IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.10.2020

CORAM

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

W.P. No. 26633 of 2019
and
W.M.P. No. 26014 of 2019

M/s.Ganges Internationale Pvt. Limited,
No.5-A, Karasur Road,
Sedarrapet,
Puducherry - 605 111,
Rep by its Authorised Signatory,
S.Sathiamurthy ...Petitioner

-vs-

The Assistant Provident Fund Commissioner,
Employees Provident Fund Organisation,
No. 101, 100 Feet Road, Cholan Nagar.
Olandaikeerapalayam,
Puducherry. ...Respondent

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records and quash the Order dated 17.07.2019 passed in EPFA No. 150 of 2017 by the respondent Presiding Officer, Employees Provident Fund Appellate Tribunal, Chennai.

For Petitioner : Mr. C.Manohar Gupta
for M/s.Gupta and Ravi
For Respondent : Mrs. V.J.Latha, Standing Counsel

O R D E R
(through video conference)

Heard Mr. C.Manohar Gupta, Learned Counsel for the Petitioner and Mrs. V.J.Latha, Learned Standing Counsel appearing for the Respondent and perused the materials placed on record, apart from the pleadings of the parties.

2. The Provident Fund dues for the period from June 2010 to September 2011 calculated on the wages of the employees of the Petitioner had been remitted by the Petitioner with the Respondent along with periodical returns in Forms 3A and 6A in

terms of para 35 and 36 of the Employees' Provident Funds Scheme, 1952 (hereinafter referred to as the 'Scheme' for short). However, the Enforcement Officer, who subsequently inspected the records of the Petitioner, was of the view that certain allowances paid by the Petitioner to its employees had not been included while computing their wages for determining the amount of contribution towards Provident Fund. An enquiry under Section 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'Act' for short), was initiated and the Respondent by Order No. TBM/SRO/ PCY/PC-1530/Comp/2012 dated 23.01.2012 determined that the sum of Rs. 80,64,138/- was liable to be paid by the Petitioner towards Provident Fund dues. However, on an application for review made by the Petitioner under Section 7-B of the Act, the said amount was reduced to a sum of Rs. 48,19,510/- in Order No. TBM/SRO/PCY/PC/1530/Comp/2012 dated 21.06.2012 passed by the Respondent. The appeal against that order in EPFA No. 150 of 2017 preferred by the Petitioner under Section 7-I of the Act before the Appellate Authority, viz., Central Government Industrial Tribunal cum Labour Court, Chennai, had been dismissed by order dated 17.07.2019 confirming the order passed by the Respondent. Aggrieved thereby, the Petitioner has filed this Writ Petition challenging the same.

3. The Appellate Authority has relied on the decision of the Constitution Bench of the Hon'ble Supreme Court of India in Bridge and Roof (India) Ltd., -vs- Union of India (AIR 1963 SC 1474) in upholding the claim of the Respondent for inclusion of certain allowances as basic wages for the purpose of determining the amount of Provident Fund payable. It requires to be highlighted here that the said decision of the Hon'ble Supreme Court of India has been reiterated in another decision in Surya Roshni Ltd. -vs- Employees Provident Fund (Order dated 28.02.2019 in Civil Appeal Nos. 3965-3966 of 2013 etc., batch), where it has been held 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 and 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], have been approved 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. Learned Counsel for the Petitioner submits that though there are no qualms at this stage regarding the aforesaid position of law governing the rights of the parties, what is now sought to be ventilated is that the CCA/Conveyance/ Attire/Washing Allowance, which have been included in the basic wages by the Respondent determining the Provident Fund dues, the Appellate Authority has not specifically dealt with the same in the impugned order that has been passed. It is also pointed out that in respect of employees whose monthly wages exceeded Rs. 6,500/-, their basic wages has to be restricted to Rs. 6,500/- for the purpose of calculation of contribution towards Provident Fund dues in terms of para 26 and 26-A of the Scheme. It is submitted that inasmuch as the aforesaid mandatory exercise has not been made by the Respondent though entire amount, which the Petitioner has been called upon to pay, have already been remitted pursuant to the orders passed by the Appellate Authority in the appeal and by this Court in this Writ Petition. Reliance is placed on the decision of the Hon'ble Supreme Court of India in Builders Association of India -vs Union of India (Order dated 02.05.2016 in CC No. 8035 of 2016 and the decision of this Court in N.Krishnan -vs- Employees Provident Fund Appellate Tribunal (Order dated 24.01.2019 in W.P. (MD) No. 13788 of 2011) to buttress the contention that the employees for whom the Provident Fund is recovered from the Petitioner would have to be ascertained and it would have to be ensured that the amount due to each of them has been credited to their respective accounts as per the code number allocated by

the Respondent. The decision of the Bombay High Court in Shri Kaushik Chatterjee -vs- Assistant Provident Fund Commissioner, Nagur (Order dated 23.03.2018 in W.P. No. 1674 of 2016) has been cited to explain that a whooping figure of Rs. 351,11,41,170/- remains undistributed to the beneficiaries of the Provident Fund throughout the country at that point of time. In this backdrop, it is persuaded that it has become imperative to remit the matter to the Appellate Authority to find out the exact amount that the Petitioner would be liable towards contribution for Provident Fund dues during the relevant period.

5. Learned Standing Counsel appearing for the Respondent, while accepting that the aforesaid exercise of ascertaining the amount of contribution towards Provident Fund for each of the employees of the Petitioner during the relevant period had not been carried out, contends that it was the Petitioner who has failed to submit revised Forms 3A and 6A showing the actual amounts due to each employees after the inclusion of allowances.

6. Having regard to the aforesaid submissions made by the Learned Counsel for both sides, the following orders are passed:-

(i) The impugned order dated 17.072019 in EPFA No. 150 of 2017 passed by the Appellate Authority is set aside and the matter is remitted to the Appellate Authority for the limited purpose to ascertain the exact amount payable towards contribution of Provident Fund for each of the employees of the Petitioner during the relevant period.

(ii) The appeal in EPFA No. 150 of 2017 shall stand re-opened and be listed for hearing before the Appellate Authority on 03.12.2020, and the Petitioner and the Respondent shall appear on that date and continue to attend the subsequent hearings to which it is adjourned till its eventual conclusion.

(iii) It shall be the obligation of the Petitioner to submit revised Forms 3A and 6A showing the actual amount of contribution payable in respect of each employee (with working-sheet showing details).

(iv) The Appellate Authority shall afford full opportunity of hearing to all parties concerned following the prescribed procedure in consonance with the principles of natural justice and shall pass reasoned orders dealing with each of the contentions raised by the parties in this regard on merits and in accordance with law.

(v) The amounts that have been remitted by the Petitioner pursuant to the interim orders of the Appellate Authority and this Court shall continue to remain invested in the interest fetching deposits till the matter is finally decided by the Appellate Authority who shall at that time also pass necessary orders for the extent of amount that the Respondent would be entitled to appropriate from those amounts deposited and for the refund of remaining amount to the Petitioner, if any.

(vi) It is also clarified here that the dates on which the amounts had been deposited by the Petitioner shall be treated as payment has been made to the Respondent towards the contribution of Provident Fund dues so that there shall not be any further liability on the Petitioner to bear interest for those deposited amounts after those respective dates on which they had been made.

7. In the result, the Writ Petition is ordered on the aforesaid terms. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

vjt

To

The Assistant Provident Fund Commissioner,
Employees Provident Fund Organisation,
No. 101, 100 Feet Road, Cholan Nagar.
Olandaikeerapalayam,
Puducherry.

Copy to

1. M/s.Ganges Internationale Pvt. Limited,
   No.5-A, Karasur Road,
   Sedarrapet,
   Puducherry - 605 111,
   Rep by its Authorised Signatory,
   S.Sathiamurthy.

2. The Presiding Officer,
   Central Government Industrial Tribunal -cum- Labour Court,
   1st Floor, B-wing,
   26 Haddows Road,
   Shastri Bhawan,
   Chennai - 600 006.

+1cc to M/s.V.J.Latha, Advocate, S.R.No.32689
+1cc to M/s.Gupta & Ravi, Advocate, S.R.No.32235

W.P. No. 26633 of 2019

SRA(CO)
KKV/29/10/2020