

Calcutta Gujarati Education Society And Another Vs Regional Provident Fund Commissioner And Others

Court: Calcutta High Court (Appellete Side)

Date of Decision: Aug. 24, 2021

Acts Referred: Constitution Of India, 1950 " Article 227

Employees' Provident Fund and Miscellaneous Provisions Act, 1952 " Section 2(b), 2(b)(ii), 6, 7A, 29, 30, 30(3), 31

Hon'ble Judges: Sabyasachi Bhattacharyya, J

Bench: Single Bench

Advocate: Soumya Majumder, Noelle Banerjee, Dipak Dey, Rajib Roy, Sudip Kumr Dutta, Susanta Pal, Ananya Neogi

Judgement

1. The present application under Article 227 of the Constitution of India has been preferred against an order dated October 20, 2005 passed by the

Employees' Provident Fund Appellate Tribunal in A.T.A No. 383(15)/2001.

2. The revisionist-petitioners had approached the Appellate Tribunal against an order, bearing Order No. 25 dated April 30, 2001 passed by the

Regional Provident Fund Commissioner, West Bengal, determining the Provident Fund (PF) dues on the Government's Dearness Allowance (DA)

component for the period from August 1982 to January 1989 under Section 7-A of the Employees' Provident Fund and Miscellaneous Provisions

Act, 1952 (for the sake of brevity, "the EPF Act"). It was found by the Commissioner that Provident Fund contribution was payable on the DA

by the petitioner no.1.

3. Learned counsel for the petitioners argues that Dearness Allowance is granted by the State Government and the petitioner no.1 has no role, as an

employer, to pay such component of the PF. It is argued that, all along, the State had been disbursing such amounts in respect of the DA component

of PF through its own Disbursing Officer (DO). However, all on a sudden, the Assistant Inspector of School (SE), Calcutta and DDO of the petitioner

no.1-School vide Memo No.666/P dated 7,1997, intimated the District Inspector of Schools (SE), Calcutta, seeking necessary instruction for taking

further action in respect of the alleged dues on the score of deductions of PF contribution for the relevant months, in so far as the DA component was

concerned.

4. Vide another Memo dated March 11, 1997, the Enforcement Officer, PF, West Bengal had indicated that the petitioner no.1-society was not

deducting any PF contributions on DA received from the Government of West Bengal since August, 1982.

5. On March 20, 1997, the petitioner no.1-society intimated the Regional Provident Fund Commissioner (RPFC) that the DA sanctioned by the

Government of West Bengal from time to time were neither received, nor managed and/or disbursed to teachers by the petitioner no.1 but the same

was placed at the disposal and control of the Disbursement Officer (DO) appointed by the Government of West Bengal, which was the only person

authorised to deal with it and he directly, without involvement of the society in any manner whatsoever, disbursed to the concerned teachers. The

petitioner no.1 also communicated to the DDO on March 29, 1997 that the PF contributions deducted by the latter be deposited by the DDO directly

under an appropriate challan into the EPF Code Account No. WB/19535 to the credit of the respective employees or to hand over such deduction to

the petitioner no.1 for enabling the petitioner no.1 to forward it for deposit into the said EPF Code Account.

6. On behalf of the Regional Provident Fund Commissioner (RPFC), intimation was given on March 11, 1999 to petitioner no.1 asking the said

petitioner to appear/be represented on April 7, 1999 at 11:00 am at the designated place to represent its case against determination of the amount due

from the petitioner no.1 under the provisions of the EPF Act. Such notice was issued in accordance with Section 7-A of the Act.

7. Ultimately, vide Order dated April 30, 2001, the proceeding under Section 7-A was disposed of, directing the petitioner no.1 to deposit the dues of

Rs.19,46,878/-, with interest (as on April 25, 2001) to the tune of Rs.10,45,970/-, totalling Rs. 29,92,848/-, within 15 days from the date of receipt of

the order, failing which, the dues would be recovered as per rules.

8. Learned counsel appearing for the petitioners specifically contends, by relying on several annexures and documents of the contemporaneous period

to indicate that, previously, the DDO had been disbursing the amount directly to the concerned teachers.

9. It is further argued that the petitioner no.1-employer never had any control on such disbursement. As such, the belated claim of arrears for a much

prior period was not tenable in the eye of law inasmuch as the DA component of PF was concerned.

10. In any event, it is contended, the employer, that is, the petitioner no.1, is not liable to pay the employees' share of the DA component of the

PF.

11. Learned counsel places reliance on a judgment dated July 24, 2009 passed by the Supreme Court in Civil Appeal No.7115 of 2009 [Calcutta

Gujarati Education Society and another Vs. Regional Provident Fund Commissioner and others] in support of the proposition that although the

Appellate Tribunal which passed the impugned order was situated in New Delhi, the Calcutta High Court had jurisdiction to entertain the present

revisional application. In view of the fact that the original order was passed by the Assistant PF Commissioner situated at Calcutta, West Bengal, this

court had territorial jurisdiction to entertain and decide a challenge thereto.

12. Learned counsel for the petitioner next relies on a Division Bench judgment of this court, reported at (1998) 2 CLJ 61 (Gyan Bharati Vs. Regional

Provident Fund Commissioner and others), in support of the proposition that the liability of the employer to pay the DA component arises only on

receiving the same from the State Government. The premise of the said judgment was that such liability arises only when the amount is released by

the Government and paid to the School Authorities.

13. However, in the present case, since no such payment had been made to the petitioner no.1-employer, no such liability arose on the part of the

petitioner no.1.

14. In the said case, it was admitted by the employer that it was liable to pay Provident Fund (PF) and have been paying such amount including the

part of the DA under the employers' share.

15. In the present case, however, the employer did not pay such amount at any point of time and the entire control over disbursement and actual

disbursement was with the DDO.

16. Learned counsel next cites a Single Bench Judgment reported at (1996) 2 CHN 134 (Gyanbharati Vidyapith Vs. RPF. Commissioner, Andaman &

Nicobar Islands) for the proposition that the DA component of PF is paid by the government and only upon such payment, the obligation is shifted to

the employer. It was further observed in the said report that, in the fitness of things, belated payment may naturally occur as the pay bills, after

preparation by the school office, are sent to the Government which, after due scrutiny, are sanctioned.

17. Placing reliance on the definition of "basic wages" in terms of Section 2(b) of the EPF Act, it is highlighted that such wages do not include

any Dearness Allowance.

18. It is, thus, contended that it is not the employer's liability to pay the DA component of the PF as well. Learned counsel submits that although

Section 6 of the EPF Act stipulates that the contribution of the employer to the fund shall be 10 per cent of the basic wages, DA and Retaining

Allowances (if any) for the time payable to each of the employees, the same has to be read in conjunction with the definition of "basic wages" in

the Act itself. As such, it is argued that the liability to pay such component, at least in respect of the employees' share, is on the State

Government.

19. Learned counsel appearing for the opposite party no.1 (RPFC) contends that the provisions of Section 6 of the EPF Act make it abundantly clear

that the employers' share of the DA component of PF is included within the employers' contribution. As such, the liability is on the employer

to pay such dues.

20. Although basic wages have been defined to exclude DA in Section 2(b)(ii) of the EPF Act, the employers' contribution as stipulated in Section

6 clearly includes, over and above the basic wages, DA and Retaining Allowance.

21. That apart, Section 29 of the EPF Act further reiterates that the contributions payable by the employer under the Scheme shall be at the rate of 10

per cent of the basic wages as well as the Dearness Allowance (including the cash value of any food concessions) payable to each employee to

whom the Scheme applies. The contribution payable by the employee shall be equal to the contribution of the employer and/or more.

22. Section 30 of the EPF Act clearly provides that the employer shall, at the first instance, pay both the contributions payable by himself and also, on

behalf of the member employed by him, directly or by or through a contractor, the contribution payable by such member.

23. It has been further clarified in Section 30(3) of the EPF Act that it shall be the responsibility of the principal employer to pay both the contribution

payable by himself respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor, as

well as administrative charges.

24. That apart, Section 31 of the EPF Act provides that, notwithstanding any contract to the contrary, the employer shall not be entitled to deduct the

employer's contribution from the wage of a member or otherwise to recover it from him.

25. It is further submitted that, in all the cited judgments, Section 6 of the EPF Act have been considered and it has been the clear finding of the

Division Bench as well as the learned Single Judge of this Court that the liability of payment of the employer's contribution of the DA component

of PF is of the employer.

26. Upon a consideration of the relevant provisions and the submissions of the parties, as well as the cited reports, there is no doubt that this Court has

jurisdiction to take up the present challenge under Article 227 of the Constitution of India, in view of the judgment of the Supreme Court in Calcutta

Gujarati Education Society (supra).

27. The question of contribution of DA component of the PF is answered clearly in Section 6 of the EPF Act which, in no uncertain terms, indicates

that the contribution of PF of the employer shall, over and above 10 per cent of the basic wages, also include the DA component and Retaining

Allowance (if any).

28. The definition of "basic wages" in Section 2(b), specifically excludes Dearness Allowances in sub-clause (ii) of the said provision. Hence,

taken harmoniously, Section 6 attributes the liability on the employer to pay the employer's share of the entire amount payable to the employee,

including 10 per cent of the basic wages as well as the DA.

29. In fact, Section 30 of the said Act clearly provides that it is the employer's liability, in the first instance, to pay both the contributions payable

by himself and also on behalf of the employee.

30. Section 29, in unequivocal terms, reiterates the concept of Section 6 that the Provident Fund is to be calculated not only on the basic wages but on

the DA as well.

31. Although Section 31 mentions that the employer shall not be entitled to deduct only the employer's contribution from the wage of a member or

otherwise to recover it from him, it does not absolve the first instance on the employer to pay both contributions, of the employer as well as employee,

under Section 30 of the EPF Act.

32. In the present case, petitioner no.1 failed to discharge its duties in clearing the DA component of PF for the relevant period, that is, August, 1982

to January, 1999. Hence, the RPFC was perfectly justified in directing the petitioner no.1 to pay such amount.

33. The perusal of Gyan Bharati (supra) and Gyanbharati Vidyapith (supra) clearly shows that both the Division Bench and the learned Single Judge

laid down the proposition that the statutory liability for payment of PF contribution, including the DA component over and above the basic pay, is of the

employer.

34. Section 6 was clearly interpreted in its literal terms by both the Benches to come to the conclusion that it was the employers', and not the

State's, liability to pay the employer's contribution of the DA component of the PF. That apart, in Section 2(b)(ii), Dearness Allowance has

been defined as all cash payments, by whatever name called, paid to an employee on account of rise in the cost of living. Such DA is obviously paid

by the State Government to the employee directly. However, insofar as the DA component of the PF is concerned, the employer has the liability to

pay the employer's share of such component, over and above the basic wages.

35. The provisions of the EPF Act, read as a whole, leave no option for any other construction.

36. In fact, the definition of "wages" in the Payment of Wages Act, 1936 also referred in the in the passing by learned counsel, means any

remuneration (whether by way of salary, allowance or otherwise) expressed in terms of money or capable of being so expressed which would, if the

terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such

employment.

37. In any event, such definition has no direct relevance to the present case, which only deals with the DA component of the PF, which is governed

entirely by the EPF Act.

38. Although the petitioner has relied on Memo No.519-Edn. (SE)/3-A dated August 23, 1973, which stipulates that the Deputy Director of

Public Instruction (Sec. Edn.), West Bengal is authorised to release necessary funds on quarterly basis in favour of the authorities concerned, such

Circular cannot be read in exclusion of Section 6 of the EPF Act, which clarifies that the liability of payment of the DA component is entirely on the

employer, at least inasmuch as the employer's share is concerned. As discussed, the primary liability to clear off, in favour of the employee, even

the employee's contribution is on the employer subject to adjustment/deduction from salary.

39. Even in Bridge & Roof Co. (India) Ltd. Vs. Union of India, reported at AIR 1963 SC 1474, there is no indication that Provident Fund contributions

in respect of the DA is not payable by the employer but by the Government. The definition of Section 2(b) cannot circumscribe the specific

stipulations in Section 6, which exclusively deals with the respective contributions of the employer and employee regarding the PF, which includes the

DA component along with basic wages.

40. In the Regional Provident Fund Commissioner (II) West Bengal Vs. Vivekananda Vidyamandir and others, rendered by the Supreme Court on

February 28, 2019, inter alia, in Civil Appeal No.6221 of 2011, the concept of PF contribution was considered to include the DA component, over and

above the basic wages.

41. Hence, although DA is not a part of the basic wages, insofar as the DA component of PF is concerned, Section 6, read with Sections 29 and 30,

of the EPF Act clearly indicate that not only is it the employer's liability to pay his share of the DA component of PF along with the other

components, the first liability of payment of the contributions of both the employer and employee lies on the employer.

42. Thus, in the instant case, the contentions raised by the petitioners have no legs to stand upon. Hence, C.O. No.208 of 2006 is disposed of without

interfering with the impugned order dated October 20, 2005 passed by the Appellate Tribunal. The petitioner no.1 shall pay the liabilities as ascertained

by the Appellate Tribunal, confirming the order of the RPFC, positively within two months from the date of this order. Upon such payment being

made, the Disbursing Authority shall take appropriate steps to distribute such arrear component of the PF in favour of the respective employees, or

their heirs and legal representatives in the event the employees are no longer in the world of the living.

43. In default of such payment, the RPFC will be at liberty to recover such amount in accordance with law from petitioner no.1. However, the

petitioners will be at liberty to approach the appropriate authorities of the State Government for recovery of the employees' share of the DA

component for the period between April, 1982 and January, 1999, and alternatively, to deduct the employees' share of the DA component of PF

for the said period, in the event the same has not been disbursed in favour of the employees, from the total amount directed to be paid by the impugned

orders.

44. There will be no order as to costs.

45. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.