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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 15.09.2023

% LPA 782/2019 & CM APPL. 54972/2019

PROWIZ MANSYSTEMS PVT LTD

..... Appellant

Through: Mr. S.K. Gupta, Advocate.

versus

ASSISTANT PROVIDENT FUND COMMISSIONER

..... Respondent

Through: Mr. Rajesh Kumar, SC EPFO with
Mr. Sanad Dobwal and Mr. Shivam
Singh, Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJEEV NARULA

SATISH CHANDRA SHARMA, C.J. (ORAL)

1. The present LPA is arising out of order dated 01.11.2019, passed by the learned Single Judge in W.P.(C) No. 11497/2019 titled *Prowiz Mansystems Pvt Ltd vs. Assistant Provident Fund Commissioner* (the 'Impugned Order').

2. The facts of the case reveal that the Appellant before this Court i.e., Prowiz Mansystem Pvt. Ltd is an establishment under the Employees' Provident Fund and Misc. Provisions Act, 1952 (the 'Act') and the Employees Provident Fund Scheme, 1952 (the 'Scheme'). The Appellant was issued a show cause notice by the Respondent on 10.01.2015 under

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Section 14-B and 7-Q of the Act, which stated that during the period of 01.04.1996 to 31.12.2014, the Appellant had made certain belated provident fund contributions due to which the Appellant was liable to pay damages to the tune of INR 35,30,472 and interest of INR 24,17,995. The show cause notice directed the Appellant to appear before the Respondent on 19.02.2015.

3. The Appellant through its representative appeared before the Respondent on 19.02.2015 and submitted that there was no intentional or deliberate delay in depositing the regular provident fund contribution. It was brought to the notice of the Respondent that the payments identified by the Respondent was made in respect of outstanding incentive/bonus and due to a fault by the clerical staff of the Appellant, provident fund contributions had wrongly been deducted on the amount of those incentive/ bonus.

4. The Appellant stated that the incentive arrears/ bonus do not fall within the meaning of wages as defined under Section 2(b) of the Act and the clerical staff has wrongly deducted provident fund contribution on the arrears of incentives and bonus. It was a case of mistake committed on behalf of the Appellant. However, it was submitted that thereafter, the provident fund contribution was immediately deposited within 15 days, and, therefore, the question of levying damages and interest does not arise. The Respondent finally passed an order on 15.10.2015 under Section 14-B and 7-Q of the Act, 1952 inflicting damages of INR 35,30,472 and interest to the tune of INR 24,17,995 for the period from 01.05.2010 to 01.10.2014.

5. The Appellant being aggrieved by the order passed by the Respondent



preferred an appeal under Section 7-I of the Act, 1952 and the Appeal was dismissed by the Central Government Industrial Tribunal (“CGIT/ Appellate Authority”) on 22.07.2019.

6. Aggrieved, the Appellant preferred W. P. (C) No. 11497/2019 before this Court and *vide* order dated 01.11.2019, the Ld. Single disposed of the petition finding no merit in the contentions of the Appellant. The operative paragraphs of the Impugned Order are as under:

“6. Having considered the submissions of the learned counsel for the parties and perused the record, I find no merit in any of the contentions raised by the learned counsel for the petitioner. The very fact that the petitioner had made deductions from the incentives payable to its employees in itself shows that the petitioner was well aware that provident fund was payable on the said amount as well, yet it had wilfully failed to deposit the same within the prescribed time. This very fact is sufficient to show mens rea on the petitioner’s part to deliberately delay depositing the provident fund dues. The petitioner has, by placing reliance on National Co-op. Sugar Mills Ltd. (supra), sought to contend that since incentives are not a part of basic pay, the petitioner cannot be held guilty of any wilful delay in depositing the provident fund dues, so as to warrant levy of damages and interest. In the light of the admitted position that the petitioner was paying incentives to all its employees and was also making deductions on the said amount, it cannot be said that the petitioner was unaware that provident fund was payable on the incentives also and therefore the plea that there was no wilful default on the petitioner’s part cannot be accepted. The reliance placed by the petitioner on National Co-op. Sugar Mills Ltd. (supra) is wholly misplaced as in the said case the Madras High Court was dealing with a situation where a demand for provident fund dues were sought to be raised on the wages paid as lay off



compensation to some of the employees, which fact situation is entirely different from the present case. The decision of the Supreme Court in The Management of RSL Textiles India (supra) also does not in any manner forward the case of the petitioner as the said decision merely reiterates the legal position that the presence of mens rea would be a determinative factor in imposing damages under Section 14B of the Act. In the present case the mens rea on the part of the petitioner is writ large and therefore the respondent was fully justified in claiming damages and interest from the petitioner.

7. I also do not find any merit in the petitioner's contention that it was incumbent on the respondent to send monthly reminders to the petitioner in case there was any delay on its part in depositing the provident fund dues. The petitioner's plea that the respondent, having failed to send monthly reminders, is estopped from claiming any damages or interest from it cannot be accepted. Neither is there any statutory basis for such a plea, nor can the respondent be expected to send monthly reminders to every defaulting employer in the country. In fact once an establishment is allotted a code under the Act, it is expected to ensure strict adherence to the provisions thereof and is under a statutory duty to make timely deposits of the provident fund dues in accordance with the timelines prescribed in the Act.

7. The writ petition along with pending application is disposed of in the aforesaid terms."

7. Learned Counsel for the Appellant has vehemently argued before this Court that the Impugned Order deserves to be set aside. He submits that there was certainly a delay in remitting the provident fund contribution in respect of arrear of incentives. However, that incentives do not fall within the definition of wages as defined under Section 2(b) of the Act. Learned Counsel states that the moment arrears were paid to the employees,



provident fund contribution were also remitted to the Employees Provident Fund Organization ('EPFO'), albeit with a slight delay and, therefore, the order dated 22.07.2019 passed by the Appellate Authority as well as the order passed by the Learned Single Judge deserve to be set aside.

8. Learned Counsel for the Appellant has vehemently argued that the Respondent has failed to establish *mens rea* on behalf of the Appellant. Existence of *mens-rea* to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/ or quantum of damages. He has placed reliance upon judgments delivered by the Hon'ble Madras High Court in the case of *Terrace Estate, Unite of United Planation Ltd. Vs. Assistant Provident Fund Commissioner*, 2010 LLR 612; and *Soliadire India Limited Vs. The Employees' Provident Fund Appellate Tribunal*, 2011 SCC Online Mad 1647; *V.S.Murugan Vs. Regional Provident Fund Commissioner*, 2011 SCC Online Mad 1271; and upon a judgment delivered by the Hon'ble Supreme Court in the case of *Assistant Provident Fund Commissioner Vs. Management of RSL Textile India Pvt. Ltd.*, AIR 2017 SC 679.

9. Learned Counsel for the Appellant has further contended that no detailed calculation sheet was provided by Respondent nor by the Appellate Authority, and, therefore, the order passed by the Assistant Provident Fund Commissioner deserves to be set aside.

10. Learned Counsel for the Appellant has vehemently that keeping in view the statutory provisions contained under Section 14-B of the Act, the damages have been quantified on the higher side and the Respondent and the



Appellate Authority should have exercised their discretion in the matter of imposition of damages as well as interest.

11. Learned Counsel for the Appellant has further argued that the Central Government has not authorized the Respondent to issue a show cause notice under Section 7-Q of the Act for imposing of interest and, therefore, to the extent interest has been levied, is bad in law.

12. *Per Contra*, Learned Counsel appearing on behalf of the Respondent has vehemently argued before this Court that the Respondents have followed the statutory provisions as contained in the Act. Show cause notice was issued to the Appellant herein and the response submitted was considered by the Respondent. An opportunity of personal hearing was also granted to the Appellant and therefore there has been no procedural irregularity on behalf of the Respondent.

13. Learned Counsel contends that the Act is a beneficial legislation designed to protect employees and to ensure that provident fund dues are deposited on time. As the Appellant has admitted delay in remittance of provident fund dues, the damages as well as interest has been rightly levied on the Respondent in accordance with the Act.

14. Heard Learned Counsel for the Parties at length and perused the record. The matter is being disposed of with the consent of the parties.

15. The relevant statutory provisions which are necessary to decide the present Appeal are detailed as under:

Section 2(b) of the Act, 1952 reads as under:



“2(b). “basic wages” means all emoluments which are earned by an employee while on duty or 3 [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 presents made by the employer;”*

Section 7-I of the Act, 1952 reads as under:

7-I. Appeals to Tribunal. —(1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub-section (3), or sub-section (4), of section 1, or section 3, or sub-section (1) of section 7A, or section 7B

[except an order rejecting an application for review referred to in sub-section (5) thereof], or section 7C, or section 14B, may prefer an appeal to a Tribunal against such notification or order.

(2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed..”

Section 7-Q of the Act, 1952 reads as under:

“7Q. Interest payable by the employer.—The employer shall be liable to pay simple interest at the rate of twelve per cent. per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on



which the amount has become so due till the date of its actual payment:

Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank.]

Section 14B of the Act, 1952 reads as under:

“14B. Power to recover damages.—Where an employer makes default in the payment of any contribution to the Fund 3 [, the 2 [Pension] Fund or the Insurance Fund] or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 4 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of 5 [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, 6 [the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf] may recover 7 [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:] 8

[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard]:

[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, subject to such terms and conditions as may be specified in the Scheme.]”

16. The show cause notice was issued by the Respondent on 10.01.2015 with a direction to the Appellant to file a reply. An opportunity of personal



hearing was also granted in the matter. Show cause notice dated 10.01.2015 is reproduced as under:

**“EMPLOYEES’ PROVIDENT FUND ORGANISATION
A-2C**

**SECTOR 24, NOIDA
UTTAR PRADESH, 201301**

*Summons to appear for hearing u/s 14B of the EPF and MP Act, 1952 (and order for payment of interest u/s 7Q) for belated remittance made during the period 01/04/1996 to 31/12/2014
No.: MR/NOI/0030276/000/Enf 501/ Damages*

Date:10/01/2015

(Please quote this reference number in your reply)

M/s PROWIZ MANSYSTEMS PVT LTD.

G-88, Sector-63

NOIDA,

G.B. NAGAR,

201301.

Sir/ Madam,

Whereas, M/s PROWIZ MANSYSTEMS PVT LTD. is an establishment covered under the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 (herein after referred to as the Act.), with Establishment ID MRN010030276000.

And whereas, under the provisions of the election 6, 6A and 6C of the Act read with Para 38 of the Employees’ Provident Fund Scheme 1952, 3 of Employees’ Pension Scheme 1995 and B(1) of Employees Deposit Linked Insurance Scheme 1976, the employer of the establishment is required to remit the contributions along with the administrative charge within 15 days of the close of every month.

And whereas, under section 14B of the Act, where an employer make default in payment of the contributions or any charges, the Commissioner is required to recover by way of penalty such damages, not exceeding the amount of arrears and rates of Damages at rates specified in Para 32A of the EPF



Scheme 1952, Para 5 of EPF 1995 and 8A of EDLI Scheme 1976 (as given below)

<i>Period of Delay</i>	<i>Rate upto 25/09/2008</i>	<i>Rate from 26/09/2008</i>
<i>Less than 2 months</i>	<i>17%</i>	<i>5%</i>
<i>2 months and above, and less than 4 months</i>	<i>22%</i>	<i>10%</i>
<i>4 months and above, and less than 6 months</i>	<i>27%</i>	<i>15%</i>
<i>6 months and above</i>	<i>37%</i>	<i>25%</i>

Now the scrutiny of the records maintained by this office for the remittances made by you during the period from 01/04/1996 to 31/12/2014 shows that there are certain payments which were made after the respective due dates and the total amount by way of penalty and the amount of interest on such belated payments are as under: (Details in Annexure A)

	<i>Amount of Damages ## (Rs.)</i>	<i>Interest (Rs.)</i>	<i>Total (Rs.)</i>
<i>EPF Contributions in A/c 1</i>	<i>2160564</i>	<i>1483212</i>	<i>3643776</i>
<i>EPS. Contribution in A/c 10</i>	<i>1147910</i>	<i>782869</i>	<i>1930779</i>



<i>EPF Administration/Inspection charges in A/c 2</i>	<i>151736</i>	<i>103917</i>	<i>255653</i>
<i>EDLI Contribution in A/c 21</i>	<i>68884</i>	<i>47052</i>	<i>115936</i>
<i>EDLI Administration/ Inspection charges in A/c 22</i>	<i>1378</i>	<i>945</i>	<i>2323</i>
<i>Total</i>	<i>3530472</i>	<i>2417995</i>	<i>5948467</i>

You are entitled for an opportunity of being heard before the Damages are levied. You may therefore avail this opportunity before the Damages are levied and in such case may appear either in person or through your representative duly authorized by you to do so, before the undersigned on 19th day of Feb, 2015 at 11.00 AM/PM. If you had made the payments within the respective due dates, the supporting documents of proof of the such remittances within the respective due dates may be produced on the date of hearing.

In case you have already made the payment of Damages/ Interest, please reply immediately quoting the reference number mentioned quoting the reference number mentioned above with proof of such remittance.

In case you do not wish to make any representation and agree with the details mentioned in the Annexure A, you may remit the same through a Challan generated on the ECR Portal by log in to the portal and using the Challan Entry option. Please enter the details in the fields provided for penal Damages in the Challan format using the miscellaneous payment option.

Please note that in the event of your failure to attend the hearing in person or through a person duly authorized by you to represent you, the undersigned shall proceed to hold the



inquiry in the above matters and decide on the levy of damages on the basis of the records available.

You are also liable to pay the amount of interest 12% per annum, as mentioned above, and the same should be paid within 15 days of receipt of this summon/order. The payment should be made using the Challan generated on the ECR Portal by log in to the portal and using the Challan Entry option. The details of the interest should be entered in the fields for miscellaneous payment and the option should be selected as Interest u/s 7Q for each account.

Issued under my signature and seal on this _____day of _____.

-sd.-

*ASSISTANT/ REGIONAL PROVIDENT FUND
COMMISSIONER*

SRO NOIDA””

17. The Appellant submitted a reply in the matter and thereafter, a detailed and exhaustive order was passed by the Respondent on 20.05.2015 wherein all the grounds raised by the Appellant were dealt with. Relevant extract of the order passed by the Respondent as contained under Paragraph 7 to 11 read as under:

“7. Before levying penalty and damages u/s 14B and 7Q of the Act, this office has followed all the procedures for providing natural justice-

- I. Show cause notice has been issued with full details of late remittances to the employer.*
- II. Appropriate opportunities (14 times) have been afforded to the employer to represent its case.*



III. *The employer through its authorized person has attended the case.*

8. *For the above reasons, I, Ankur Sharma, Assistant Provident Fund Commissioner, SRO Noida on application of my mind to the facts and circumstances of the case and on perusal of the relevant records consider it to be a fit case to levy damages u/s 14 B read with Para 32-A of the EPF Scheme, 1952, Para9(l) of the Employees' Family Pension Scheme, 1971/Para 5(1) of the Employees Pension Scheme, 1995 and Para 8-A of the Employees Deposit Linked Insurance Scheme, 1976 which prescribes a graded scale of rates of damages to be imposed upon an employer for belated remittances depending upon the period of delay.*

The amount of damages payable by the establishment for the defaults committed, at the prescribed rates in respect of each account for the period from 05/2010 to 10/2014 is shown below:

Sr. NO.	Name of the Account & A/c No.	Total Amount	Paid	Balance
1.	01	2160564	NIL	2160564
2.	02	151736	NIL	151736
3.	10	1147910	NIL	1147910
4.	21	68884	NIL	1378
5.	22	1378	NIL	1378
Total		3530472	NIL	3530472
		Thirty Five Lac Thirty Thousand Four Hundred Seventy Two Only.		



A detailed notice showing the defaults committed by the establishment and the amount of penal damages levied on the amount in default is enclosed to this order and forms an integral part of this order (Annexure A)

9. The establishment is further liable to remit a sum of Rs. 24,17,995/- (Twenty Four Lac Seventeen Thousand Nine Five Only) towards interest payable under Section 7Q of the Act @ 12% p.a. on the amount in default, which is also quantified and reflected in the statement annexed to this order. The account-wise detail of the amount payable towards 7Q of the Act is furnished below:

Sr. NO.	Name of the Account & A/c No.	Total Amount	Paid	Balance
1.	01	1483212	NIL	1483212
2.	02	103917	NIL	103917
3.	10	782829	NIL	782869
4.	21	47052	NIL	47052
5.	22	945	NIL	945
TOTAL		2417995	NIL	2417995
		Twenty Four Lac Seventeen Thousand Nine Hundred Ninety Five Only		

Total leaviable amount u/s 14B & 7Q Rs, 35, 30, 472+24, 17, 995=59, 48, 467/- (Rs. Fifty Nine Lac Forty Eight Thousand Four Hundred Sixty Seven Only:)]

10. I, further order that the above amount of damages &



interest shall be paid by the aforesaid employer into the respective Employees' Provident Fund Accounts maintained at the State Bank of India within 15 days of receipt of this order, failing which action will be taken under Section 8 of the Act to recover the amount in the same manner as laid down under Section 8B to 8G of the Act.

11. It should also be noted that the failure to remit the above said damages/ interest within the stipulated time mentioned above, the order will attract interest @12% p.a. from the due date to the date of remittance as prescribed under Section 7Q of the Act.”

18. Thereafter, the Appellant preferred an appeal before the Appellate Authority under Section 7I of the Act and the appeal was dismissed by a detailed speaking order. The order passed by the Appellate Authority reads as under:

“Perusal of the impugned order shows that the Ld. APFC in the second page of the impugned order has made a discussion about the plea and came to hold that from the Challans and the documents there is nothing to hold that the amount remitted is towards the arrears of the bonus and incentive for the back period i.e. March 2011 to February 2012 declared in November 2012. He also came to hold that from the annual return submitted in form 6-A though the amount has been shown as a remittance for the period March 2011 to February 2012, there is no clarity in the document with regard to the kind of the arrear. The Ld. APFC had also examined the balance sheet of the A.Y 2013-2014 and found that the arrears from March 2011 to February 2012 were deposited in respect of employer shares only and not the employees shares. He thus, came to hold that had those been the incentive/bonus arrear posted mistakenly should have reflected the employees share as well. He, thereby concluded that the establishment made delayed remittance of the remaining dues of the contribution of the above said period under reference.



The Ld. APFC has also observed in his order that the proceeding was adjourned 14 times giving opportunity to the management to produce documents like declaration of arrear bonus by management, account sheet of arrear bonus distribution etc. But the establishment did not produce any document to support its stand.

The impugned order alongwith the calculation sheet has been filed by the Ld. Counsel for the respondent as well as by the appellant. The notice sent to the appellant also contains a detailed calculation of the delayed remittance alleged against the appellant. Thus, the argument of Ld. Counsel for the appellant that no opportunity was afforded by the respondent for explaining the circumstances is held without substance, in view of the order passed by the Ld. APFC discussing all the points raised before him.

The Ld. Counsel for appellant though challenged the impugned order as a non speaking order for no reasons assigned by the APFC and relied upon the judgment of Kranti Associates referred supra, the same doesn't appear convincing for the detailed reason given by the APFC in the impugned order.

No doubt the Hon'ble Supreme Court in the case of M/s Prestolite India Limited vs. The Regional Director and other reported in AIR 1994 SC Page 521 have held that while imposing the damages the authority should consider the mitigating circumstances. The, Ld. Counsel for the appellant though relied upon the said judgment, in the facts and circumstances of the case this judgment has no applicability since it is not the case of appellant that for some reasons beyond its control remittance was made belatedly. The appellant has challenged the impugned order on the ground that the amount in respect of which delayed remittance was made is not the basic wage but bonus/ incentive arrear. There is no evidence at all on record to accept the said contention. There is also allegation by the appellant that a detailed calculation was not provided despite demand. But it is found that the notice sent to the appellant was containing the detail



calculation of the deferred period of remittance, amount of damage and interest payable. Moreover the impugned order contains a detailed discussion by the Ld. APFC for turning down each and every objection raised by the appellant during the proceeding taken u/s 14-B of the Act. Hence, this tribunal finds no valid reason for interfering with the impugned order passed by the Ld. APFC Noida. Hence,, ordered.

ORDER

The appeal be and the same is dismissed on contest. The impugned order passed by the Ld. APFC is hereby confirmed.”

19. The Appellant being aggrieved by the order dated 22.07.2019 passed by the Appellate Authority had approached this Court by filing a Writ Petition. The Learned Single Judge after careful consideration of entire material on record has dismissed the Writ Petition.

20. The Learned Single Judge has affirmed the findings of fact arrived at by the Respondent as well as by the Appellate Authority holding that the Appellant did make deductions from the incentives payable to its employees and the deductions were not deposited with the EPFO on time. It has been further held that the very fact that the Appellant had made deductions from the incentives payable to its employees in itself shows that the Appellant was aware that the provident fund was payable on the said amount also.

21. The Learned Single Judge, in those circumstances, held that the Appellant deliberately delayed depositing of the provident fund dues and, therefore, the damages and interest were rightly levied upon the Appellant.

22. In the present appeal, the Appellant contends that the incentives paid by it cannot be understood as basic wages for the purposes of the Act. The



question of interpretation of basic wages under the Act was considered by the the Hon'ble Supreme Court in a landmark judgment delivered in the case of ***Regional Provident Fund Commissioner (II) West Bengal vs. Vivekananda Vidyamandir***, 2019 SCC OnLine SC 291. The Paragraph Nos. 9 to 15 of the aforesaid judgment read as under:

“9. Shri Vikramajit Banerjee, learned Additional Solicitor General appearing for the appellant in Civil Appeal No. 6221 of 2011, submitted that the special allowance paid to the teaching and non-teaching staff of the respondent school was nothing but camouflaged dearness allowance liable to deduction as part of basic wage. Section 2(b)(ii) defined “dearness allowance” as all cash payment by whatever name called paid to an employee on account of a rise in the cost of living. The allowance shall therefore fall within the term dearness allowance, irrespective of the nomenclature, it being paid to all employees on account of rise in the cost of living. The special allowance had all the indices of a dearness allowance. A bare perusal of the breakup of the different ingredients of the salary noticed in the earlier order of the Division Bench dated 13-1-2005 [Provident Fund Commr. v. Vivekananda Vidya Mandir, 2005 SCC OnLine Cal 13 : (2005) 2 LLN 214] makes it apparent that it formed part of the component of pay falling within dearness allowance. The special allowance was also subject to increment on a time scale. The Act was a social beneficial welfare legislation meant for protection of the weaker sections of the society i.e. the workmen, and was therefore, required to be interpreted in a manner to subserve and advance the purpose of the legislation. Under Section 6 of the Act, the appellant was liable to pay contribution to the provident fund on basic wages, dearness allowance, and retaining allowance (if any). To exclude any incentive wage from basic wage, it should have a direct nexus and linkage with the amount of extra output.

10. Relying on Bridge & Roofs Co. Ltd. v. Union of India [Bridge & Roofs Co. Ltd. v. Union of India, (1963) 3 SCR



978 : AIR 1963 SC 1474] , it was submitted that whatever is payable by all concerns or earned by all permanent employees had to be included in basic wage for the purpose of deduction under Section 6 of the Act. It is only such allowances not payable by all concerns or may not be earned by all employees of the concern, that would stand excluded from deduction. It is only when a worker produces beyond the base standard, what he earns would not be a basic wage but a production bonus or incentive wage which would then fall outside the purview of basic wage under Section 2(b) of the Act. Since the special allowance was earned by all teaching and non-teaching staff of the respondent school, it has to be included for the purpose of deduction under Section 6 of the Act. The special allowance in the present case was a part of the salary breakup payable to all employees and did not have any nexus with extra output produced by the employee out of his allowance, and thus it fell within the definition of “basic wage”.

11. The common submission on behalf of the appellants in the remaining appeals was that “basic wages” defined under Section 2(b) contains exceptions and will not include what would ordinarily not be earned in accordance with the terms of the contract of employment. Even with regard to the payments earned by an employee in accordance with the terms of contract of employment, the basis of inclusion in Section 6 and exclusion in Section 2(b)(ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose of contribution under Section 6. But whatever is not payable by all concerns or may not be earned by all employees of a concern are excluded for the purposes of contribution. Dearness allowance was payable in all concerns either as an addition to basic wage or as part of consolidated wages. Retaining allowance was payable to all permanent employees in seasonal factories and was therefore included in Section 6. But, house rent allowance is not paid in many concerns and sometimes in the same concern, it is paid to some employees but not to others, and would therefore stand excluded from basic wage. Likewise overtime allowance though in force in all concerns, is not earned by all employees and would again stand



excluded from basic wage. It is only those emoluments earned by an employee in accordance with the terms of employment which would qualify as basic wage and discretionary allowances not earned in accordance with the terms of employment would not be covered by basic wage. The statute itself excludes certain allowance from the term basic wages. The exclusion of dearness allowance in Section 2(b)(ii) is an exception but that exception has been corrected by including dearness allowance in Section 6 for the purpose of contribution.

12. Attendance incentive was not paid in terms of the contract of employment and was not legally enforceable by an employee. It would therefore not fall within basic wage as it was not paid to all employees of the concern. Likewise, transport/conveyance allowance was similar to house rent allowance, as it was reimbursement to an employee. Such payments are ordinarily not made universally, ordinarily and necessarily to all employees and therefore will not fall within the definition of basic wage. To hold that canteen allowance was paid only to some employees, being optional was not to be included in basic wage while conveyance allowance was paid to all employees without any proof in respect thereof was unsustainable.

13. Basic wage, would not ipso facto take within its ambit the salary breakup structure to hold it liable for provident fund deductions when it was paid as special incentive or production bonus given to more meritorious workmen who put in extra output which has a direct nexus and linkage with the output by the eligible workmen. When a worker produces beyond the base or standard, what he earns was not basic wage. This incentive wage will fall outside the purview of basic wage.

14. We have considered the submissions on behalf of the parties. To consider the common question of law, it will be necessary to set out the relevant provisions of the Act for purposes of the present controversy:

“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 presents made by the employer;

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 employee's 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.

Explanation 1.—For the purposes of this section dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

Explanation 2.—For the purposes of this section, “retaining allowance” means an allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services.”

15. “Basic wage”, under the Act, has been defined as all emoluments paid in cash to an employee in accordance with the terms of his contract of employment. But it carves out certain exceptions which would not fall within the definition of “basic wage” and which includes dearness allowance apart from other allowances mentioned therein. But this exclusion of dearness allowance finds inclusion in Section 6. The test adopted to determine if any payment was to be excluded from basic wage is that the payment under the scheme must have a direct access and linkage to the payment of such special allowance as not being common to all. The crucial test is one of universality. The employer, under the Act, has a statutory obligation to deduct the specified percentage of the contribution from the employee's salary and make matching contribution. The entire amount is then required to be deposited in the fund within 15 days from the date of such collection.”

23. In the aforesaid case, the Hon'ble Supreme Court held that no material was placed on record by the Establishment therein to demonstrate whether the allowances/incentives being paid to its employees were either variable or linked to any output or that the allowances in question were not paid across the board to all employees in a particular category. In those circumstances, it was held that the allowances paid therein would form a part of basic wages.



24. In the present case, the record reveals that incentive was paid accorss the board, to all the employees by the Appellant. It is not the case of the Appellant that the incentives paid herein were variable or not universal and therefore, the contention made by the Appellant cannot be accepted by this Court.

25. Learned Counsel for the Appellant has placed reliance upon a judgment delivered in the case of *Terrace Estate, Unite of United Planation Ltd.* (Supra). In the aforesaid case, the Learned Single Judge of Madras High Court has set aside the Order impugned therein levying damages by holding that the order was passed in the mechanical manner.

26. In the present case, due process of law has been followed by the Respondent. An opportunity for personal hearing was granted and the order passed is a detailed speaking order and, therefore, it cannot be said it is a mechanical order warranting interference by this Court. Therefore, the aforementioned judgment does not help the Appellant in any manner.

27. Learned Counsel for the Appellant places reliance upon a judgment delivered by the Madras High Court in the case of *V.S.Murugan* (Supra). In the aforesaid case, one Jawahar Mills Limited, Salem was subjected to an action under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act (SARFAESI), 2002.

28. The Petitioner before the Madras High Court was declared the successful bidder in the auction process and the Mill was purchased by the Petitioner therein through auction. The Petitioner furnished a bank guarantee of 1 crore to the Regional Provident Fund Commissioner in lieu of statutory



dues payable to Employee State Insurance Corporation and towards the Employee Provident Fund. The Petitioner therein was also informed about the damages levied under Section 14B of the Act and the interest which was levied under Section 7Q of the Act. In the aforesaid case, erstwhile employer had not accepted the liability unequivocally and there was no *mens rea* to delay the payment of contribution. The issue of *mens rea* was not considered by the Authorities. In those circumstances, the matter was remitted to the Provident Fund Commissioner to decide it afresh.

29. The aforesaid case is again distinguishable in facts. In the present case, the Learned Single Judge has arrived at a conclusion that the *mens rea* on the part of the Appellant is writ large, and, therefore the aforesaid judgment relied upon also does help the Appellant in any manner.

30. Learned Counsel for the Appellant has again placed reliance upon a judgment delivered by the Madras High Court in the case of ***Soliadire India Limited*** (Supra). In the aforesaid case, the Company in question was a sick company and the matter was referred to Board for Industrial and Financial Reconstruction (BIFR) for framing a scheme of revival. The Learned Single Judge in the aforesaid case arrived at a conclusion that the order inflicting damages was passed in the mechanical manner.

31. In the present case, order certainly has not been passed in a mechanical manner, and, therefore, the judgment relied upon is again distinguishable on facts.

32. Reliance has also been placed by the Learned Counsel for the Appellant upon a judgment delivered by the Hon'ble Supreme Court of



India in the case of *Management of RSL Textile India Pvt. Ltd.* (Supra), wherein it was held that presence of *mens rea* would be a determining factor to impose damages under Section 14B of the Act.

33. This Court has carefully gone through the aforesaid judgment. In the present case, the Learned Single Judge after taking into account the aforesaid judgement has arrived at a conclusion that the *mens rea* on the part of the Appellant is writ large. The Appellant deliberately did not deposit the amount in time with the Provident Fund Organization, and, therefore, the judgment again does not help the Appellant.

34. In light of the above, the position that emerges is that the Appellant, while paying incentives to its employees, deducted provident fund contributions from this amount but wilfully delayed payment to the EPFO in contravention of the timeline provided under the Act. Therefore, damages and interest was imposed on the Appellant after providing an opportunity of hearing to the Appellant. Under these facts and circumstances, the question of interference by this Court does not arise and accordingly, the LPA stands dismissed.

SATISH CHANDRA SHARMA, CJ

SANJEEV NARULA, J.

SEPTEMBER 15, 2023

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