2024:BHC-NAG:12276

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH

WRIT PETITION NO. 1268 OF 2011

Maharashtra State Cooperative Cotton Growers'
Marketing Federation Ltd.,
Cotton Bhavan, Ajani Chowk,
Nagpur, through the Zonal Manager.

...PETITIONER

Versus

1] The Appellate Tribunal,
Employees Provident Fund,
Mayur Bhawan, Cannaught Place,
New Delhi.

2] The Assistant Provident Commissioner,
Regional Office at 1138/2,
Raje Raghuji Nagar, Ring Road,
Nagpur.

...RESPONDENTS

Mr. M.V. Samarth, Senior Counsel with Mr. Vipul Ingle, Counsel for the petitioner.
Mr. G.A. Kunte, Counsel for respondent no.2.

CORAM : ANIL L. PANSARE, J.
ARGUMENTS WERE HEARD ON : SEPTEMBER 25, 2024
JUDGMENT IS PRONOUNCED ON : NOVEMBER 11, 2024

JUDGMENT :

Heard Mr. M.V. Samarth, learned Senior Counsel for the petitioner and Mr. G.A. Kunte, learned Counsel for respondent no.2.

2] The petitioner – Maharashtra State Co-operative Cotton Growers' Marketing Federation Limited, Nagpur (for short "Federation") is aggrieved by order dated 17/2/2011 passed by respondent no.1, the Appellate Authority, as also order dated 15/12/2008 passed by respondent no.2, the Assistant Provident Fund Commissioner, Nagpur.

3] These orders arises out of demand notice dated 3/3/2011 issued by respondent no.2 calling upon the Federation to pay an amount of Rs.14,21,145/- and to deposit the same to the credit of respective EPF accounts of the employees of the Federation. Respondent no.2, vide impugned order dated 15/12/2008, took cognizance of default committed by the Federation in remittance of Provident Fund, Family Pension Fund and Insurance Fund for the period from 1991-92 to 2008. It was found that the Federation is/was paying retention allowance to seasonal employees but Provident Fund contribution has been not paid. Accordingly, a summon under Section 7-A of The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "EPF Act") was issued to the Federation to justify non-payment of

Provident Fund. It appears that the Federation failed to tender any justification. Respondent no.2 accordingly worked out the amount due from the Federation and was called upon to deposit the same within fifteen days.

4] This order was challenged before respondent no.1 with a contention that retention allowance paid by the Federation to the employees is not basic wage as defined under the provisions of the EPF Act. As against, respondent no.2 submitted that the Federation is a Principal Employer and there is no difference between casual and temporary employee under the EPF Act. Reliance was placed on Section 6 of the EPF Act to contend that the Federation is duty bound to contribute to funds against the amount paid as retention allowance. Respondent no.1 has assigned following reasons to dismiss the appeal :

> *"6. The applicability of the Act is not challenged. Section 2f defines the word employee. The dominant feature in the definition is that the person must be working in or in connection with the work of the establishment and receiving the wages. The persons engaged by the contractors in connection with the work of the establishment are also the employees of the establishment. In the case of P.M. Patel V/s. Union of*

India reported in 1986 Vol. 1 SCC at page 32 their Lordship held that "the definition of the word employees were wide. This includes not only person directly employee by the employer but also those employed through a contractor." In this case it is not disputed that the persons were engaged in connection with the work of the establishment and the appellant was paying for them so they are the employee of the appellant.

7. There is no different between the casual and the permanent employees so far the EPF Act is concerned. In the case of Railway Employees Co-operative Banking Society Ltd. V/s. Union of India reported in 1980 LIC at page 1212 the Hon'ble High Court Rajasthan held that "the wider definition of employee in our opinion embarrasses a part time employee as also an employee who is engaged for any work in the establishment which may not necessarily be connected with the work of the establishment.

8. Absolute control is not necessary to determine the master and servant relationship the relevant test is whether such person is the part of establishment or not. In the case of South India Research Institution V/s. RPFC reported in 1982 Vol.I LLN at page 53 the Hon'ble High Court Andra Pradesh held that "the test of being a servant is not submission to order but being part and parcel of the organisation". In the case of Silver Jubli Tailering House V/s. Chief Inspector of Shop & Establishment reported in 1974 Labic IC (SC) at page 133 their lordship held that" a person can be servant of more than one employer and servant need not be under the exclusive control of one master.

9. Section 2(b) defines the word basic wages. The characteristic of the definition is that (I) the payment should be by way of emoluments (II) The emoluments must be earned while on duty (III) It must be provided for by the term of employment. The emolument is not defined in the Act. In the Webster's of new 20th century dictionary (II- Edition). Emolument is described as the

> *profit arising from office or employment that which is received as compensation for service, payment received for work, wages, salary, fees, advantage gain in general. In this case allowance paid to all for their service and this satisfied the requirement of emoluments. In the case of Gujrat Cyproment Ltd. V/s. APFC reported in 2004 Vol. 3 GLR at page 529 the Hon'ble High Court Gujrat held that "in conclusion the impugned order Annexure A & B are required to be upheld in so far as the same include the benefits received by the employees under the heading of Medical Allowance, Convenience Allowance, Lunch Allowance for the purpose of computing the provident fund contribution". Under section 6 contributions has to be made for the amount paid as a retaining allowance.*
>
> *10. It is true that assessment has to be made with respect to identifiable employee only. As per Para 36A of the scheme it was the duty of the principal employer to prepare the list of the employees engaged by him in the case of M/s.S.K.Nashiruddin Biddi Murchant Ltd. V/s. CPFC reported in AIR 2001 SC at page 850 their lordship held that " it is opened for the petitioner to collect the name of the biddi workers who work for them through their contractors and furnished the name of all the workers to provide fund commissioner. Thereafter the commissioner will verify those names and calculate the liability of the petitioner on the basis of such verification". Their lordship further held that "we fail to understand as to how the appellant can rely upon his own latches in not deducting the wages". Similar view was held by the lordship in the case of ESIC V/s. M/s. Hurrisum Malayam Pvt. Ltd. in CA No.1133/90."*

5] Thus, respondent no.1 has taken into account the definitions of ‘employee’ and ‘basic wages’ so also relevant authorities to hold that employees include not only the persons

directly employed by the employer but also those employed through contractor and further that there is no difference between casual and permanent employee, so far as EPF is concerned. On the point of basic wages, the definition is clear enough to include all emoluments paid to the employees. Respondent no.1 has also referred to Section 6 of the EPF Act, which provides that employer is under obligation to contribute to funds for the amount paid as retention allowance.

6] Mr. M.V. Samarth, learned Senior Counsel for the petitioner submits that the Federation is not an industry in terms of Section 2(i) read with Section 4 of the EPF Act. Section 2(i) defines 'industry' to mean any industry specified in Schedule – I, and includes any other industry added to the Schedule by notification under section 4. According to the learned Senior Counsel, the Federation was acting as Chief Agent of the Government of Maharashtra under the provisions of The Maharashtra Raw Cotton (Procurement, Processing and Marketing) Act, 1971 (for short "Act of 1971"), in order to carry out work as entrusted by the Government of Maharashtra in respect of procurement and sale of cotton during cotton

season. This is a work of facilitating farmers to sell cotton crop at reasonable price. Such facilitation cannot be termed as industry. Accordingly, he argued that the provisions of the EPF Act will not apply.

7] As against, the learned Counsel for respondent no.2 submits that this point was not raised before the authorities below and, thus, cannot be entertained in writ petition. He has then invited my attention to the by-laws of the Federation, which were submitted by the Counsel for the Federation before this Court. The object of the Federation, as mentioned in by-laws 4 and 5, is to purchase cotton, process it and to provide the same to cotton consumers/industry as also to take all necessary steps from the stage of procurement of cotton to preparation of garments and to act as Mediator in this process, which includes import and export of cotton.

8] I find substance in the submissions made by the learned Counsel for respondent no.2. Firstly, it appears that this issue was not raised before the authorities below and, therefore, the orders impugned cannot be criticized on this

ground. The Federation has not assigned any valid reason why was this ground not raised before the authorities below. Secondly, Schedule – I of the EPF Act enlisted the industries, which includes any industry engaged in the manufacturing of textiles (made wholly or in part of cotton or wool or jute or silk, whether natural or artificial) as also cotton ginning, baling and pressing industry. Further, the object of the Federation is such that it involves in procurement of cotton and its processing in order to supply the same to the factories involved in textile and garment business. Thus, the Federation is not acting as facilitator as argued. This activity can be termed as industry engaged in manufacturing of textiles or cotton ginning, baling and pressing industry.

9] The learned Senior Counsel for the petitioner further failed to show that the State Government has, by Notification in Official Gazette in terms of Section 17 of the EPF Act, exempted it from payment of contribution. In view thereof, I do not find any substance in the argument of the Federation that the provisions of the EPF Act are not applicable.

10] Another limb of argument of the Federation is that payment of Provident Fund is not attracted in respect of employees, who are not in employment during the period during which there is no season. It is argued that since the employees are engaged on seasonal basis, there is no continuity in the employment and, therefore, payment of Provident Fund is not attracted.

11] This argument is contrary to Section 6 of the EPF Act, which provides 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 :*
> ....
> ....
> ....
> *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."*

12] As could be seen, the employer is duty bound to contribute to Provident Fund 10% of basic wages, dearness allowance and retaining allowance. Explanation 2 provides that retaining allowance is an allowance payable to an employee of any factory or other establishment during any period in which the establishment is not working and the allowance is paid for retaining the services of an employee. In the present case, there is no dispute that the Federation has paid retaining allowance and, therefore, will be under obligation to contribute to the Provident Fund in terms of the EPF Act.

13] The concept of retaining allowance payable to seasonal workmen during off-season in seasonal establishment has been clarified by the Hon'ble Supreme Court in the case of *Managing Director, Chalthan Vibhag Sahakari Khand Udyog, Chalthan, District Surat Vs. Government Labour Officer And Others [(1981) 2 SCC 147],* which is relied upon by the learned Counsel for respondent no.2 to justify the impugned

orders. The Supreme Court held thus :

> *"3. For a proper understanding of the question involved, it is necessary to state a few facts. Chalthan Vibhag Sahakari Khand Udyog runs a seasonal factory which crushes sugar-cane and produces sugar. It does not work for all the 12 months in year. There is an off-season during the year during which the factory remains closed. For this off-season during which the workmen suffer forced idleness, full wages are not paid. There are several categories of workmen employed by the management. There are unskilled workmen who are paid 10% of the basic wages and dearness allowance as retaining allowance during the off-season. There are also semi-skilled workmen who get 25% of the basic wages and dearness allowance as retaining allowance. The rest, i.e., skilled `C' to supervisory class of workmen, are paid at the rate of 50 per cent of basic wages and dearness allowance as retaining allowance during the off-season. The retaining allowance is paid to these workmen after 40 days of work in the next crushing season. Workmen in sugar factories in the State of Gujarat usually come from the State of Uttar Pradesh. During the off-season, they engage themselves in different occupations. Retaining allowance is a sort of incentive which is offered to the workmen to attract them to return to the factory after the expiry of the off-season.*
> *4. ....*
> *5. ...*
> *6. There can be no doubt that the retaining allowance paid to the workmen during the off-season falls within the substantive part of the definition of the expression 'salary or wage'. It undoubtedly is remuneration which would, if the terms of employment, express or implied, were fulfilled, be payable to any employee in respect of his employment. The retaining allowance is a remuneration on a lower scale which is paid to the workmen by the management during the off-season for their forced idleness. The payment of such allowance by the management to its workmen during the off-*

> *season when there is no work and when the factory is not working, is indicative of the fact that it wants to retain their services for the next crushing season. The very fact that retaining allowance is paid to the workmen clearly shows that their services are retained and, therefore, the jural relationship of employer and the employee continues. It is true that a workman may not return to work and may take up some other job or employment. In that event, he forfeits the right of payment of the retaining allowance. But when the workmen returns to work when the next crushing season starts, the payment of retaining allowance during the off-season, partakes of the nature of basic wage on a diminished scale. The definition of the expression 'salary or wage' given in Section 2(21) of the Act is wide enough to cover the payment of retaining allowance to the workmen. It is nothing but remuneration correlated to service and it would be a misnomer to call it an allowance. The retaining allowance does not fall within the purview of clause (i) of the exclusionary clause of Section 2(21), but comes within the substantive part of the definition of 'salary or wage' in Section 2(21) of the Act. The retaining allowance cannot be construed to be any other allowance which the employee is, for the time being, entitled. The High Court was, therefore, justified in holding that the retaining allowance paid to the seasonal employees was a part of their 'salary or wage' within the meaning of Section 2(21) of the Act and, therefore, must be taken into account for the purpose of calculation of bonus payable under the Payment of Bonus Act, 1965."*

14] Thus, the Supreme Court has held that retaining allowance is an incentive offered to the workmen to attract them return to the factory after the expiry of off-season and it falls within the substantive part of the definition of expression

'salary or wage'. Though the Supreme Court was dealing with the provisions of The Payment of Bonus Act, 1965 (for short "Payment of Bonus Act"), the learned Counsel for respondent no.2 submits that the definition of salary/wage in the said Act is *pari materia* the definition of salary/wage in the EPF Act. Basic wages under Section 2(b) of the EPF Act includes all emoluments, which are earned by an employee while on duty in accordance with terms of the contract of employment and which are paid or payable in cash to him.

15] In the present case and in terms of the above mentioned judgment, the fact that the Federation has paid retaining allowance to the employees, it indicates that the Federation has retained the services of these employees and, therefore, jural relationship of employer and employee continues. Accordingly, when the workmen returns to work when the next cotton season starts, payment of retaining allowance during off-season partakes of the nature of basic wage on a diminished scale. This allowance is nothing but remuneration co-related to service and it cannot be treated as simple allowance.

16] In fact, basic wages, as defined under Section 2(b) of the EPF Act excludes certain allowances/payment, like 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. It, however, does not include retaining allowance. The authorities below, therefore, have rightly applied the law and calculated the contribution of Provident Fund by the Federation.

17] The learned Senior Counsel for the petitioner has relied upon following judgments in support of his arguments :

1] Maharashtra State Cooperative Cotton Growers Marketing Federation Ltd., Nagpur Vs. The Employees State Insurance Corporation, ESIC Bhavan, Ganeshpeth, Nagpur [First Appeal No. 599/2008 decided on 4/5/2023].

2] Maharashtra State Co-operative Cotton Growers' Marketing Federation Ltd. and another Vs. Maharashtra State Co-operative Cotton Growers' Marketing Federation Employees' Union and another [AIR 1994 SC 1046].

3] Kapus Ekadhikar Karmachari Sangh Vs. State of Maharashtra and Ors. [MANU/SC/0294/2000].

4] Cable Corpn. of India Ltd. & anr. Vs. Union of India & anr. [2006 SCC OnLine Bom 765].

5] Regional Provident Fund Commissioner and Ors. Vs.

Madathupatti Weavers Co-operative Production and Sales Society Limited [AIR 2008 SC 1499].

6] Keshorai Patan Sahkari Sugar Mills Ltd. Vs. Regional Provident Fund Commissioner and others [1993 SCC OnLine Raj 156].

7] R. Ramanathan Chettair Jewellers, Madurai Vs. Regional Commissioner, Employees' Provident Fund, Madurai [1998 SCC OnLine Mad 553].

8] Manipal Academy of Higher Education Vs. Provident Fund Commissioner [(2008) 5 SCC 428].

9] Managanese Ore (India) Ltd. Vs. Chandi Lal Saha and others [AIR 1991 SC 520].

18] The first judgment deals with liability of the Federation to contribute under The Employees' State Insurance Act, 1948 (for short "ESI Act"). The issue before the Court was whether the Federation is a seasonal factory and, therefore, is exempted from the provisions of the ESI Act. The co-ordinate Bench of this Court held that since the Federation is involved in seasonal work for the purpose of the ESI Act, it is exempted from contributing to ESI scheme. Such is not the case here. As stated earlier, the issue involved in the present case is whether payment of retention allowance will attract contribution to Provident Fund at the hands of the Federation.

19] In second judgment, the issue was regularization of

services of seasonal employees after putting more than 240 days of service. The Supreme Court held that such employees are not entitled to be regularized.

20] In the third judgment, the contention was that the Supreme Court, in its earlier judgment, has not properly considered the definition under Section 2(j) of the Act of 1971. The petition was dismissed upon noticing that the definition was properly considered in earlier judgment. Section 2(j) defines 'cotton season' to mean the season for the period from 1st day of July of any year to 30th day of June of the next year. The Supreme Court, in earlier judgment, had observed that procurement and processing season of crop of cotton lasts only for about four months from August to November and hence staff needed for procurement and processing is only for about six months on an average. The Court further held that operation of marketing and maintenance goes on throughout the year and for that purpose, some staff is needed throughout the year.

21] In fourth judgment, the co-ordinate Bench of this

Court dealt with the issue of payment of interest and damages in terms of Section 7Q and 14B of the EPF Act, which is not the case here.

22] In the next judgment, the Supreme Court has dismissed the petition challenging the judgment passed by the Rajasthan High Court. The judgment of the Rajasthan High Court is placed on record at Sr. No. 6. The issue involved before the Rajasthan High Court was the amount of damages calculated by the authorities below. The Court found that the alleged delay in payment of contribution by the employer has been not property considered while deciding quantum of damages under Section 14B of the EPF Act. The High Court remanded back the matter for consideration afresh. However, the employer therein has not even raised grievance before the High Court that it is not liable to contribute to Provident Fund for the payment of retention allowance made to the employees. Thus, in a way, the Federation therein conceded to contribute Provident Fund for payment of retention allowance. This judgment has been relied upon by the respondents, which, to my mind, would support the respondents' case.

23] In the next judgment, the issue before the Madras High Court was about payment of special allowance paid by the Management to its workmen upon the Management's own will and pleasure and not under any contract of employment. Accordingly, it was held that payment of such allowance will not form part of basic wages as defined under Section 2(b). This judgment also does not deal with the issue of retention allowance.

24] The next judgment is on the point whether leave encashment is a component for payment of contribution to the Provident Fund by the employer in terms of Section 2(b) and 6, the Supreme Court held that leave encashment being uncertain and contingent is not part of basic wage for calculation of employer's contribution towards Provident Fund. As is evident, the Supreme Court has not dealt with payment of retention allowance.

25] In the next judgment, the Supreme Court was required to consider the provisions of Minimum Wages Act, 1948 in a case where the workmen were paid by supply of

grains at concessional rates. The Supreme Court held that the wages cannot be in kind under the scheme of the Act unless there is a Notification by appropriate Government. This judgment is also of no relevance to the facts of the present case.

26] Thus, none of these judgments deal with the issue involved in the present case, *viz.,* the liability of the Federation to contribute to Provident Fund for payment of retention allowance to the employees and will be thus of no benefit to the petitioner.

27] Put all together, the authorities below having considered the relevant provisions of the EPF Act as also the relevant authorities, no interference is called for in the impugned orders. There is no merit in the petition.

28] The writ petition is accordingly dismissed. Rule is discharged.

JUDGE

Sumit