



THE EMPLOYEES' PROVIDENT FUND AND MISCELLANEOUS PROVISIONS ACT, 1952

“Emoluments that are universally, ordinarily and necessarily paid to all shall be considered as a part of a Basic Wages”



THE SUPREME COURT OF INDIA ON
WHAT SHALL CONSTITUTE THE 'BASIC WAGES'



BACKGROUND

The issue revolves around Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as 'the Act').

The common question of law before the Apex Court was :

“Whether special allowances paid by an establishment to its employees would fall within the expression “basic wages” under Section 2(b)(ii) read with Section 6 of the Act for computation of deduction towards Provident Fund?”

FACTS

The brief facts of all the Appeals are as under:

Civil Appeal No. 6221 of 2011:

It was regarding an unaided school giving special allowance (SA) by way of

incentive to teaching and non-teaching staff which was reviewed from time to time upon enhancement of tuition fee.

The authority under the Act held that the special allowance was to be included in the basic wage for deduction. **The Single Judge set aside this order** and the Division Bench allowed the appeal on 13.01.2005 while holding that the **SA** was a part of Dearness Allowance (DA) liable to deduction.

This order was recalled. **Subsequently the Division Bench dismissed the Appeal** to hold that the **SA** was not linked to the consumer price index and hence did not fall within the definition of basic wage. Thus, it was held that **SA** was not liable to deduction.

Civil Appeal Nos. 3965-66 of 2013:

In this appeal, the Appellant was paying basic wage along with variable dearness allowance (VDA), house rent allowance (HRA), travel allowance (TA), canteen allowance and lunch incentive.



Deductions for PF were not made from the **SAs** aforementioned.

The authority under the Act held that only washing allowance could be excluded from basic wage. The High Court partially allowed the Writ Petition by excluding lunch incentive from basic wage and the review petition against the same was dismissed.

Civil Appeal Nos. 3969-70 of 2013:

The Appellants were not deducting PF contribution on HRA, **SA**, management allowance and conveyance allowance by excluding it from basic wage.

The authority under the Act held that the allowances had to be taken into account as basic wages for deduction. However, the High Court dismissed the Writ Petition and thereafter a Review Petition was filed by the Appellant.

Civil Appeal Nos. 3967-68 of 2013:

The Appellant Company was not deducting PF contribution on HRA, **SA**, Management allowance and Conveyance

Allowance by excluding it from basic wage.

The Authority under the Act held that the **SAs** formed part of basic wage and was liable to deduction. The Writ Petition and Review Petition filed by the Appellant were dismissed.

Transfer Case (C) No. 19 of 2019 :

The Petitioner filed a writ petition against the show cause notice issued by the authority under the Act calling for records to determine if conveyance allowance, education allowance, food concession, medical allowance, special holidays night shift incentives and city compensatory allowance constituted part of basic wage.

The Writ Petition was dismissed and a Writ Appeal was preferred against the same and which was transferred to this Hon'ble Court before the adjudication of the liability.



RELEVANT PROVISIONS OF THE ACT

The relevant provisions of the Act which are required to be necessarily referred to are as under:

Section 2(b) of the Act:

“(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;”

Section 6 of the Act:

“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 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 not 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 [11 : 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.]”



REASON OF JURISPRUDENCE

This Hon'ble Court held that the Act had defined "Basic Wage" under Section 2(b) *to exclude dearness allowance and a few allowances mentioned therein*. However, dearness allowance finds inclusion in Section 6.

*The Hon'ble Court observed that the **crucial test** adopted to determine if any payment was to be excluded from basic wage, was one of **Universality**.*

To elaborate on this point, the Hon'ble Court opined as follows:

*"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.**"*

This Bench took aid of the interpretation adopted by this Hon'ble Court in *Bridge & Roof Co. (India) Ltd. vs. Union of India, (1963) 3 SCR 978*.

In the aforementioned Judgment, it was explained that despite the use of the

terminology "**all emoluments**" contained in definition clause 2(b) of the Act, there were certain exclusions laid down in **sub-clauses (i) and (iii)**, to exclude those presents which would not be earned in accordance with the terms of the contract of employment.

Further, **Sub-clause (ii)** lies as an exception, the payments which are earned by an employee in accordance with the terms of his contract of employment.

Hence, even though no logical pattern can be determined for the basis of the exceptions in the three sub-clauses of Section 2(b) of the Act, it is conclusive that they must be earned by employees in accordance with the terms of the contract of employment.

Further, Section 6 includes dearness allowance for purposes of contribution to the PF. Conclusively, the basis of its exclusion under Section 2(b) and inclusion under section 6 is that **whatever is payable in all concerns and is earned by all permanent**



employees is included for the purpose of contribution to PF.

This Hon'ble Court further referred to its judgment in *Muir Mills Co. Ltd., Kanpur vs. Its Workmen*, AIR 1960 SC 985 wherein it was held that "any variable earning which may vary from individual to individual according to their efficiency and diligence would stand excluded from the term "basic wages".

Additionally, this Hon'ble Court referred to *Manipal Academy of Higher Education vs. Provident Fund Commissioner (2008) 5 SCC 428*, wherein it was summarized as follows:

- *The emoluments which are universally, ordinarily and necessarily paid to all employees are basic wages.*
- *The payment specially availed by those who avail of the opportunity is not basic wage.*
- *Any payment by way of a special incentive or work is not basic wage.*

The aforementioned summarization was upheld by this Hon'ble Court in *Kichha Sugar Company Limited through General Manager vs. Tarai Chini Mill Majdoor Union, Uttarakhand*, (2014) 4 SCC 37 while further specifying that, *"when an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning"*.

Finally, the Hon'ble Court in *The Daily Pratap vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh*, (1998) 8 SCC 90 also opined that *the Act was a piece of beneficial social welfare legislation and must be interpreted as such in its judgment.*

CONCLUDING VIEW

This Hon'ble Court held that *the establishments herein had failed to demonstrate that the allowances in question herein were being paid to its employees as an incentive for production resulting in greater output and were not paid to all employees across the board.*



The Hon'ble Court further elaborated that in order for the amount to exceed beyond basic wages, it has to be *established that the workman concerned had become eligible to get this extra amount by working beyond his normal work that he was required to put in.*

Conclusively, it held that *the wage structure and components of salary examined in the current appeals had been correctly determined by the Appellate Authority under the Act and the respective High Courts as a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution to the PF account of the employees.*

Therefore, the Appeals by the Provident fund Commissioner were allowed and the Appeals by the establishments were dismissed.

AMLEGAL'S REMARKS

This decision has categorically laid down “**two way tests**” for basic wages as below:

Test of Generality :

The naturally bundled components which are implied, common and universal in nature.

Test of Exclusivity :

Exclusive and/or special components are subjective in nature, unique, uncommon and are entitled with/for some and in certain situations alone.

Decisive Factor :

The nature of an allowance and why it is given will be a decisive factor.

The conditions which are sine qua non to such incentives will seal its fate.

Purview of Basic Wages :

The basic wages will be the set of implied or natural or universal components which always come as a bundle in a remuneration during the course of employment.



When, such components can be differentiated and are an additional or surplus to the general or universal or implied component then it will be fit to be classified under **SA**.

*The onus will always lie upon an employer to show conclusively with a reasoning as to why a component is outside the ambit of the basic wages and to be called as a **SA**.*

It is most appropriate to describe this judgment as a progressive one that initially seems to incur short term sacrifices but brings with it long term benefits for all employees benefited by this Act.

For queries/feedback/comments, please feel free to connect with us on anand@amlegals.com.

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