

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.10.2020

CORAM

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

W.P. No. 31515 of 2019
and
W.P. No. 949 of 2020
and
W.M.P. No. 31713 of 2019
and
W.M.P. No. 1151 of 2020

W.P. No. 31515 of 2019:-

M/s GMMCO Limited,
6, G.S.T. Road,
Chennai - 600 016,
Rep. by Dy. General Manager (Legal)

... Petitioner

-vs-

1. The Regional Provident Fund Commissioner - I,
Employees Provident Fund Organisation,
Regional Office Tamabaram,
3, Rajaji Salai,
Chennai - 600 045.

2. The Regional Provident Fund Commissioner - II (C&R),
Employees Provident Fund Organisation,
Regional Office Tamabaram,
3, Rajaji Salai,
Chennai - 600 045.

... Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records of the First Respondent in proceedings TN/RO/TBM/ENF/19698/7B/CC-I/T-3/2019 and quash its order dated 09.10.2019 and further direct the First Respondent to entertain the Review Petition filed by the Petitioner under Section 7B of EPF Act on 19.08.2019.

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

For Respondents: Mr. K.Ramu, Standing Counsel

W.P. No. 949 of 2020:-

M/s GMMCO Limited,
6, G.S.T. Road,
Chennai - 600 016,
Rep. by Dy. General Manager (Legal)

... Petitioner

-vs-

1. The Secretary (L&S),
Ministry of Labour & Employment,
Government 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,
Employees Provident Fund Organisation,
Ministry of Labour and Employment,
Regional Office, Tambaram,
3, Rajaji Salai,
Chennai - 600 045.
4. The Recovery Officer,
Employees Provident Fund Organisation,
Ministry of Labour and Employment,
Regional Office, Tambaram,
3, Rajaji Salai,
Chennai - 600 045.

... Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, forbearing the Respondents from claiming contribution on allowances from the Petitioner for the period prior to 28.02.2019 pursuant to the representation of the Petitioner dated 31.12.2019.

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

For Respondents: Mr. D.Sathyaraj,
Special Government Pleader (for R1)

Mr. K.Ramu,
Standing Counsel (for R2 to R4)

C O M M O N O R D E R
(through video conference)

Heard Mr. Anand Gopalan, Learned Counsel for the Petitioner, Mr. K.Ramu, Learned Standing Counsel appearing for the Respondents in W.P. No. 31515 of 2019 and Second to Fourth Respondents in W.P. No. 949 of 2020 and Mr. D.Sathyaraj, Learned Special Government Pleader appearing for the First Respondent in W.P. No. 949 of 2020 and perused the materials placed on record, apart from the pleadings of the parties.

2. Since the same Petitioner has filed these Writ Petitions relating to the inclusion of allowances for assessment of Provident Fund contribution seeking different reliefs, they have been heard together and are disposed by this common order.

3. The Petitioner had earlier approached this Court in the Writ Petition in W.P. No. 22641 of 2013 on service of Notice No. TB/TAM/RO/19698/Enf/T-2/2013 issued by the Regional Provident Fund Commissioner - II, 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 28.06.2018 disposed that Writ Petition holding as follows:-

"The notice issued under Section 7(A) of the Employees Provident Fund Act is under challenge in this writ petition.

2. The learned counsel appearing on behalf of the respondent now made a submission that during the pendency of the writ petition, the competent authority namely Regional Provident Fund Commissioner passed a final order under Section 7 (A) of the Employees Provident Fund Act imposing recovery in respect of all the allowances, in respect of certain employees whose names are enrolled with the respondent organisation, and the defects in respect of the non enrollment of

certain employees by the management.

3. It is left open to the competent authority to proceed with all further actions in accordance with the Act and Rules. However, in respect of the disputed allowances which is now subjudice by the Hon'ble Supreme Court of India, the same shall not be recovered till the final disposal of the case 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. All other allowances in respect of non enrollment of the names of certain employees with the issuances or the actions of the Acts and Rules may be proceeded with by the competent authorities.

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

4. 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.

5. While the matter stood as narrated supra, the Petitioner had made an application for review on 19.08.2019 invoking Section 7-B of the Act before the First Respondent in W.P. No. 31515 of 2019 for reconsideration of the determination of Provident Fund dues on the various allowances granted by the Petitioner to its employees in view of the decision of 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). The First Respondent in W.P. No. 31515 of 2019 by Order in TN/RO/TBM/ENF/19698/ 7B/CC-I/T-3/2019 dated 09.10.2019 declined to entertain the application for review as it had been filed after the prescribed period of limitation of 45 days from 28.02.2019 when the aforesaid judgment was delivered by the Hon'ble Supreme Court of India. Aggrieved thereby, the Petitioner has filed W.P. No. 31515 of 2019 challenging the said order and for consequential direction to the First Respondent in W.P. No. 31515 of 2019 to entertain the application for review filed by the Petitioner under Section 7-B of the Act. The contention of the Petitioner in W.P. No. 949 of 2020 is that the Respondents have to be restrained from claiming contribution on allowances from the Petitioner for the period prior to 28.02.2019 pursuant to the representation dated 31.12.2019 made by the Petitioner in that regard.

6. The First Respondent in the order impugned in W.P. No. 31515 of 2019 has cited para 79-A of the Employees' Provident Funds Scheme, 1952 (hereinafter referred to as the 'Scheme' for short), for declining to entertain the application for review filed by the Petitioner under Section 7-B of the Act. A bare perusal of the said para in the Scheme would show that an application for review cannot be entertained unless it is filed within 45 days from the date of passing of the order against which the review under Section 7-B of the Act has been sought by the establishment concerned.

7. As already noticed, this Court in the order dated 28.06.2018 in the Writ Petition in W.P. No. 22641 of 2013 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. Having regard to that fact situation, the Petitioner could seek to re-determine the amounts included in the allowances only after the decision of 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) was pronounced, and as such, the First Respondent in W.P. No. 31515 of 2019 had held that the date for computing limitation would have to commence from 28.02.2019, when that decision was delivered, but the Petitioner had filed the application for review on 19.08.2019, which was not within 45 days from that date. However, the Learned Counsel for the Petitioner has now brought to notice of this Court that a Review Petition in R.P. (C) Nos. 1972-1973 of 2019 in C.A. Nos. 3965-3966 of 2013 has been pending before the Hon'ble Supreme Court of India to reconsider the decision in Surya Roshni Ltd. -vs- Employees Provident Fund (Order dated 28.02.2019 in Civil Appeal Nos. 3965-3966 of 2013 etc., batch), which came to be dismissed by order dated 28.08.2019 and got merged into the earlier order dated 28.02.2019 and as such, the application filed by the Petitioner on 19.08.2019 could not have been rejected as time barred. A Circular No. C-I/1(33)2019/Vivekanand Vidyamandir/717 dated 28.08.2019 issued by the Additional Central Provident Fund Commissioner - HQRS, New Delhi has been relied to show that the various authorities under the Act (including the Respondents) were also required to await the disposal of the Review Petition in R.P. (C) Nos. 1972-1973 of 2019 in C.A. Nos. 3965-3966 of 2013 by the Hon'ble Supreme Court of India before proceeding to take coercive measures for recovery.

8. There is substantial force in the said contention, which is buttressed by the decision of the Hon'ble Supreme Court of India in Union of India -vs- West Coast Paper Mills Ltd., [(2004) 3 SCC 458], where it has been recognized by the operation of doctrine of merger that when the statute which provides for remedy for challenging any adjudication made to a higher forum and that right has been exercised, it is from the date of final decision by the higher forum that limitation would commence for another legal proceeding based on the adjudication made by the original authority. Viewed from that perspective, inasmuch as this Court had held that the final decision in

respect of differential allowances shall be kept in abeyance till the outcome of the Hon'ble Supreme Court of India, it is beyond any pale of doubt that in view of the pendency of the application for review against the order dated 28.02.2019 in Civil Appeal Nos. 3965-3966 of 2013 etc., batch that decision had not attained finality till 28.08.2019 when that application for review was dismissed confirming the earlier decision. As such, the application for review filed on 19.08.2019 by the Petitioner to reconsider the determination of various allowances in terms of the decision of 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) was not barred by limitation and it would have to be entertained by the First Respondent in W.P. No. 31515 of 2019 and decided on merits and in accordance with law.

9. However, it is not possible to countenance the contention raised by the Learned Counsel for the Petitioner in W.P. No. 949 of 2020 that the decision of 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) would have to be applied by the Respondents only for the period after 28.02.2019 when it was pronounced as it is not only factually untenable, but also militates against the fundamentals of jurisprudence for several reasons.

10. 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.

11. 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].

12. 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 as held by 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) after referring to several earlier decisions governing the subject.

13. Looked from any angle, the misconceived relief that has been sought in W.P. No. 949 of 2020 cannot be countenanced.

14. In view of the foregoing discussion, the Order in TN/RO/TBM/ENF/19698/ 7B/CC-I/T-3/2019 dated 09.10.2019 in the application for review passed by the First Respondent in W.P. No. 31515 of 2019 is set aside and the matter shall be listed for hearing before the First Respondent in W.P. No. 31515 of 2019 on 25.11.2020, and the Petitioner and the parties concerned shall appear on that date without fail. If the First Respondent in W.P. No. 31515 of 2019 is not in a position to take up the matter for hearing on that date, it shall inform to all parties concerned of the date of hearing to which it is adjourned in the

prescribed manner. The First Respondent in W.P. No. 31515 of 2019 shall afford a 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 on merits and in accordance with law. Though obvious, it is made clear that no view has been expressed by this Court on the correctness or otherwise on the merits of the factual controversies between the contesting parties.

15. In the result, W.P. No. 31515 of 2019 is ordered on the aforesaid terms and W.P. No. 949 of 2020 is dismissed. Consequently, the connected Miscellaneous Petitions are closed. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. The Regional Provident Fund Commissioner - I,
Employees Provident Fund Organisation,
Regional Office Tamabaram,
3, Rajaji Salai,
Chennai - 600 045.
2. The Regional Provident Fund Commissioner - II (C&R),
Employees Provident Fund Organisation,
Regional Office Tamabaram,
3, Rajaji Salai,
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3. The Secretary (L&S),
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5. The Recovery Officer,
Employees Provident Fund Organisation,
Ministry of Labour and Employment,
Regional Office, Tambaram,
3, Rajaji Salai,
Chennai - 600 045.

+2 Ccs to Mr.T.S. Gopalan & Co, sr 32402, 32403.

W.P. No. 31515 of 2019
and W.P. No. 949 of 2020

BP(CO)
SP(29/10/2020)