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W.A.No.1655/2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 06-02-2023

CORAM

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

AND

THE HONOURABLE MR.JUSTICE J.SATHYA NARAYANA PRASAD

W.A.No.1655 of 2022

The Regional Provident Fund Commissioner,
Employees Provident Fund Organisation,
Sub Regional Office,
Ambattur.

...

Appellant

-vs-

1.M/s.Colorplus Fashions Ltd.

2.Employees Provident Fund Appellate Tribunal,
Scope Minar, Core-II, 4th Floor,
Laxmi Nagar District Centre,
Laxmi Nagar,
New Delhi – 110 092.

...

Respondents

Appeal is filed under Clause 15 of the Letters Patent against the order,
dated 11.05.2022, passed in W.P.No.18104 of 2012, on the file of this Court.

For Appellant : Mrs.Sunitha Kumari

For Respondent 1 : Mr.Anand Gopalan,
for M/s.T.S.Gopalan & Co.



JUDGMENT

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This appeal has been preferred against the order of the learned single Judge, dated 11.05.2022, passed in W.P.No.18104 of 2012, whereby the order passed by the second respondent Appellate Tribunal was confirmed.

2. The issue in this case revolves around as to whether "attendance bonus" should come within the purview of "basic wages" in terms of Section 2 (b) (ii) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, in short, "the Act".

3. For the sake of convenience, the expression of "basic wages" under Section 2 (b) of the Act is extracted below :

"2.(b). "basic wages" means all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include --

(i) the cash value of any food concession ;

(ii) any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment ;



(iii) any present made by the employer.

4. The main contention of the appellant is that "attendance bonus" has to be included as a part of basic wages as it cannot and under any stretch of imagination fall under the exclusion clause and that will not attract Section 6 of the Act.

5. Section 6 of the Act reads as under :

"6. Contributions and matters which may be provided for in Schemes.— The contribution which shall be paid by the employer to the Fund shall be ten per cent. of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable to each of the employees (whether employed by him directly or by or through a contractor), and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding ten per cent of his basic wages, dearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section:

Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words ten per cent, at both the places where they occur, the words twelve per cent shall be substituted:

Provided further that where the amount of any contribution



payable under this Act involves a fraction of a rupee, the Scheme may provide for the rounding off of such fraction to the nearest rupee, half of a rupee or quarter of a rupee."

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6. As per the above Section 6 of the Act, the employer has to make contribution to Employees Provident Fund and any other allowances falling under this Section need to be paid.

7. The Employees Provident Funds and Miscellaneous Provisions Act, 1952, alone defines the word "basic wages" and no other labour enactment defines the said word, but only refers to "wages".

8. A reading of Section 6 of the Act would make it clear that even though dearness allowance is excluded under the definition "basic wages", the contribution has to be paid in terms of Section 6. Whether Clause 29 of the Employees Provident Fund Scheme is in conformity with Section 6 needs to be answered, as it appears that the said provision in the Scheme runs counter to Section 6 of the Act. However, we are not answering the said issue in the present appeal.

9. In the instant case, the employee has been paid bonus every month



provided he reported for work on all six days of a week. If he failed to report so, then, attendant bonus was paid on pro-rata basis. It is one way of making an employee not to avail frequent leave and to avoid absenteeism and also to ensure that he/she reports for work. Bonus is paid to employees under the Payment of Bonus Act, 1965, at 8.33% per annum subject to a maximum of 20%, based on the provisions of the said Act. If the employee avails a day's leave in a week, he/she will lose 5% of the attendance bonus. In case he/she avails 2 days' leave in successive weeks, he/she will lose 10% and if he/she avails more than three days, no attendance bonus is given.

10. As stated supra, attendance bonus is paid to the employees to ensure their presence and avoid absenteeism. The present bonus, namely, attendance bonus is not one under the Payment of Bonus Act, as stated above.

11. The learned single Judge, referring to definition of "bonus" and relying upon a decision of the Supreme Court in *Bridge and Roofs Company Limited v. Union of India and Others*, AIR 1963 SC 1474, has held that by no stretch of imagination it can be termed as "bonus" under the Payment of Bonus Act. The learned single Judge also relied upon a decision of the Supreme Court in *The Regional Provident Fund Commissioner v. Vivekananda Vidyamandir*, 2019 SCC Online 291, which is extracted below :



"14. Applying the aforesaid tests to the facts to the present appeals, no material has been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in."

12. The learned single Judge has further held that "attendance bonus" would qualify as bonus for the purpose of exclusion from Section 2 (b) (ii) of the Act. The contention of the appellant that the employer is adopting a dubious method to overcome the payment of this benefit to the employees is not acceptable. Whether the employee reports for work or not, provided he avails leave well within the norms, the entire basic wages have to be taken into account for the purpose of payment of Employees Provident Fund contribution in the light of Section 6 of the Act. Attendance bonus is payable depending upon the number of days the employee attends to work. It varies. When there is an exclusion clause and that the attendance bonus payable to the employee falls within the exclusion clause, we are of the view that "attendance bonus" would fall within the expression "bonus" in terms of Section 2 (b) (ii) of the Act and is



well within the exceptions carved out from "basic wages". Hence, we do not find any reason to interfere with the order passed by the learned single Judge.

13. Writ Appeal is, accordingly, dismissed. No costs.

Index : Yes/No

Internet : Yes/No

Speaking / Non-speaking Order
dixit

(S.V.N.,J.)

(J.S.N.P.,J.)

06-02-2023

To

Employees Provident Fund Appellate Tribunal,
Scope Minar, Core-II, 4th Floor,
Laxmi Nagar District Centre,
Laxmi Nagar,
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S.VAIDYANATHAN,J.
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