

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 10397 of 2019

**The Peerless Inn
Vs.
Central Provident Fund Commissioner & Ors.**

For the petitioner	:	Mr. Ranjay De Mr. Basabjit Banerjee Mr. Bikram Sarkar Ms. Sayani Bose
For the PF authorities	:	Mr. S.C.Prasad
For the respondent no.4	:	Mr. R.Guha Thakurta Ms. Senjuti Sengupta Ms. Dipa Roy Ms. Dona Ghosh
Heard on	:	05.01.2023, 20.04.2023, 25.04.2023, 02.05.2023
Judgment on	:	02.05.2023

Raja Basu Chowdhury, J:

1. The present writ application has been filed, inter alia, challenging the order dated 23rd May, 2019 passed by the Assistant Provident Fund Commissioner, RO, Park Street Kolkata.
2. The original respondent no. 4 was appointed with the writ petitioner sometimes in or about 13th February 1993 in the

maintenance department. While the original respondent no. 4 was in employment, a charge sheet-cum-order of suspension dated 12th December 2001 was issued alleging that the original respondent no. 4 along with other employees, who were either on duty or off duty had assembled in front of the main gate, walked through the lobby towards the office of the VP & GM (O), shouted slogans and pasted posters, both inside and outside the hotel lobby thereby defacing the entire walls. The above constituted major misconduct on the part of the original respondent no. 4 and the original respondent no. 4 was called upon to explain in writing why disciplinary action shall not be taken against him. The reply to the charge sheet having been found unsatisfactory, a regular disciplinary proceeding was initiated against the original respondent no. 4 along with other employees.

3. Records reveal that on 15th August 2003, the enquiry officer submitted his report and a copy thereof was also served on the original respondent no. 4. By a communication in writing dated 12th November 2004, the original respondent no. 4 had made a representation. However, no final order in such proceeding was passed.
4. In the interregnum, a conciliation was initiated before the office of the Assistant Labour Commissioner. The conciliation having failed, the appropriate Government, by order dated 7th April 2008

by a Governmental Order was, inter alia, pleased to refer the dispute between the parties to the Learned First Industrial Tribunal, West Bengal by framing the following issues:

“ I S S U E (S)

1. *Whether the suspension of Sri Rajesh Sharma and 18 others (vide list enclosed) from their services by the management w.e.f. the date mentioned against each in the list is justified?*
2. *What relief, if any are the workmen entitled to?”*

5. The said reference was registered as Case no. VIII-18/2005. Both the petitioner as also the concerned union representing the charge sheeted workmen filed their respective written statements. However, prior to the Tribunal adjudicating the terms of reference, the original respondent no. 4 having reached the age of superannuation on 27th December, 2015 was permitted to retire
6. At the time of retirement, the original respondent no. 4 was paid in total a sum of Rs.12,24,454/-. The original respondent no. 4 accepted the same. However, subsequently, since according to the original respondent no 4, the petitioner did not deposit the provident fund contributions amounting to Rs. 2,73,506/- with the provident fund authorities, a writ application was filed before this Court which was registered as WP no. 11830 (W) of 2018.

7. On contested hearing, by order dated 18th March 2019, a Coordinate Bench of this Hon'ble Court, by taking into consideration the grievance of the original respondent no. 4 was, inter alia, pleased to dispose of the writ application by directing the original respondent no. 4 to file a composite representation before the concerned Assistant Provident Fund Commissioner dealing with the affairs of the provident fund contribution of the petitioner, claiming appropriate relief for obtaining pensionary benefits.
8. It was made clear that in the event the aforesaid representation was made within the stipulated period as indicated in the said order, the concerned Assistant Provident Fund Commissioner shall pass a reasoned order deciding the claim of the original respondent no. 4. Records reveal that the original respondent no.4, in terms of the liberty granted by the Coordinate Bench of this Hon'ble Court had made a composite representation whereupon the Assistant Provident Fund Commissioner by affording opportunity of hearing, to both the original respondent no. 4 as also the petitioner had passed an order dated 23rd May 2019, which forms the subject matter of challenge in the instant writ application.
9. Mr. Dey, learned advocate appearing for the petitioner submits that the original respondent no. 4 had retired as a suspended employee. During the entire period of suspension, the petitioner in compliance of the provisions of the West Bengal Subsistence Allowance Act, 1969, had made payment of subsistence allowance to the original

respondent no. 4. The said subsistence allowance does not constitute basic wages as defined, under Section 2(b) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter being referred to as the “said Act”). He argues that unless the original respondent no. 4 was paid basic wages during the period of suspension, there is no obligation on the part of the petitioner to make provident fund contributions.

10. By referring to Section 2(rr) of the Industrial Disputes Act, 1947, it is submitted that “wages” means and includes all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment, or of work done in such employment, and includes allowances and the like as morefully enumerated in Section 2 (rr) of the Industrial Disputes Act, 1947.
11. He says that the original respondent no. 4, on being suspended could not have fulfilled the terms of employment, for him to acquire a right to claim wages within the meaning of Section 2 (rr) of the Industrial Disputes Act, 1947 and as such, the petitioner was under no obligation to make payment of provident fund contributions for the period for which the original respondent no. 4 remained suspended.
12. By placing reliance on a judgment delivered by the High Court of Orissa in the case of **M/s Orissa Air Products Pvt. Ltd. v.**

Regional Provident Fund Commissioner (C & R), Khurda and Another¹ it is contended that the issue whether payment of subsistence allowance paid to a suspended employee forms part of basic wages, is no longer res-integra.

13. He also placed reliance on a judgment delivered by the Hon'ble Supreme Court in the case of **Kichha Sugar Company Limited Through General Manager v. Tarai Chini Mill Majdoor Union, Uttarakhand**² in support of his contention that extra bonus allowances payable to a workman does not constitute basic wages and that the basic principles for consideration of what would constitute basic wages have long been settled in the case of **Bridge and Roofs Co. Ltd. v. Union of India & Ors.** ³, wherein the Hon'ble Supreme Court had, *inter alia*, been pleased to note down which of the payment would constitute basic wages and which would not.

14. Simply because the original respondent no. 4 had been paid the differential amount to make payment of full wages, payable to the original respondent no.4, during the period spent by the original respondent no. 4 in suspension, the same would not constitute basic wages within the meaning of Section 2(b) of the said Act, for the petitioner to make payment of employer's contribution under the said Act.

¹ 2012-III-LLJ-597 (Ori)

² (2014) 4 SCC 37

³ AIR 1963 SC 1474

15. He says that the effect of legal fiction cannot be extended beyond the purpose for which it is created. In support of the aforesaid contention, he places reliance on a judgment delivered by the High Court of Judicature at Bombay in the case of ***Motor Industries Company, Ltd. v. Popat Murlidhar Patil and others***⁴. He says that under no stretch of imagination can subsistence allowance be converted to wages.
16. In the factual backdrop as aforesaid, he submits that the order passed by the Assistant Provident Fund Commissioner is without any basis, and no reason has been provided for. The petitioner cannot be directed to make payment of provident fund contributions in respect of the original respondent no. 4. No reasons have been assigned in the aforesaid order. The decision rendered by the Assistant Provident Fund Commissioner, in any event has become an academic exercise, in the light of the original respondent no.4 accepting his retiral dues, and no fruitful purpose will be served in enforcing such order. The Assistant Provident Fund Commissioner has acted irregularly. The order should be set aside and quashed.
17. *Per Contra* Mr. Guha Thakurta, learned advocate appearing for the substituted respondent no. 4 (a) has taken me through all the documents on record, inter alia, including the charge sheet and the order of suspension. He says that before the proceedings pending before the Tribunal could come to an end, the original respondent

⁴ 1997 (1) L.L.N. 749

no. 4 reached the age of superannuation on 27th December 2015 and was permitted to retire. At the time of retirement, he was paid his net salary including other benefits.

18. By drawing the attention of this Court to page 131 of the writ application, he says that the petitioner all along proceeded on the premise that the provident fund contributions need to be paid and it is for such reason, the provident fund contributions have been included in the computations of payments, based on which payment was disbursed in favour of the original respondent no. 4, however, since the manner, mode and quantification of payment was irregular/ illegal, the same was challenged.

19. It is submitted that the stand taken by the petitioner before this Court to, *inter alia*, contend that the provident fund contribution is not payable to the original respondent no. 4, for the period he was under suspension, is by way of an afterthought and is an argument in desperation. He says that the right of the respondent no. 4 to receive the provident fund cannot be questioned by the petitioner.

20. It is submitted that the respondent no. 4(a) was, at all material times, ready and willing and had also made over the amount paid by the petitioner towards the provident fund contributions directly to the original respondent no. 4, for the petitioner to deposit the same with the provident fund authorities in terms of the order which is impugned in the present proceedings. However, it is the petitioner who had not accepted the same and had returned the same to the

respondent no. 4(a). In the facts stated herein above, he prays for dismissal of the writ application with costs.

21. Mr. Prasad, learned advocate appearing for the provident fund authorities, on the other hand, while adopting the submission made by Mr. Guha Thakurta submits that in this case, admittedly the domestic enquiry has not been concluded till today. The employee-employer relationship between the original respondent no. 4 on one hand and the petitioner on the other having been determined by cessation of employment, no punishment could have been inflicted on the original respondent no. 4.

22. He says that the petitioner was aware with regard to the aforesaid and for reasons thereof, the petitioner had made payment of entirety of the wages as were payable to the original respondent no. 4, less the amount already paid towards subsistence allowance. He says that there is no irregularity on the part of the Assistant Provident Fund Commissioner in issuing the directions. The petitioner cannot avoid its liability. By placing reliance on Section 12 of the said Act, he says that no employer of any establishment, for whatever reason, can reduce the quantum of wages payable to its employees. The wages once paid cannot be reduced under any circumstances. He says that the order passed by the Assistant Provident Fund Commissioner cannot be faulted and there is no irregularity in passing the order which is impugned in the present proceedings.

23. Heard the learned advocates appearing for the respective parties and considered the materials on record. Although the parties have deliberated on several points, the primary question that falls for consideration in the present writ application is whether despite the original respondent no. 4 being superannuated during the period of his suspension and having been permitted to retire, could the petitioner claim the amount paid by the petitioner, for the period of suspension up to the date of superannuation to be treated as subsistence allowance, or whether consequent upon abrupt termination of enquiry proceedings, on the cessation of employee-employer relationship, the right of the original respondent no.4 to receive the wages which had remained dormant by reason of his suspension, revives, for him to claim the balance in the form of wages, and to seek compliance of all statutory formalities by the petitioner.
24. The admitted facts of this case would demonstrate that the original respondent no. 4 was charge sheeted on 12th December 2001 and was simultaneously put under suspension. The reply of the original respondent no. 4 having been found unsatisfactory, a regular disciplinary proceeding was initiated. Before such proceeding could conclude, the employee-employer relationship came to an end on account of the original respondent no. 4 reaching the age of superannuation.

25. Records reveal that the petitioner permitted the original respondent no. 4 to retire and simultaneously made payment of a sum of Rs.12,24,454/- as per the following particulars:

*“Total amount payable to Mr. Prabir Das as full and final settlement, who retired on 27/12/2015 during suspension period pending enquiry = Rs.12,24,154/- {Net Arrear Wages Rs. 769595 + Bonus for 14 years (2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008 and 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015 & upto Dec 2015) Rs.=111900/- + LTA @ Rs.2000/-x 14 yrs 9 months 29500 ÷ 80 days PL encashment 2001 = (14870/30*80) days = Rs.39653/-. Plus P.F. and Gratuity as per Company’s rule.”*

26. The aforesaid would demonstrate that the original respondent no. 4 was paid his balance net arrear wages of Rs. 7,69,595/- and in addition thereto, was paid bonus for 14 years and other benefits. It is, therefore, apparent that even during the period for which the original respondent no. 4 was placed under suspension, the petitioner had not only paid the wages but had made payment of bonus and also *leave* encashment to the original respondent no. 4.
27. Mr. Dey, learned advocate appearing for the petitioner had strenuously argued that subsistence allowance does not qualify as basic wages as defined under Section 2(b) of the said Act or under Section 2 (rr) of the Industrial Disputes Act, 1947. It has been, inter alia, contended by referring to the aforesaid provisions that the

petitioner cannot be made responsible for payment of provident fund contributions, simply because the original respondent no. 4 had superannuated as a suspended employee and for the suspended period, he cannot be entitled to the basic wages, for the petitioner to make payment of provident fund contributions.

28. In support of his contention, Mr. Dey has placed reliance on a judgment of the Orissa High Court in the case of **M/s. Orissa Air Products Pvt. Ltd.** (*supra*). He has also referred to the case of **Kichha Sugar Company Limited** (*supra*) to, *inter alia*, contend that any payment by way of special incentive or otherwise would not constitute basic wages.

29. It is well settled that a judgment is an authority for what it decides. A slight variation in facts may lead to a completely different result. In the present case there is no dispute that the original respondent no. 4 was under suspension. However, before the disciplinary proceeding could be concluded, the original respondent no. 4 having reached the age of superannuation, was permitted to retire.

30. Interestingly, the petitioner while making payment of the retiral benefits to the original respondent no.4 not only made payment of arrear wages but bonus for 14 years, leave encashments, gratuity and provident fund dues. The document at page 131 of the writ petition does not indicate that that the petitioner had made payment of only the balance of subsistence allowance. The aforesaid

document in no uncertain terms records that the petitioner had computed the retiral dues of the original respondent no. 4, based on wages payable to him at the time of retirement, including the suspended period. There is no escape from the document prepared by the petitioner in relation to payment of retiral benefits of the original respondent no. 4. Once, after the abrupt termination of enquiry proceedings the petitioner made payment of the aforesaid amount which included wages and other allowances, the same no longer remains to be a part of the subsistence allowance. It would thus, lead to inevitable conclusion that what was paid to the original respondent no. 4 was the basic wages, including the bonus, leave encashments and gratuity even for the period he was kept under suspension.

31. The petitioner, thus cannot be permitted to take contradictory stand especially, having permitted the original respondent no. 4 to retire and having disbursed his wages, bonus and leave encashments for the suspended period cannot avoid liability.

32. In the light of the above the judgment delivered by the Hon'ble High Court of Judicature at Bombay in the case of **Motor Industries Company, Ltd** (supra) also does not assist the petitioner, as the provident fund authorities had not purported to give effect to any legal fiction. The determination made by the Assistant Provident Fund Commissioner was on the basis on a direction passed by a Co-ordinate Bench of this Court on 18th March, 2019. In any event the

aforesaid judgment is distinguishable on facts. In the aforesaid case the subsistence allowance was paid to the workman, for the period of suspension till the date of dismissal. The workman had claimed the said allowance received by him during the suspended period amounted to salary or wages. Unlike the present case the workman there had been dismissed from service. It is well settled that as per service jurisprudence the enquiry starts with a chargesheet and ends with either finding of guilt or exoneration. In the present case the enquiry had to be abruptly terminated by reasons of cessation of employee employer relationship. Once the enquiry is abandoned, the employer loses the right to continue with the enquiry or to punish. It is settled law that a suspension can be ordered in contemplation of an enquiry proceedings. The learned first Industrial tribunal by his award dated 17th December, 2018, while returning a finding that the that the petitioner was justified in its action had, *inter alia*, observed as follows:

“ Therefore, on giving an anxious consideration of all aspects of evidences and materials on record any view of the discussions made above and the reasons stated therein, I am of the view that the management is justified in placing the 19 workmen under suspension in contemplation of the disciplinary proceedings. “

33. It is, therefore, apparent that justifiability of the suspension order was dependent upon the contemplated disciplinary proceedings. Once the disciplinary proceedings were abandoned in so far as the

original respondent no.4 was concerned, the petitioner lost the right to treat the period spend by the original respondent no. 4 on suspension, as such. The right to receive wages which had remained suspended by reasons of the order of suspension, revived on the abrupt termination of the enquiry proceedings.

34. The case of **M/s. Orissa Air Products Pvt. Ltd.** (*supra*), is also distinguishable from the facts of this case. The Hon'ble Orissa High Court while deciding whether payment of last drawn wages as required under of section 17B of the Industrial disputes Act, 1947 would constitute basic wages under the said Act, had opined that any payment made under section 17B of the Industrial disputes Act, 1947 is in the nature of subsistence allowance given to the workman, who has been ordered to be reinstated in service by the Labour Court, the same is not actual wages earned and do not constitute basic wages within the meaning of the said Act. In the case of **Kichha Sugar Company Limited** (*supra*) the the Hon'ble Supreme Court was considering whether payment of hill development allowance and other allowances, would constitute basic wages within the meaning of the said Act. The Hon'ble Supreme Court in the said judgment was not concerned with a suspended employee, against whom the enquiry proceedings had been abandoned by his employer. The aforesaid judgments do not assist the petitioner.

35. In the facts stated herein above, the Assistant Provident Fund Commissioner cannot be faulted for having decided the issue on the basis of the direction passed by the Co-ordinate Bench of this Hon'ble Court. I do not find any irregularity in procedure or any illegality on the part of the Assistant Provident Fund Commissioner in passing the order impugned.
36. On the basis of discussions as aforesaid, no case for interference has been made out. The writ application being WPA 10397 of 2019 fails and the same is accordingly **dismissed** without any order as to costs.
37. Urgent photostat certified copy of this judgment, if applied for, be given to the parties on priority basis upon compliance of requisite formalities.

(Raja Basu Chowdhury, J.)

Saswata
Assistant Registrar (Court)