage negative equality. Article 14 is not meant to perpetuate illegality or fraud. Article 14 of the Constitution has a positive concept. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim the benefits on the basis of the wrong decision. Even otherwise Article 14 cannot be stretched too far otherwise it would make function of the administration impossible. (vide Coromandel Fertilizers Ltd., -vs- Union of India [(1984 Supp SCC 457)], Panchi Devi -vs- State of Rajasthan [(2009) 2 SCC 589] and Shanti Sports Club -vs- Union of India [(2009) 15 SCC 705]"

In Doiwala Sehkari Shram Samvida Samiti Ltd. -vs- State of Uttaranchal [(2007) 11 SCC 641], this Court in the context of negative equality observed thus:

"28. This Court in Union of India -vs- International Trading Co., has held that two wrongs do not make one right. The appellant cannot claim that since something wrong has been done in another case, directions should be given for doing another wrong. It would not be setting a wrong right but could be perpetuating another wrong and in such matters, there is no discrimination involved. The concept of equal treatment on the logic of Article 14 cannot be pressed into service



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in such cases. But the concept of equal treatment pre-supposes existence of similar legal foothold. It does not countenance repetition of a wrong action to bring wrongs on a par. The affected parties have to establish strength of their case on some other basis and not by claiming negative quality. In view of the law laid down by this Court in the above matter, the submission of the appellant has no force. In case, some of the persons have been granted permits wrongly, the appellant cannot claim the benefit of the wrong done by the Government."

In Bondu Ramaswamy -vs- Bangalore Development Authority [(2010) 7 SCC 129], this Court observed thus:

"146. If the rules/scheme/policy provides for deletion of certain categories of land and if the petitioner falls under those categories, he will be entitled to relief. But if under the rules or scheme or policy for deletion, his land is not eligible for deletion, his land cannot be deleted merely on the ground that some other land similarly situated had been deleted (even though that land also did not fall under any category eligible to be deleted), as that would amount to enforcing negative equality. But where large extents of land of others are indiscriminately and arbitrarily deleted, then the court may grant relief, if, on account of such deletions, the development scheme for that area has become inexecutable or has resulted in abandonment of the scheme."

In Kulwinder Pal Singh -vs- State of Punjab [(2016) 6 SCC 532], this Court while relying upon State of U.P. -vs- Rajkumar Sharma [(2006) 3 SCC 330], observed as under:

16. The learned counsel for the appellants contended that when the other candidates were appointed in the post against dereserved category, the same benefit should also be extended to the appellants. Article 14 of the Constitution of India is not to perpetuate illegality and it does not envisage negative equalities. In State of U.P. -vs- Rajkumar Sharma [(2006) 3 SCC 330] it was held as under (SCC p. 337, para 15)

"15. Even if in some cases appointments have been made by mistake or wrongly, that does not confer any right on another person. Article 14 of the Constitution does not envisage negative equality, and if the State committed the



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mistake it cannot be forced to perpetuate the same mistake. (See *Sneh Prabha -vs- State of U.P.*, [(1996) 7 SCC 426]; *Jaipur Development Authority -vs- Daulat Mal Jain* [(1997) 1 SCC 35]; *State of Haryana -vs- Ram Kumar Mann* [(1997) 3 SCC 321]; *Faridabad CT Scan Centre -vs- DG, Health Services* [(1997) 7 SCC 752]; *Jalandhar Improvement Trust -vs- Sampuran Singh* [(1999) 3 SCC 494]; *State of Punjab -vs- Rajeev Sarwal* [(1999) 9 SCC 240]; *Yogesh Kumar -vs- Govt. (NCT of Delhi)* [(2003) 3 SCC 548]; *Union of India -vs- International Trading Co.* [(2003) 5 SCC 437] and *Kastha Niwarak Grahnirman Sahakari Sanstha Maryadit -vs- Indore Development Authority* [(2006) 2 SCC 604]."

Merely because some persons have been granted benefit illegally or by mistake, it does not confer right upon the appellants to claim equality."

In *Rajasthan State Industrial Development & Investment Corporation -vs- Subhash Sindhi Cooperative Housing Society, Jaipur* [(2013) 5 SCC 427], this Court held as under:

"19. Even if the lands of other similarly situated persons have been released, the Society must satisfy the Court that it is similarly situated in all respects, and has an independent right to get the land released. Article 14 of the Constitution does not envisage negative equality, and it cannot be used to perpetuate any illegality. The doctrine of discrimination based upon the existence of an enforceable right, and Article 14 would hence apply, only when invidious discrimination is meted out to equals, similarly circumstanced without any rational basis, or to relationship that would warrant such discrimination. [vide *Sneh Prabha -vs- State of U.P.* [(1996) 7 SCC 426], *Yogesh Kumar -vs- Govt. (NCT of Delhi)* [(2003) 3 SCC 548], *State of W.B. -vs- Debasish Mukherjee* [(2011) 14 SCC 187] and *Priya Gupta -vs- State of Chhattisgarh* [(2012) 7 SCC 433]."

In *Arup Das -vs- State of Assam* [(2012) 5 SCC 559], this Court observed as under:

"19. In a recent decision rendered by this Court in *State of U.P. -vs- Rajkumar Sharma* [(2006) 3 SCC 330], this Court once again had to consider the question of filling up of vacancies over and above the number of vacancies advertised.



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Referring to the various decisions rendered on this issue, this Court held that filling up of vacancies over and above the number of vacancies advertised would be violative of the fundamental rights guaranteed under Articles 14 and 16 of the Constitution and that selectees could not claim appointments as a matter of right. It was reiterated that mere inclusion of candidates in the select list does not confer any right to be selected, even if some of the vacancies remained unfilled. This Court went on to observe further that even if in some cases appointments had been made by mistake or wrongly, that did not confer any right of appointment to another person, as Article 14 of the Constitution does not envisage negative equality and if the State had committed a mistake, it cannot be forced to perpetuate the said mistake."

In State of Orissa -vs- Mamata Mohanty [(2011) 3 SCC 436], it was observed:

"56. It is a settled legal proposition that Article 14 is not meant to perpetuate illegality and it does not envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief. (vide Chandigarh Administration -vs- Jagjit Singh [(1995) 1 SCC 745], Yogesh Kumar -vs- Govt. of NCT of Delhi [(2003) 3 SCC 548], Anand Buttons Ltd. -vs- State of Haryana [(2005) 9 SCC 164], K.K. Bhalla -vs- State of M.P. [(2006) 3 SCC 581], Krishan Bhatt -vs- State of J&K [(2008) 9 SCC 24], State of Bihar -vs- Upendra Narayan Singh [(2009) 5 SCC 65] and Union of India -vs- Kartick Chandra Mondal [(2010) 2 SCC 422]."

9. Looked from any angle, the misconceived relief that has been sought in the Writ Petition cannot be countenanced.

In the upshot, the Writ Petition, which lacks merits, is dismissed. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar



To

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+lcc to Mr.R.Durgarani, Advocate Sr.30954

+lcc to M/s.T.S.Gopalan and Co., Advocate Sr.31056

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