IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2082 OF 2018

The Regional Provident Fund Commissioner,
Employees' Provident Fund Organization,
Regional Office, Plot No. 2,
Bhavishya Nidhi Bhavan, Town Centre,
Commercial Area, Cidco, Aurangabad-431009. ...**PETITIONER**
[Ori. Respondent]

VERSUS

M/s. Shreya Life Sciences Pvt. Ltd.
B-9/2, MIDC, Waluj, Aurangabad- 431136. ...**RESPONDENT**
[Ori. Appellant]

....

Mr. K.B. Chaudhary, Advocate for the Petitioner
Mr. Sachin Dankh, for the Respondent.

....

[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 parties.

2. This petition, filed under article 227 of the Constitution of India is directed against the order dated 04.07.2016 passed by the

Provident Fund Tribunal in Appeal ATA No. 678(9) 2015, thereby setting aside the order dated 19.05.2015, passed by the petitioner under Section 7-A of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 (for short '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 respondent failed to remit the amount of contribution, therefore an inquiry under section 7-A of the said Act was initiated, in the year 2011. The respondent was called upon to submit necessary documents including statements of month wise salary for the period 2007-08, 2008-09, salary sheet for the period 2009-10, balance sheet for the period 2007-08, 2008-09 and 2009-10, etc. The Enforcement Officer, who conducted an inquiry, submitted report on 19.03.2015 stating that while verifying the salary/wages it is observed

that employer is complying on the basic salary/wages in respect of all employees more and above than the statutory wages limit i.e. Rs. 6500/-. It was noticed that dearness allowance was not being paid, instead special allowance was being paid to the employees. The dues of the employees were collected as per the enclosed year wise sheets. The details of the employees and the dues in respect of each employees were calculated. According to the Enforcement Officer, total dues of Rs. 11,93,166/- were required to be paid by the respondent for the period between 5/2007 to 3/2008, 4/2008 to 3/2009, 4/2009 to 8/2009.

5. The said report was supplied to the respondent for filing its say. The respondent submitted its say on 11.05.2015 contending that the said report is liable to be rejected in the light of decision of Karnataka High Court in the matter of Employee State Insurance Corporation and Karnataka Asbes Stores Cement Products, the report of Enforcement Officer does not meet the criterias and specifications laid down by the said judgment. In the said report, no specifications as regard to the omitted wages are given. The respondent therefore, contended that the report of the Enforcement Officer be rejected and proceedings initiated against them be closed. In the event, the

petitioner rejects the contention/application of the respondent, then the respondent may be given an opportunity of being heard and contest the inquiry.

6. The petitioner thereafter passed order under section 7-A of the said Act, on 19.05.2015 thereby directing the respondent to pay sum of Rs. 11,93,166/-. Further direction is given to respondent to submit all pending monthly and yearly return immediately.

7. Being aggrieved by the said order the respondent approached Provident Fund Appellate Tribunal by filing appeal ATA No. 678(9) 2015. The Tribunal while allowing the appeal has held that the special allowance which is in dispute cannot be included in the basic wages treating it as dearness allowance. The Tribunal further held that there is no evidence on case file which would reveal that special allowance is given to all the employees employed by the respondent/establishment. The petitioner is aggrieved by this order.

8. Heard the learned advocate for the petitioner and learned advocate for respondent. The learned advocate for the petitioner by

relying on the decision Hon'ble Supreme Court in ***Regional Provident Fund Commissioner (II) West Bengal Vs. Vivekananda Vidyamandir and Others*** (2020) 17 SCC 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.

The learned advocate for the Petitioner submits that the inquiry was conducted for six years. He further submits that the decision in ***Assistant Provident Fund Commissioner, Gurgaon Vs. M/s. G4S Security Services (India) Ltd, and another***, 2011 LLR 316, is not applicable to the facts of the present case as the said decision does not take into consideration the payment of special allowance to the employees. According to him by splitting wages, the respondent is avoiding the payment of provident fund contribution. He further submits that on 19.03.2015 the report was submitted by the Enforcement Officer. The establishment has filed reply to the same on 11.05.2015, thereafter, the impugned order is passed on 19.05.2015, thus proper opportunity of hearing was given to the establishment. He therefore, submits that the impugned order passed by the Tribunal is liable to be quashed and set aside.

9. Per contra, the learned advocate for the respondent submits that the Karnataka High Court judgment which is relied upon by the Tribunal is subject matter of challenge before the Apex Court, therefore, the decision in the present case be deferred till the said matter is decided by the Apex Court. He further submits that during the course of inquiry no opportunity of hearing was given to the respondent as provided under section 7-A(3) of the said Act. In that view of the matter, in case this Court comes to a conclusion that the order of the Tribunal is unsustainable, the matter may be remitted back to the petitioner. According to him, though reply to the Enforcement Officer's report was filed and after filing of said reply, no summons or notice was given to the respondent. Further submission is that the Enforcement Officer's report does not contain details i.e. names of employees to whom the special allowance was being paid. He submitted that the Tribunal is justified in setting aside the petitioner's order by giving cogent reasons. He submits that, Section 12 of the said Act is not applicable in the facts of the present case, as respondent has not reduced the basic wages. He therefore submits that the decision in

the present matter may be deferred till the decision of Karnataka case is rendered by the Apex Court and in the alternative he submits that there is no substance in the petition and the petition is liable to be dismissed.

10. The record indicates that the Enforcement Officer has conducted an inquiry by seeking documents from the respondent, from time to time. After going through the documents made available by the respondent, the Enforcement Officer submitted a report dated 19.03.2015 wherein he has observed that the respondent has remitted the provident fund dues to basic and no 'dearness allowance' is paid to the employees, but the respondent is paying 'special allowance' to the staff and workers since the respondent was unable to clarify the payment of special allowance dues are required to be determined as proposed. As the respondent has failed to contribute on the special allowance which was given to the staff and the special allowance is paid in order to subterfuge the employees provident fund contribution as per the definition of section 2(b) of Basic Wages. The special allowance is not excluded from the definition of Basic Wages, hence the special allowance is considered for assessment as per Enforcement Officer's

report, and the dues are determined for the period from 05/2007 to 08/2009.

11. The Enforcement Officer in his report has mentioned that *"it is observed that the salary/wages in most of the cases is less than Rs. 6500/- and compliance in respect of those employees were made on the basic wages/salary only even after the special allowance was paid to the staff and workers of the establishment, in absence of the Dearness allowance in the salary/wages sheets the employer has to comply on the special allowance but failed to do so. That the undersigned here by considered the special allowance as dearness allowance as the salary/wages sheet were not showing the dearness allowance and the undersigned calculate the dues on the special allowance which restricted to Rs. 6500/- (Basic+Special Allowance) the dues were calculated as per enclosed year wise sheets, the details of employees and the dues in respect of each employees were calculate and the soft copy is provided to the employer for further necessary action and to submit the returns and to deposit the dues. The dues in respect of account number 21 were calculated as per the calculation sheet but the same were not assess/not shown in this report due to establishment is*

having EDLI exemption."

The Enforcement Officer has therefore, reached to a conclusion that the dues payable by the respondent are 11,93,166/-. It is clear from the report that year wise sheets, details of employees and dues in respect of each employees which are calculated and the soft copy is provided to the employer/respondent for further necessary action to submit returns and to deposit the dues. Thus, the respondent is made aware of the details of the dues to be paid by it.

12. By way of a cryptic reply the respondent has submitted that there are no specifications as regard to the omitted wages which could aid it in revealing calculation of alleged liability in the observations. The respondent further contended that in absence of these specifications great prejudice and irreparable loss will be caused if the inquiry is proceeded further on such report. The respondent, therefore, requested to close the proceedings forthwith.

13. The Enforcement Officer has prepared his report on the basis on record made available by the respondent. The Enforcement

Officer has furnished all the details of the employees and dues in respect of each employee to be paid by the respondent, to the respondent. This fact is also reflected in the report. Since the entire data was furnished to the respondent, the respondent could not have stated that specifications as regards omitted wages be given to it. It is true that the respondent in its reply claimed opportunity of hearing to contest the inquiry in case the petitioner rejects its say/application. It is a matter of record that the order of the petitioner was passed on the basis of Enforcement Officer's report, the Enforcement Officer had forwarded all the necessary details and data in respect of each employee to the respondent. Thus even if for the sake of argument the argument of the respondent is accepted that opportunity of hearing was denied to it, still on the basis of material on record even after giving opportunity of hearing to the respondent the same order, which is passed by the petitioner would have been passed. Therefore, in the peculiar facts of the present case, non followance of principles of natural justice would not vitiates the order passed by the petitioner.

14. While setting aside the order passed by the petitioner, the Tribunal has placed reliance on *Assistant Provident Fund*

Commissioner, Gurgaon (supra). The Tribunal has held that the special allowance cannot be included in basic wages, treating it as dearness allowance. It is also held that there is no evidence on the case file which could reveal that special allowance is given to all the employees employed by the respondent. These observations are contrary to the report of the Enforcement Officer's report which categorically states that the special allowance was being paid to all the employees.

15. In *Regional Provident Fund Commissioner (II) West Benga*l (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 allowance 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.

16. Coming to the facts of the present case, admittedly, there is no material placed on record by the respondent to show that special allowance was being paid only to limited employees, who earned it. On the contrary, it is clear from the Enforcement Officer's report that each employee was being paid special allowance. It is therefore clear that the special allowance was being paid essentially as a part of basic wage camouflaged as part of an allowance, so as to avoid deduction and contribution to the provident fund account of the employees.

17. The Hon'ble Apex Court in ***Kichha Sugar Co. Ltd v. 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.

18. In *Assistant Provident Fund Commissioner, Gurgaon* (supra) the grievance of the Assistant Provident Fund Commissioner before the learned Single Judge of Punjab and Haryana High Court

was that rates of minimum wages which ought to have been taken into consideration are not being done so by the Respondent and by splitting up the wage structure there is an evasion of its liability. In the facts of that case the Court held that the contention of the learned counsel for the petitioner is misplaced and that the respondent have rightly excluded certain allowances such as house rent allowance, washing allowance and conveyance allowance while determining their liability towards the fund. This judgment is challenged before the Hon'ble Apex Court and learned advocate for the respondent urged to keep the present petition pending till the decision is rendered by the Hon'ble Apex Court.

19. I am unable to accept the said contention as the issue raised in the present petition is already covered by the decision of the Hon'ble Supreme Court in *Regional Provident Fund Commissioner (II) West Benga*l (supra). Since in the present case this Court has come to a conclusion that the special allowance was being paid to all the employees and there is no material placed on record by the respondent to show that it was being paid only to limited workers who earned it. Since this issue is covered by the said decision, it is not necessary to

keep the present petition pending till the decision in *Assistant Provident Fund Commissioner, Gurgaon* (supra).

20. For the aforestated reasons, the writ petition is allowed in terms of prayer clause 'B'. The impugned order dated 04.07.2016 passed by the learned Tribunal in Appeal ATA No. 678(9) 2015 is hereby quashed and set aside. Rule is made absolute in the aforesaid terms. No costs.

[NITIN B. SURYAWANSHI]
JUDGE