IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.08.2023

CORAM

THE HON'BLE Mr. JUSTICE **G.K.ILANTHIRAIYAN**

W.P. No.34827 of 2014

Central Board of Trustees (EPF),
Represented by Assistant Provident
Fund Commissioner,
O/o.Regional Provident Fund Commissioner,
Dr.Balasundaram Road,
Coimbatore – 641 018. .... Petitioner

Vs

1. Presiding Officer,
Employees Provident Fund Appellate Tribunal,
(Ministry of Labour and Employment,
Government of India),
SCOPE MINAR, CORE II,
4th Floor, Lakshmi Nagar District Centre,
Lakshmi Nagar, New Delhi – 110 092

2. M/s.N.Mahalingam & Co.,
No.102, Coimbatore Road,
Pollachi – 642 002. .... Respondents

PRAYER: Writ Petition filed under Article 226 of Constitution of India praying to issue Writ of Certiorarified Mandamus to call for the records pertaining to the ATA No.927 (12) of 2012 dated 04.03.2013 and to quash the same and direct the 2nd respondent to remit the amount assessed by the petitioner towards the EPF dues.

For Petitioner	:	Mr.C.Kulanthaivel
For R1	:	Court
For R2		Mr.B.Gopalakrishnan

ORDER

This Writ Petition has been filed challenging the order passed by the first respondent, thereby allowed the appeal filed by the second respondent.

2. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the second respondent and perused the materials available on record.

3. The second respondent firm is covered under the Employees Provident Funds and Miscellaneous Provision Act, 1952 (herein after referred to as the "Act"). It failed to remit the Provident Fund and Insurance Fund dues with all eligible components of wages for the period from March 2011 to September 2012. In order to determine the amount payable in respect of the second respondent, an enquiry was initiated under Section 7A of the Act. The second respondent was also duly served with a notice dated 09.08.2012 for a personal hearing to determine the contributions. During enquiry, the second respondent stated that the

House Rent Allowance, Washing Allowance and Conveyance Allowance were not taken into account for Provident Fund contribution since it is not being paid uniformly to all employees. It is also stated that only its workmen were paid allowances for washing their uniforms which is not paid to other staffs.

4. They also admitted that the wages and dearness allowance leaving the wage components of City Compensatory Allowance and Washing Allowance. The Enforcement Officer, during investigation, found that the Provident Fund has not been contributed on City Compensatory Allowance, Washing Allowance and House Rent Allowance and also been split up into basic, fixed Dearness Allowance, variable Dearness Allowance, House Rent Allowance, City Compensatory Allowance and Washing Allowance. Further, they had also been shown 30% to 60% of the basic wages in respect different categories of employees. Accordingly, the Enforcement Officer has submitted his report.

5. During enquiry, the second respondent had contended that 70% of the PF contribution is being paid to the employees. Based on the

records, it is observed that the second respondent had split up the wage components as basic wages, fixed DA, variable DA, HRA, CCA and Washing Allowance. It has not substantiated it with material records to split up the wage components with basic pay. The HRA paid to the employees are not uniform to all the category of employees and the reasons for such variations has not been established by the terms of contract of the employment. They have no justification to split up the pay package and categorizing HRA to an extent from 30% to 60% of total wages. Therefore, it cannot be accepted that the second respondent is paying HRA to the employees at certain fixed percentage which is not attracting the payment of PF.

6. Inspite of split up of wage components, under various nomenclatures it is felt proper and just to arrive at a conclusion that the salary/wages has been split up with a view to subterfuge the PF contributions and thus the wages has to be limited to the ceiling of Rs.6500/- for arriving at the dues payable and disallowing the disproportionate HRA. Without considering the above, the Appellate Authority, viz., the first respondent, allowed the appeal filed by the second respondent.

7. The learned counsel appearing for the petitioner would submit that the Hon'ble Supreme Court of India in the case of ***Bridge & Roof Co India Ltd case*** reported in ***(1962) 2 LLJ 490*** held that to satisfy the definition of basic wages, the allowance should satisfy the "test of universality". Therefore, the Washing Allowance is also a part of basic wages, since it is liable for PF deductions. The second respondent also failed to remit the Provident Fund and Employees Pension Fund Contributions and Administrative charges towards Provident Fund and Insurance Fund dues with all eligible components of wages for the period from March 2011 to September 2012 in order to determine the amount payable in respect of the second respondent.

8. A perusal of the counter filed by the second respondent revealed that they were paying more than minimum wages as contemplated under the minimum wages and remitting contributions for the above wages. As a special gesture, the second respondent was paying allowances as fringe benefit to its employees which is not normally paid to one and all the employees. But the payments were made to one and all the employees in different logic and pattern, which could not be construed as basic wages as defined under Section 2(b) or Section 6 of

the EPF Act. However, these allowances were not being uniformly paid among workers and were being paid based on their performance. Conveyance Allowance being paid to staff members according to their category and not to all uniformly. Further more, the authority is empowered to decide the dispute regarding contribution and liability of the employer, it does not give any such power to determine whether the minimum wage was bifurcated or spilt for the purpose of determining the contribution. Therefore, no liability could be fastened on the second respondent regarding the PF contribution on allowances especially when these payments are excluded under the contract of employment.

9. He also relied upon the Judgment of the Hon'ble Division Bench of this Court in the case of ***EID Parry India Ltd Vs RPFC Tamil Nadu*** reported in ***(1984) I LLJ 300,*** in which this Court held that far from contracting out of the statutory provision, parties are trying to be within the framework of the statute. This is because the definition defining basic wage under clause (b), clearly states 'in accordance with the contract of employment'. Therefore, if in accordance with the contract of employment, the parties agree that a particular sum should be excluded, it cannot be held that it should be treated as basic wage.

Therefore, the Appellate Authority, viz., the first respondent, rightly allowed the appeal, which does not require any interference by this Court.

10. A perusal of the order passed by the first respondent/Appellate Authority shows that it simply relied upon the Judgement of the Hon'ble Supreme Court of India in the case of M/s.Bridge & Roof Co (India) Ltd., Vs. Union of India reported in 1962 (3) SCR 978 and allowed the appeal on the ground that the Enforcement Officer, in its report has not found whether the allowances are paid to all the employees across the board or to some of the employees etc., Therefore, it cannot be said that the allowances are earned by all the employees and therefore, the allowances are liable for deduction of PF contribution.

11. On the report submitted by the Enforcement Officer, the petitioner determined the dues on account of Provident Fund, Insurance and Employees Pension Fund Contributions and Administrative charges towards Provident Fund and Insurance Fund dues with all eligible components of wages for the period from March 2011 to September

2012, in accordance with the provision of EPF and MP Act. The Hon'ble Supreme Court in the case of ***Bridge and Roofs Co., Ltd Vs. Union of India and others*** reported in ***(1963) 3 SCR 978,*** held that for the basis for the exclusion in clause (ii) of the exceptions in Section 2(b) is that all that is not earned in all concerns or by all employees of a concern is excluded from basic wages. To this, the exclusion of dearness allowance in clause (ii) is an exception. But that exception has been corrected by including dearness allowance in Section 6 for the purpose of contribution. Dearness allowance which is an exception in the definition of “basic wages”, is included for the purpose of contribution by Section 6 and the real exceptions therefore in clause (ii) are the other exceptions besides dearness allowance, which has been included through Section 6.

12. The basic principles as laid down in the said case on a combined reading of Sections 2(b) and 6 are as follows :-

> (a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.
>
> (b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages. By way of example it was held that

> overtime allowance, though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment but because it may not be earned by all employees of a concern, it is excluded from basic wages.
>
> (c) Conversely, any payment by way of a special incentive or work is not basic wages.

13. Therefore, the components Conveyance Allowance and Washing Allowance is paid universally, necessarily and ordinarily paid to all employees of the second respondent. Therefore, both are liable for contribution under EPF Act. Further, the components of Conveyance Allowance/Transport Allowance, Medical Allowance, Washing Allowance and attendance incentive has to be treated as components of "Basic Wages" for the purpose of Provident Fund as it has been paid to all employees. Thus, it is clear that all the allowance which are not specifically excluded from basic wages as given in Section 2 (b) of the Act are part of basic wages. They were earned by all the employees of the second respondent. Further the second respondent establishment failed to submit any material in order to substantiate their contention before the petitioner. Substantiate the contention means that the allowances in question being paid to its employees were either variable

or were linked to any incentive for production resulting in grater 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. That apart, there is no available date on record to show that what were the norms of work prescribed for those workmen during the relevant period. Therefore, it is not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen.

14. In view of the above, the order passed by the first respondent is liable to be set aside and is set aside. Accordingly, this Writ Petition stands allowed. There shall be no order as to costs.

02.08.2023

Index:Yes/No
Internet:Yes/No
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To

1. Presiding Officer,
Employees Provident Fund Appellate Tribunal,
(Ministry of Labour and Employment,
Government of India),
SCOPE MINAR, CORE II,
4th Floor, Lakshmi Nagar District Centre,
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