SUPREME COURT OF INDIA

Manipal Academy of Higher Education

Vs.

Provident Fund Commissioner

C.A.No.1832 of 2004

(Arijit Pasayat and P.Sathasivam,JJ.)

12.03.2008

JUDGMENT

Dr. Arijit Pasayat, J.

1. In all these appeals common points of law are involved and therefore they are disposed of by a common judgment.

2. The dispute in each case is whether the amount received by encashing the earned leave is a part of "basic wage" under Section 2(b) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (in short the 'Act') requiring pro rata employer's contribution. In each case the Regional Provident Fund Commissioner (in short the 'Commissioner') held that the amount received on encashment of earned leave has to be reckoned for the purpose of Section 2(b) of the Act. Accordingly, demands were raised. Appeal was preferred before the Employees Provident Fund Appellate Tribunal (in short the 'Tribunal') which held that it is not a part of basic wages. However, it was observed that a different view was taken by the Bombay High Court and, therefore, the respondent in the appeals i.e. the Commissioner should take up the matter before the Karnataka High Court. Accordingly, Writ Petitions were filed before the Karnataka High Court. A learned Single Judge allowed the Writ Petitions and set aside the impugned orders. The present appellant preferred Writ Appeals before the Karnataka High Court which came to be dismissed by the common impugned judgment.

3. Learned counsel for the appellant pointed out that the impugned judgment cannot be sustained as it merely followed the judgment of the Bombay High Court in *Hindustan Lever Employees' Union v. Regional Provident Fund Commissioner and Anr*[1]. It is pointed out that different view has been taken by the Madras High Court in

Thiru Arooran Sugar Ltd. and Ors. v. Assistant Provident Fund Commissioner, Employees Provident Funds Organisation and connected cases disposed of by judgment dated 12.10.2007. It is submitted that the controversy was settled long back in *Bridge & Roof Co. (India) Ltd. v. Union of India*[2] which was followed in *Jay Engineering Works Ltd. and Ors. v. Union of India and Ors*[3]. and the concept of beneficial legislation is misplaced philanthropy where the statutes and principles underlying it are clear and the question is no longer res integra.

4. Learned counsel for the respondent on the other hand submitted that even applying Bridge Roof's case (supra) the view taken by the Bombay High Court and the Karnataka High Court in the present impugned judgment reflects the correct position in law.

5. Sections 2(b) and 6 of the Act read as follows:

> "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-
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> (i) the cash value of any food concession;
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> (ii) any dearness allowance (that is to say, all cash payments by whatever name called paid to any 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 the Scheme-The contribution which shall be paid by the employer to the Fund shall eight and one-third per cent of the basic wages dearness allowances 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 and if the Scheme makes provision therefore be an amount not exceeding eight and one-third per cent of his basic wages dearness allowances 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 "eight and one-third per cent" at both the places where they occur the words "ten 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 to a rupee.
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> 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.
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> 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."

6. In Bridge Roof's case (supra) it was inter-alia observed as follows:

> "8. The main question therefore that falls for decision is as to which of these two rival contentions is in consonance with s. 2(b). There is no doubt that "basic wages" as defined therein means all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash. If there were no exceptions to this definition, there would have been no difficulty in holding that production bonus whatever be its nature would be included within these terms. The difficulty, however, arises because the definition also provides that certain things will not be included in the term "basic wages", and these are contained in three clauses. The first clause mentions the cash value of any food concession while the third clause mentions that presents made by the employer. The fact that the exceptions contain even presents made by the employer shows that though the definition mentions all emoluments which are earned in accordance with the terms of the contract of employment, care was taken to exclude presents which would ordinarily not be earned in accordance with the terms of the contract of employment. Similarly, though the definition includes "all emoluments" which are paid or payable in cash, the exception excludes the cash value of any food concession, which in any case was not payable in cash. The exceptions therefore do not seem to follow any logical pattern which would be in consonance with the main definition.

9. Then we come to clause (ii). It excludes dearness allowance, 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. This exception suggests that even though the main part of the definition includes all emoluments which are earned in accordance with the terms of the contract of employment, certain payments which are in fact the price of labour and earned in accordance with the terms of the contract of employment are excluded from the main part of the definition of "basic wages". It is undeniable that the exceptions contained in clause (ii) refer to payments which are earned by an employee in accordance with the terms of his contract of employment. It was admitted by counsel on both sides before us that it was difficult to find any one basis for the exceptions contained in the three clauses. It is clear however from clause (ii) that from the definition of the word "basic wages" certain earnings were excluded, though they must be earned by employees in accordance with the terms of the contract of employment. Having excluded "dearness allowance" from the definition of "basic wages", s. 6 then provides for inclusion of dearness allowance for purposes of contribution. But that is clearly the result of the specific provision in s. 6 which lays down that contribution shall be 6-1/4 per centum of the basic wages, dearness allowance and retaining allowance (if any). We must therefore try to discover some basis for the exclusion in clause (ii) as also the inclusion of dearness allowance and retaining allowance (for any) in s. 6. It seems that the basis of inclusion in s. 6 and exclusion in clause (ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose, of contribution under s. 6, but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution. Dearness allowance (for examples is payable in all concerns either as an addition to basic wages or as a part of consolidated wages where a concern does not have separate dearness allowance and basic wages. Similarly, retaining allowance is payable to all permanent employees in all seasonal factories like sugar factories and is therefore included in s. 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, for the theory is that house-rent is included in the payment of basic wages plus dearness allowance or consolidated wages. Therefore, house-rent allowance which may not be payable to all employees of a concern and which is certainly not paid by all concern is taken out of the definition of "basic wages", even though the basis of payment of house-rent allowance where it is paid is the contract of employment. Similarly, 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". Similarly, commission or any other similar allowance is excluded from the definition of "basic

wages" for commission and other allowances are not necessarily to be found in all concerns; nor are they necessarily earned by all employees of the same concern, though where they exist they are earned in accordance with the terms of the contract of employment. It seems therefore that the basis for the exclusion in clause (ii) of the exceptions in s. 2(b) is that all that is not earned in all concerns or by all employees of 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 s. 6 for the purpose of contribution. Dearness allowance which is an exception in the definition of "basic wages", is included for the propose of contribution by s. 6 and the real exceptions therefore in clause (ii) are the other exceptions beside dearness allowance, which has been included through s. 6.

7. Similarly in Jay Engineering's case (supra) it was observed as follows:

> "9. Finally, it was urged that even if the payment for production between the quota and the norm is not production bonus which can be taken out of definition of basic wages in the Act, it should be treated as payment in the nature of "other similar allowance" appearing in s. 2(b)(ii). We are of opinion that this payment for work done between the quota and the norm cannot be treated as any "other similar allowance". The allowances mentioned in the relevant clause are dearness allowance, house-rent allowance, overtime allowance, bonus, and commission. Any "other similar allowance", must be of the same kind. The payment in this case for production between the quota and the norm has nothing of the nature of an allowance, it is a straight payment for the daily work and must be included in the words defining basic wage i.e., "all emoluments which are earned by an employee while on duty or on leave with wages in accordance with terms of the contract of employment".
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> 10. In the view we have taken of the scheme in this case, the petition succeeds partly. We direct that the petition of the payment which is made by the petitioner for production above the "norm" would be production bonus and would be covered by the judgment of this Court in Bridge and Roof Company, but that portion of the payment which is made by petitioner for production up to the quota as well as production between the "quota" and the "norm" is basic wage within the meaning of that term in the Act. The petition is therefore partially allowed as indicated above. In the circumstances we pass no order as to costs."

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8. It is to be noted that in the case before the Bombay High Court the factual scenario was somewhat peculiar. There the employer was including the amount of leave encashment as emoluments for the purpose of calculating provident fund dues from

the employer as well as employee's contribution. When the Employees' Union took up the issue to the Commissioner it was informed that the provision does not provide for deduction of provident fund on leave encashment.

9. On the strength of the letter dated 3.7.1991 of the Commissioner, Hindustan Lever Ltd. decided to make provision for deduction. It was this direction of the department which was challenged by the Union. In this context the High Court has held that the Commissioner's letter/circular was illegal and leave encashment dues should be included for provident fund contribution. In fact it was the understanding of the parties over the period that leave encashment will be included in the wages.

10. The basic principles as laid down in Bridge Roof's case (supra) 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.
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> (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.
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> (c) Conversely, any payment by way of a special incentive or work is not basic wages."

11. In *TI Cycles of India, Ambattur v. M.K. Gurumani and Ors*[4]. it was held that incentive wages paid in respect of extra work done is to be excluded from the basic wage as they have a direct nexus and linkage with the amount of extra output It is to be noted that any amount of contribution cannot be based on different contingencies and uncertainties. The test is one of universality. In the case of encashment of leave the option may be available to all the employees but some may avail and some may not avail. That does not satisfy the test of universality. As observed *in Daily Partap v. Regional Provident Fund Commissioner*[5] the test is uniform treatment or nexus under-dependent on individual work.

12. The term 'basic wage' which includes all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in accordance with the terms of the contract of employment can only mean weekly holidays, national holidays and festival holidays etc. In many cases the employees do not take leave and

encash it at the time of retirement or same is encashed after his death which can be said to be uncertainties and contingencies. Though provisions have been made for the employer for such contingencies unless the contingency of encashing the leave is there, the question of actual payment to the workman does not take place. In view of the decision of this Court in Bridge Roof's case (supra) and TI Cycles's case (supra) the inevitable conclusion is that basic wage was never intended to include amounts received for leave encashment.

13. Though the statute in question is a beneficial one, the concept of beneficial legislation becomes relevant only when two views are possible.

14. The appeals deserve to be allowed which we direct. But if any payment has already been made it can be adjusted for future liabilities and there shall not be any refund claim since the fund is running one. There will be no order as to costs.

Judgment Referred.

1(1995) 2 LLJ. 0279
2(1963) 2 SCR 0978
3(1963) 3 SCR 0995
4(2001) 7 SCC 0204
5(1998) 8 SCC 0090