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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2081 OF 2018

The Regional Provident Fund Commissioner PETITIONER
Employees' Provident Fund Organization,
Regional Office, Plot No.2,
Bhavishya Nidhi Bhavan, Town Centre,
Commercial Area, CIDCO, Aurangabad 431 009

VERSUS

M/s Laxmi Agni Components & Forgings Pvt. Ltd., RESPONDENT
(Through its Authorized Signatory)
B-11/12, MIDC, Chikalthana, Aurangabad
Maharashtra

....
Mr. K. B. Chaudhary, Advocate for the petitioner
....

[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 30th MARCH, 2022
PRONOUNCED ON : 6th JUNE, 2022

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned advocate for the petitioner.

2. This petition, filed under Article 227 of the Constitution of India, is directed against the order dated 12th August, 2016 passed by the Provident Fund Appellate Tribunal (hereinafter for short "the Tribunal") in Appeal No. ATA No. 355 (9) 2016 thereby

setting aside the order dated 23rd February, 2016 passed by the petitioner under section 7-A of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 (hereinafter, for short "the said Act").

3. The petitioner is an "authorized officer" as defined under section 2 (aa) of the said Act, conferred with the powers to determine the amount of contribution due and payable as per the provisions of the said Act and schemes framed thereunder, from the establishments covered under the provisions of the said Act. The respondent is an establishment covered under the provisions of the said Act.

4. The establishment failed to remit the amount of contribution, therefore, an inquiry under section 7-A of the said Act was initiated. Pursuant to the inquiry, the Enforcement Officer submitted report that on the verification of salary statement tendered by the establishment for the period 2002-03 to 2009-10, the establishment has shown basic pay, HRA, washing allowance, personal allowance, education allowance, allowance-1, allowance-2, arrears, leave and Over Time payable to the employees and the attendance allowance is shown to have been paid from September, 2009 onwards. It is further stated that from the year 2003-04, the establishment has reduced

"basic wages" percentage, compared to the earlier "basic wages" and the same is done to avoid provident fund contribution to be paid by the employer. The Enforcement Officer, therefore, stated in his report that the allowances mentioned in the report may be treated as part of the "basic salary and wages" and by doing so, worked out the amount of contribution to be paid by the establishment at Rs.69,93,870/-.

5. The report was forwarded to the establishment and its reply was sought. The establishment submitted reply, contending that the employees are getting allowances as agreed by the union. Considering the definition of "basic wages", the allowances which are being paid by the establishment are exempted from being considered for assessment of the dues. Since the basic wages are being paid on the basis of settlement signed with the recognized union, the ratio percentage is not applicable. Sometimes, in terms of the agreement, wages are increased, but as per the understanding between the parties, it is not added to the basic wages, therefore, the say of the Enforcement Officer that there is reduction of basic wages is erroneous and cannot be accepted.

6. The petitioner, thereafter, called upon the Enforcement Officer to submit reply to the say filed by the establishment,

which was submitted on 26th November, 2015. The establishment thereafter submitted application on 1st January, 2016 requesting for reconsideration of the records and fresh assessment as the dues were calculated on the gross wages, including all the allowances and ignoring the ceiling limit of Rs.6500/-. The petitioner, therefore, directed the Enforcement Officer to re-verify the said issue and submit a report. On re-verification, the Enforcement Officer submitted a report dated 18th February, 2016, thereby working out liability of the establishment to the tune of Rs.31,42,675/- The said figure was arrived at by considering the ceiling limit of Rs.6500/-. The petitioner, thereafter, by order passed under Section 7-A of the said Act, on 23rd February, 2016 directed the establishment to pay dues of Rs.31,42,675/-.

7. The establishment challenged the order passed by the petitioner, by filing appeal ATA No. 355 (9) 2016 before the Tribunal.

The Tribunal, by relying upon the decision in the case of ***"Assistant PF Commissioner V/s G4S Securities Services (India) Limited, 2011 LLR 316, P & H HC***, held that the allowances in dispute cannot be included in the basic wages and provident fund authorities are having no right to issue any direction and order against the employer asking to pay PF contributions according to Minimum Wage Act. By relying on the decision in ***"Breaks India Ltd (Breaks Division) Sholinghur v/s EPFO, 2015 LLR 635***, the Tribunal held that the contractor, who is registered with the PF department having independent code number is to be treated as "independent Employer" and it is settled law that employees of an independent contractor, by no stretch of imagination, can be treated to be employees of establishment where they are working, claiming establishment as "Principal Employer". The Tribunal, therefore, held that the liability with regard to contractor registered cannot be fastened on the establishment. The Tribunal, therefore, by recording a finding that assessment of the petitioner of PF dues is entirely based on surmises and conjectures and, therefore, the petitioner has passed the impugned order illegally, set it aside and allowed the appeal. The petitioner is aggrieved by this order.

8. Heard learned advocate for the petitioner. Though served, none appears for the respondent.

9. The learned advocate for the petitioner, by relying on the decision of the Hon'ble Supreme Court in ***"Regional Provident Fund Commissioner (II) West Bengal V/s Vivekananda Vidyamandir and Others" (2020) 17 SC, 643,*** contended that the

present case is squarely covered by the said decision. According to him, the Tribunal has misread and misconstrued the definition of basic wages provided under section 2 (b) and Section 6 of the said Act.

He submitted that the inquiry was conducted for six years. According to him, decision in *"Assistant Provident Fund Commissioner, Gurgaon V/s M/s G4S Security Services (India) Ltd and Another" 2011 LLR 316*, is not applicable to the facts of the present case. He submitted that from the record it is clear that the establishment has reduced the basic wages as compared to the earlier basic wages and it is done to avoid the PF contribution. By relying on para 30 (2) (3) of the Provident Fund Scheme, he submitted that it is the liability of the Principal employer to pay the provident fund contribution, even if the contractor fails to pay the same. He, therefore, submitted that the impugned order passed by the Tribunal is unsustainable.

10. Perusal of the record indicates that the Enforcement Officer, after going through the salary sheets provided by the establishment has held that the establishment has shown basic pay, HRA, washing allowance, education allowance, allowance-1, allowance-2, allowance-3 and the establishment has decreased basic wage percentage after 2003-04 as compared to earlier

basic wages and included various allowances, such as personal allowance, allowance-1, allowance-2, allowance-3 in order to subterfuge basic wages. He has also found that though there was increase in gross salary during the entire time period, there was no increase in the basic pay / wages in proportion to the gross salary, since the increase was mainly adjusted in various allowances as noticed in the salary sheets. The Enforcement Officer, therefore, proposed that personal allowance, allowance-1, allowance-2, allowance-3, attendance allowance may be treated as basic salary / wages and calculated the proposed dues for the period 2002-03 to 2009-10 at Rs.69,65,412/-.

11. At the instance of the establishment, petitioner directed the Enforcement Officer to re-consider and re-verify the record of the establishment. On re-verification, liability of the establishment was calculated at Rs.31,24,675/-. The petitioner, therefore, passed order under section 7-A of the said Act, directing the establishment to pay a sum of Rs.31,42,675/-.

12. While upsetting the order passed by the petitioner, the Tribunal has relied on ***"Assistant PF Commissioner"*** (*supra*). The Tribunal, by relying on the said decision has held that the allowances in dispute cannot be included in the basic wages and

the direction of the petitioner / PF authority asking to pay PF contribution according to Minimum Wages Act, is without jurisdiction.

13. In ***"Regional Provident Fund Commissioner (II)"*** (*supra*), the Apex Court held that where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages and any variable earning which may vary from individual to individual according to their efficiency and diligence stands excluded from the basic wages. In the facts of that case it is held that in absence of any material to prove that allowances in question were either variable or were linked to any incentive or were not paid across the board to all the employees or were paid especially to those who avail the opportunity. Concurrent findings of authorities, that 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, calls for no interference.

14. Coming to the facts of the present case, it is clear from the record that the establishment has decreased basic wage percentage and included various allowances like personal allowance, allowance-1, allowance-2, allowance-3 in order to

subterfuge the basic wages. Though the salary record of the establishment showed increase in the gross salary of the employees during the entire time period, there was no increase in the basic pay / wages in proportion to the gross salary, since the increase was mainly adjusted in various allowances, which was noticed in the salary sheets. It is, therefore, clear that the said allowances were being paid essentially as a part of basic wages, camouflaged as part of allowances, so as to avoid deduction and contribution to the provident fund account of the employees.

15. The Hon'ble Apex Court in ***"Kichha Sugar Co. Ltd V/s Tarai Chini Mill Majdoor Union" (2014) 4 SCC 37*** held :

> " *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 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."

This citation is squarely applicable to the facts of the present case.

16. The Tribunal erred in relying on ***"Breaks India Ltd"*** (*supra*) while allowing the appeal of the establishment.

17. Para 30 of Employees Provident Fund Scheme 1952 reads thus -

" ***30. Payment of contributions*** *– (1) The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member's contribution).*

(2) In respect of employees employed by or through a contractor, the contractor shall recover the contribution payable by such employee

(in this Scheme referred to as the member's contribution) and shall pay to the principal employer the amount of member's contribution as deducted together with an equal amount of contribution (in this Scheme referred to as the employer's contribution) and also administrative charges.

(3) It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges.

*[Explanation – For the purpose of this paragraph the expression "administrative charges' means such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value f\of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee, and in respect of which provident fund contributions are payable, as the Central Government may, in consultation with the Central Board and having regard to the resources of the Fund for meeting its normal administrative expenses, fix]***"**

18. In view of clauses 2 and 3 of Para 30 of the Employees Provident Fund Scheme 1952, it is clear that it is the responsibility of the principal employer to pay both the PF contribution payable by himself and also in respect of employees employed by or through contractor. The appellate Tribunal has erred in recording a finding that liability with regard to contractor register cannot be fastened on the appellant establishment, hence the establishment cannot be treated as principal employer.

Since the finding is recorded by the Tribunal in ignorance of the above provision, the same is unsustainable.

19. For the aforestated reasons, the writ petition is allowed in terms of prayer clause 'B'. The impugned order dated 12.08.2016 passed by the appellate Tribunal in Appeal ATA No. 355(9) 2016 is hereby quashed and set aside. Rule is made absolute in aforesaid terms. No costs.

[NITIN B. SURYAWANSHI]
JUDGE

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