Madras High Court
Madras High Court
The Management Of vs The Regional Provident Fund ... on 7 June, 2011
DATED : 07.06.2011

CORAM

THE HONOURABLE MR.JUSTICE K.CHANDRU

W.P.Nos.15823, 22480, 25442 and 25443 of 2010, 3427 of 2011,

19751 of 2010, 970, 3986,1853 and 2908 of 2011

and

M.P.Nos.1,1,1 and 1 of 2010, 1 of 2011, 1 of 2010, 1,1,1 and 1 of 2011

The Management of

Reynolds Pens India Pvt. Ltd.,

Plot No.C21, SIPCOT Industrial Partk,

Irrugattukottai, Pennallur Post,

Sriperumbudur Taluk,

Kancheepuram-602 105

rep by its Director. .. Petitioner in

W.P.No.15823 of 2010

The Management of Hinduja Foundries Limited,

Plot No.K2,SIPCOT Industrial Park,

Arneri Village, Sriperumbudur-602 105

rep by its Managing Director. .. Petitioner in

W.P.No.22480 of 2010

The Management of Mando India Ltd.,

F64, Sipcot Industrial Park,

Irrungattukottai, Sriperumbudur Taluk,

Deputy General Manager-HR .. Petitioner in

W.P.No.25442 of 2010

The Management of

Saint-Gobain Glass India Limited,

Plot No.A1, SIPCOT Indl. Park,

Sriperumbudur, Kanchipuram Dt.,

Pin : 602 105

rep by its Managing Director. .. Petitioner in

W.P.No.25443 of 2010

Prakruthi Associates,

rep by its Partner Mr.R.Sivakumar

A3, First Floor, Lloyds Road,

Royapettah, Chennai-600 014. .. Petitioner in

W.P.No.3427 of 2011

The Madras Advertising Company (P) Ltd.,

861,Anna Salai,

Chennai-600 002.

rep by its Wholetime Director .. Petitioner in

W.P.No.19751 of 2010

The Management of

Vetri Software India Pvt. Ltd.,

'DOWLATH TOWERS,

No.59, 9th Floor,

Taylors Road, Kilpauk,

Chennai-600 010.

rep by its Deputy General Manger-Legal .. Petitioner in

W.P.Nos.970 and

3986 of 2011

The Management of

Chennai Gemini Soft Consultants (P) Ltd.,

16/13, Jain Vatika,

Wason Street, T.NAgar,

Chennai-600 017

represented by its Director Mr.P.B.Ramoji .. Petitioner in

W.P.No.1853 of 2011

The Management of

L.M.Van Moppes Diamond Tools India Ltd.,

P.B.No.853, Hozur Gardes,

Sembium,

Chennai-600 011. .. Petitioner in

W.P.No.2908 of 2011

Vs.

1.The Regional Provident Fund Commissioner-II,

Employees' Provident Fund Organisation,

Sub Regional Office, Ambattur

Ministry of Labour, Government of India,

No.R-40A, TNHB Office-cum-Shopping Complex,

Mugappair, Chennai-600 087.

2.The Assistant Provident Fund Commissioner,

Employees' Provident Fund Organisation,

Sub Regional Office, Ambattur,

Ministry of Labour, Government of India,

No.R-40A, TNHB Office-cum-Shopping Complex,

Mugappair, Chennai-600 087. .. Respondents in

W.P.No.15823 of 2010

The Regional Provident Fund Commissioner,

Employees' Provident Fund Organisation,

Sub Regional Office, Ambattur,

T.N.H.B. Shopping Cum Office Complex,

Chennai-600 037. .. Respondent in

W.P.Nos.22480, 25442

and 25443 of 2010

The Assistant Provident Fund Commissioner,

Employees' Provident Fund Organization,

37,Royapettah High Road,

Royapettah,

Chennai-600 014. .. Respondent in

W.P.No.3427 of 2011 and

2nd respondent in

W.P.No.19751 of 2010,

1853 and 2908 of 2011

1.The Presiding Officer,

Employees' Provident Fund Appellate Tribunal

(Ministry of Labour and Employment,

Government of India),

Scope Minar, Core-II, 4th Floor,

Laxmi Nagar District Centre,

Laxmi Nagar,

New Delhi-110 092. .. 1st respondent in

W.P.Nos.19751 of 2010,

1853 of 2011

1.The Presiding Officer,

Employees' Provident Fund Appellate Tribunal

(Ministry of Labour and Employment)

Core-II, 4th Floor, Laxmi Nagar Distance Centre

Laxmi Nagar, Delhi

Camp : Coimbatore. .. 1st Respondents in

W.P.Nos.970,

3986 and 2908 of 2011

2.The Regional Provident Fund Commissioner,

EPF Organisation, Regional Office,

37,Royapettah High Road,

Chennai-600 014. .. 2nd Respondents in

W.P.Nos.970 and

3986 of 2011

W.P.No.15823 of 2010 is preferred under Article 226 of the Constitution of India praying for the issue of a writ of certiorari to call for the records of the first respondent in proceedings No.TN/SRO/AMB/48845/CC(Area 1) 2010, dated 30.06.2010 and the notice of the second respondent dated 8.7.2010 in proceedings No.TN/AMB/Circle : 5/TN/48845/1120 and to quash the same.

W.P.Nos.22480, 25442 and 25443, of 2010 are preferred under Article 226 of the Constitution of India praying for the issue of a writ of mandamus to forbear the respondent from holding the proceedings claiming contribution in respect of "other allowances" pursuant to the notices of the respondent dated 19.8.2010 in proceedings No.TN/AMB/Circle:5/TN/66282/1141, in respect of "expatriate allowances and other allowances" pursuant to the proceedings dated 6.10.2010 and 21.10.2010 in even Nos.TN/SRO/AMB/39514/Intl. Workers/2010, in respect of various allowances as referred to in its proceedings dated 21.10.2010 in TN/SRO/AMB 40002/Intl. Workers/2010 and in terms of respondent notice dated 2.9.2010 in proceedings No.TN/AMB/Circle:5/TN/40002/1149 and to direct the respondent to confine the enquiry under Section 7A of the Employees' Provident Fund and Miscellaneous Act and to determine the contribution only on the basic salary paid or payable to the employees who are required to be covered or covered under the Employees' Provident Fund and Miscellaneous Scheme.

W.P.No.3427 of 2011 is preferred under Article 226 of the Constitution of India praying for the issue of a writ of mandamus to direct the respondent to reopen the enquiry in terms of its notice dated 21.09.2010 in proceedings No.CHN/TN/CC-II (26)/54896/Eng/Regl/2009-10, to decide the preliminary issue raised by the petitioner in its communication dated 7.2.2011 and pass orders after providing adequate opportunity to the petitioner.

W.P.Nos.19751 of 2010, 970, 3986, 1853 and 2908 of 2011 are preferred under Article 226 of the Constitution of India praying for the issue of a writ of certiorari to call for the records of the first respondent in ATA No.882 (13) 2008, ATA No.771 (13) 2004, ATA No.400 (13) 2009, ATA 659 (13)/2005 and ATA No.674 (13) 2010 and to quash its order dated 22.07.2010, 29.12.2010, 28.01.2011, 08.12.2010 and 31.12.2010 respectively.

For Petitioners : .Mr.AL.Somayaji, SC

for M/s.T.S.Gopalan and Co. in all W.Ps.

For Respondents : Mr.K.Gunasekar, ACGSC

in W.P.Nos.22480, 25442,25443 &,19751/2010

Ms.V.J.Latha

in W.P.Nos.15823 of 2010, 3427, 3986, 970, 1853 and 2908 of 2011,

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COMMON ORDER

In these 10 writ petitions, the petitioners are different employers covered by the provisions of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (for short PF Act). Some of the petitioners are also multi national companies doing their business in India.

2.A common question that arises for consideration in all the 10 writ petitions is that various allowances paid by the petitioners to their employees under different heads, such as conveyance, educational allowances, food concessions, medical, special holidays, night shift incentives, city compensatory allowances were amounting to wages within the meaning of the term 'basic wage' as per Section 2(b) of the PF Act covered for deductions towards the Provident Fund.

3.In W.P.Nos.15823, 22480, 25442 and 25443 of 2010 and 3427 of 2011, the petitioners have come forward to challenge the notices issued under Section 7-A of the PF Act on various dates and it had not culminated into final orders. The petitioners were merely directed to produce various records to decide the question whether particular payment made by the petitioners to their employees would be covered by the term "basic wage" for the purpose of deduction towards Provident Fund subscription.

4.Under Section 7-A(3), no orders can be passed unless the employer concerned is given a reasonable opportunity of representing their case. Even if an adverse order is passed, the aggrieved employer can file a review under Section 7-B with the same authority. Thereafter, a further appeal lies to the EPF Appellate Tribunal under Section 7-I. When there is hierarchy of authorities in deciding the matters raised herein, including comprehensive appeal to the judicial tribunal, it is unthinkable as to how the petitioners can file writ petitions even at the stage of show cause notice under Section 7-A. The issues raised herein are not purely legal issues, but mixed questions of facts and law involved.

5.The petitioners' stand is that they are seeking this court to give an authoritative ruling by holding certain allowances will not constitute wages under Section 2(b), then it will be binding on the authorities and that the employers can arrange their affairs based on the said ruling. The said request may look attractive. However, this court exercising powers under Article 226 of the Constitution of India cannot clutch on to a jurisdiction which it does not have. The limited power of the judicial review can be exercised only when statutory authorities make an order and still it required an appropriate correction by way of judicial review. The

petitioners cannot construe the High Court exercising power under Article 226 as an advance ruling authority as provided in some taxing statutes. In fact, by the exercise of power under Article 226, the Court cannot give ruling based on apprehension or on academic issues. It is preciously for this reason, the authorities have been created under the Act and also a judicial appellate Tribunal has been constituted.

6.In none of the cases cited by the petitioners, the Court had directly entertained a writ petition even before facts could be marshalled and findings given by the PF Commissioner. Before the amendment made to the PF Act by Amending Act 33/1988 (with effect from 1.7.1997), there was no scope for any appeal. Only the Central Government was given powers to remove difficulties under Section 19-A and to determine the matters in cases of doubt. But, with the introduction of Amending Act 33 of 1988, extensive amendments have been made, whereby determination by the PF Commissioner can be made only after hearing the parties, but power of review was also given under Section 7-B with a further right of appeal to a judicial Tribunal under Section 7-I. The appeal power is a comprehensive power and the Tribunal constituted under the Act can go into both questions of law and facts. The decisions relied were all cases where the initial determination was made either by the Central Government or by the Tribunal.

7.Therefore, the petitioners cannot invoke the jurisdiction under the spacious plea of getting a binding ruling from this court, so that there is certainty in their carrying on their business. As already observed, the Court cannot given any advance ruling whether a particular payment is a "basic wage" in terms of Section 2(b) and it is essentially a question of fact based on relevant materials. The authorities are empowered to also call for appropriate records and can enforce attendance of persons. They can receive evidence including issuing Commission for examination of witnesses. If it transpired that the employers have adopted subterfuge in rechristening or labelling the allowances so as not to come within the terms 'basic wage', and in effect they are basis wages within the purview of the Act, the authorities can demand subscription towards the escaped payment. In case of deliberate delay, the Act provides for penalty by way of damages and interest on delayed payments.

8.Since the Act provides for determination by quasi judicial authority with power of review and also an appeal before a judicial appellate Tribunal, the petitioners will have to necessarily avail the remedies under the Act. In this context, it is necessary to refer to a judgment of the Supreme Court in Raj Kumar Shivhare v. Directorate of Enforcement reported in (2010) 4 SCC 772, wherein the Supreme Court while dealing with an alternative remedy available under the FEMA Act held that the Act cannot be bypassed and the jurisdiction under Article 226 of the Constitution of India cannot be invoked. In the following passages found in paragraphs 31 and 32, the Supreme Court had observed as follows:

"31.When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

32.No reason could be assigned by the appellant s counsel to demonstrate why the appellate jurisdiction of the High Court under Section 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum."

9.The Supreme Court in United Bank of India v. Satyawati Tondon reported in (2010) 8 SCC 110 dealt with SARFAESI Act and DRT Act and in paragraphs 55 and 56, it had held as follows:

"55.It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of

banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

56.Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act. In the result, the appeal is allowed and the impugned order is set aside. Since the respondent has not appeared to contest the appeal, the costs are made easy.

10.Even under the ESI Act, the Supreme Court has held that if authorities make determination under Section 45A, unless it is challenged in a proceedings under Section 75, it can be deemed to become final and the authority can proceed to execute the order vide judgment in ESI Corpn. v. C.C. Santhakumar reported in (2007) 1 SCC 584. The following passages found in paragraphs 17, 25, 28, 30 and 31 of the said judgment may be usefully reproduced below: "17. Prior to the incorporation of Section 45-A under Act 44 of 1966, the only resort available to the Corporation was Section 75, for recovery of contribution through the court. Since this procedure was found to be impracticable and delayed process involved, a special provision was contemplated whereunder adjudication is to be made by the Corporation itself. By reason of incorporation of Section 45-A with effect from 17-6-1967, it became possible for the Corporation to have determination of the question, binding on the principal employer, without resorting to the ESI Court. In regard to the order under Section 45-A, the same is enforced, as envisaged under Section 45-B, which was similarly brought into the Act, by which the contribution may be recovered as arrears of land revenue. With regard to the decision reached by the ESI Court in the application under Section 75, the said decision is enforced, as envisaged in sub-section (4) of Section 75 as if it is a civil court. The mode of recovery under Section 45-B of the Corporation and the mode of recovery as per Section 75(4) by the ESI Court as the civil court are entirely different as both Sections 45 and 75 operate in different spheres.

25.Section 45-A of the Act contemplates a summary method to determine contribution in case of deliberate default on the part of the employer. By Amendment Act 29 of 1989, Sections 45-C to 45-I were inserted in the Principal Act, for the purpose of effecting recovery of arrears by attachment and sale of movable and immovable properties or establishment of the principal or immediate employer, without having recourse to law or the ESI Court. Therefore, it cannot be said that a proceeding for recovery as arrears of land revenue by issuing a certificate could be equated to either a suit, appeal or application in the court. Under Section 68(2) and Sections 45-C to 45-I, after determination of contribution, recovery can be made straightaway. If the employer disputes the correctness of the order under Section 45-A, he could challenge the same under Section 75 of the Act before the ESI Court.

28.What Section 75(2) empowers is not only the recovery of the amounts due to the Corporation from the employer by recourse to the ESI Court, but also the settlement of the dispute of a claim by the corporation against the employer. While this is so, there is no impediment for the Corporation also to apply to the ESI Court to determine a dispute against an employer where it is satisfied that such a dispute exists. If there is no dispute in the determination either under Section 45-A(1) or under Section 68, the Corporation can straightaway go for recovery of the arrears.

30.The legislature has provided for a special remedy to deal with special cases. The determination of the claim is left to the Corporation, which is based on the information available to it. It shows whether information is sufficient or not or the Corporation is able to get information from the employer or not, on the available records, the Corporation could determine the arrears. So, the non-availability of the records after five years, as per the Regulations, would not debar the Corporation to determine the amount of arrears. Therefore, if the provisions of Section 45-A are read with Section 45-B of the Act, then, the determination made by the Corporation is concerned. It may not be final so far as the employer is concerned, if he chooses to challenge it by filing an application under Section 75 of the Act. If the employer fails to challenge the said determination under Section 75 of the Act before the Court, then the determination under Section 45-A becomes final against the employer as well. As such, there is no hurdle for recovery of the amount determined under Section

45-B of the Act, by invoking the mode of recovery, as contemplated in Sections 45-C to 45-I.

31.In ESI Corpn. v. F. Fibre Bangalore (P) Ltd.2 it was observed that it is not necessary for the Corporation to seek a resolution of the dispute before the ESI Court, while the order was passed under Section 45-A. Such a claim is recoverable as arrears of land revenue. If the employer disputes the claim, it is for him to move the ESI Court for relief. In other cases, other than cases where determination of the amount of contributions under Section 45-A is made by the Corporation, if the claim is disputed by the employer, then, it may seek an adjudication of the dispute before the ESI Court, before enforcing recovery."

In view of the above, this court is not inclined to entertain at the stage of notice under Section 7A these five writ petitions, i.e., W.P.Nos.15823, 22480, 25442 and 25443 of 2010, 3427 of 2011.

11.In the other five writ petitions, the petitioners have moved the EPF Appellate Tribunal against orders under Section 7A and having failed in their attempts, have come before this Court. Therefore, it is necessary to deal with each one of the cases on merits.

12.In W.P.No.19751 of 2010, the petitioner was an Advertisement Company. They were given a show cause notice dated 24.9.2008. The petitioner had sent a reply stating that the food and entertainment allowances given by them cannot be considered on par with the basic wages. It was stated that their employees were not provided canteen facilities. They were paying food and entertainment allowances and the amounts were paid in terms of contract of employment and hence, it will not attract contribution by treating it as a basic pay. Similarly the educational allowance and conveyance allowances are paid for specific purposes in terms of contract of employment. Since they were already paying contributions on the basic wages paid, the question of payment of contribution on these allowances will not arise. The authorities after hearing the parties had issued an order dated 11.11.2008 holding that the petitioner is liable to pay contribution in respect of education allowance, special allowance, conveyance allowance and food concession. The authority had treated those allowances as part of basic wages. Aggrieved by the same, the petitioner had preferred an appeal under Section 7-I before the EPF Appellate Tribunal. It was taken on file as ATA No.882 (13)2008. After notice to the authorities, by a final order dated 22.7.2010, the appeal was dismissed. The Tribunal found that the wages are universally, necessarily and ordinarily paid to all across the Board and such emoluments are basic wages. Since allowances are paid to all employees and no PF was deducted, the Company was bound to pay subscription on the basic wages. The writ petition was admitted on 27.8.2010 and an interim stay was granted.

13.W.P.Nos.970 and 3986 of 2011 : Both writ petitions were filed by the same Software Company. In the first writ petition, the challenge is to an order of the EPF Appellate Tribunal made in ATA No.771 (13) 2004, dated 29.12.2010. The Tribunal held that the special allowance, medical allowance and other allowances paid by the Company would also amount to basic wage. It is the stand of the Company that the conveyance, special allowance, leave on loss of pay conveyance, leave on loss of pay special allowance, holiday allowance, night shift allowance were not coming within the term of 'basic wage' under Section 2(b).

14.In the second writ petition , by an order dated 28.1.2011, the petitioner Company's appeal in ATA No.400(13)2009 for the subsequent period was rejected and identical contentions were raised by the petitioner company. In the first writ petition, on 20.1.2011, private notice was given to the Standing Counsel. Pending the same, an interim stay was granted. In the second writ petition, notice was taken by the counsel for the respondent Department and an interim stay was also granted.

15.In W.P.No.1853 of 2011, the petitioner is also a Software company. They have come forward to challenge an order of the ERP Appellate Tribunal made in ATA No.659(13) 2005, dated 8.12.2010. The Tribunal by its order had dismissed the petitioner's claim for exclusion of special allowances from calculation of basic pay. When this writ petition came up on 31.1.2011, the Standing Counsel for the PF Department was directed to take notice and an interim stay was also granted.

16.In W.P.No.2908 of 2011, the petitioner is running a machine tool factory. They have come forward to challenge an order of the EPF Appellate Tribunal made in ATA No.674(13)2010, dated 31.12.2010. The Tribunal by a final order had refused to accept the case of the petitioner Company to exclude the special allowance, medical allowance and other allowances from making contribution towards payment of subscription for PF. In this writ petition, notice of motion was ordered on 08.02.2011 and an interim stay was also granted.

17.Since in all these five writ petitions, the common question arises for consideration is regarding the true meaning of 'basic wage' as per Section 2(b) of the PF Act, they were grouped together and a common order is passed.

18.Attacking the order of the Tribunal, Mr.A.L.Somayaji, learned Senior Counsel submitted that the authorities exercising power under Section 7A cannot on their own held that the special allowance can be treated as dearness allowance. In this context, the learned Senior Counsel referred to a judgment of a division bench of this Court in Regional Commissioner, EPF, Tamil Nadu and Pondicherry Vs. Management of Southern Alloy Foundries (P) Ltd. Reported in 1982 (1) LLJ 28. Reliance was placed upon the following passage found in paragraph 2 which reads as follows: "2....Needless to say that an officer like the appellant has no power to deem something to be something else which it is not, it being the prerogative only of the Legislature...."

Therefore, the order including special allowance as basic wage passed by the authority and confirmed by the Tribunal was erroneous.

19.In the very same judgment, the division bench took care to state that the authority in the absence of giving reason and clear finding, cannot rely upon Section 6 to include special allowance as basic wage. In the very same paragraph, it was stated as follows: "2...As a matter of fact, even the appellant merely stated that as per section 6 of the Employees Provident Funds and Miscellaneous Provisions Act the special allowance should also be deemed to be dearness allowance. But he has not given any reason as to why the same should be deemed to be dearness allowance. It is not the finding of the appellant that the special allowance formed part of dearness allowance, but as he himself states in his order, dated 7th March, 1977, it was only deemed to be dearness allowance...."

20.The learned Senior Counsel referred to a subsequent division bench judgment of this court in E.I.D. Parry (India) Ltd. Vs. Regional Commissioner EPF Tamilnadu and another reported in 1984 (1) LLJ 300 to contend that if parties in terms of contract employment agree that a particular sum should be excluded, then the court cannot include those amounts. For this purpose, the learned Senior counsel relied upon the following passage found in paragraph 4 of the said judgment, which reads as follows: "4....Therefore, the intention of the parties is very material. Why we say it is very material is because the Commissioner has taken the view as though the parties are contracting out of the statutory provision, which is prohibited by the Act. Far from it, the parties are trying to be within the framework of the statute. This is because in defining basic wages under Cl.(b) which clearly states "in accordance with the terms of the contract of employment". Therefore, if in accordance with the terms of the contract of employment, if the parties agree that a particular sum should be excluded, we cannot hold that it has to be treated as basic wages...."

21.But, in that case, the division bench referred to the earlier judgment in Alloy Foundries (P) Ltd.'s case. Further, after referring to the judgment of the Supreme Court in M/s.Bridge & Roofs Co.'s case, the division bench made a distinction which is found in paragraph 7 of the said judgment, which reads as follows: "7.We do not understand this passage's meaning that if the payment is made to all the employees irrespective of the nature of the payment, it would straightaway partake the character of basic wages. But the Supreme Court clearly pointed out that it is only on combined reading of S.2(b) and S.6, the basis for computation can be arrived at and we are adopting the same basis in the instant case also. Therefore, we find the order of the respondent, the Regional Provident Fund Commissioner, cannot be supported in law and

accordingly the same is quashed...." Therefore, what is required is treating certain amounts as basic wage should be only on the basis of a combined reading of Section 2(b) and Section 6. Therefore, it can be safely held that merely because parties have come to an arrangement to exclude certain amounts, calling it outside the term "basic wage", that by itself will not make the amount excluded from the definition of 'basic wage'. In essence, there cannot be contracting out of the statute at the whims of the parties.

22.The learned Senior Counsel further referred to a judgment of the Supreme Court in Whirlpool of India Ltd. Vs. E.S.I.C. reported in 2000 (1) LLJ 1101 = (2000) 3 SCC 185, which is a case arose under the ESI Act. The Supreme Court had dealt with the definition of 'wage' found under Section 2(22) of the ESI Act. In that case, the Supreme Court had excluded the "Production incentive" scheme from falling outside the purview of the term 'wage'. The learned Senior counsel placed reliance upon the following passage found in paragraph 14 of the said judgment which reads as follows: "14....The High Court has found that the payment was made quarterly. It is not for us to rewrite the definition of wages even if we assume that there is a possibility of misuse by employers by making the payment at a period exceeding two months and thus circumventing the provisions of the Act. When in the last part of Section 2(22), the word used is paid , we cannot add the word payable or other similar expression thereto."

23.But, however, before understanding the said judgment, it is necessary to refer to a definition of a term "wage" under Section 2(22) of the ESI Act. In paragraph 6 of the very same judgment, the Supreme Court dealt with the definition which is as follows: "6.Under the first part of Section 2(22), all the remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled would be wages . Under this part neither the actual payment nor when the payment is made is of any relevance. The last part of Section 2(22) relates to payment of additional remuneration. The additional remuneration, if any, paid at intervals not exceeding two months and not falling in (a) to (d) would also be wages within the meaning of the term as defined. Under this part of the definition, there has to be payment and not only payability and the payment has to be at intervals not exceeding two months."

24.Thereafter, the Supreme Court made a distinction of the two earlier judgments of the Supreme Court in Wellman (India) Pvt. Ltd. Vs. Employees' State Insurance Corporation reported in 1994-I-LLJ-545 and Modella Woollens Ltd. Vs. Employees' State Insurance Corporation and another reported in 1994 Supp (3) SCC 580. After holding that they may not be relevant in deciding the issue on hand, the Supreme Court had placed reliance upon a judgment in Harihar Polyfibres Vs. Regional Director, ESI Corporation reported in 1984-II-LLJ-475 (SC) and Handloom House, Ernakulam Vs. Regional Director, ESIC reported in 1999-I-LLJ-1319 (SC). The relevant paragraph found in paragraphs 11 and 12 may be usefully extracted below: "11.In Harihar Polyfibres v. Regional Director, ESI Corpn.3 affirming the decision of the Full Bench of the Andhra Pradesh High Court holding that under the third part of the definition to constitute wages , it has to be actual factum of payment made at intervals not exceeding two months, house rent allowance , night shift allowance , incentive allowance and heat, gas and dust allowance were held to be covered by the definition of wages in Section 2(22). In this case, it was held that for the aforesaid allowances to be covered by the definition of wages , it was not necessary that the payments should be in terms of employment.

12.In Handloom House v. Regional Director, ESI4 it has been held that any additional remuneration paid at intervals exceeding two months has been excluded from the purview of the definition. It is clear that if the amount paid or payable is not remuneration on fulfilment of the terms of employment falling under the first part and is also not covered by the second part of the definition, it would be wages if the payment is made at intervals not exceeding two months."

25.The Supreme Court also held in paragraph 15, on the facts of that case, that the payment of production incentive do not fall either under the first part or at a later part of the definition 'wage' of the ESI Act. It is not clear as to how the said judgment in Whirlpool of India Ltd. has any assistance to the case of the petitioners.

26.Further the learned Senior Counsel referred to a judgment of the Supreme Court in H.R. Adyanthaya v. Sandoz (India) Ltd., reported in (1994) 5 SCC 737 and placed reliance upon the following passage found in paragraph 24 which reads as follows: "24..... Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation." Reliance was placed for the purpose of interpretation of a particular provision in the statute. This is to emphasis that what was not covered by the statute cannot be said to be deemed to be included in the main part of the definition.

27.In the present case, emphasis made by the learned Senior Counsel was on the main part of the definition 'basic wage' and if it did not include an item, then the authorities cannot include the said item into the said definition. The parties, i.e., employer and employee are allowed to exclude certain items for not being covered by the provisions of the said Act. There is internal evidence to show that these allowances will not come within the definition of the term ' basic wage'. Reliance was placed upon certain circulars issued by the Central Provident Fund Commissioner, dated 15.7.1961 and various other circulars.

28.The learned Senior Counsel also referred to Coal Mines Provident Fund Scheme, wherein the term "basic wage" was defined in an exhaustive manner. Payment of food concession, dearness allowance, house rent allowance and other similar allowances, overtime, bonus, commission, presents and donations were excluded from the definition. That should be the same spirit of the definition 'basic wage' found under the Act. That definition can be taken as an internal aid for construing the definition 'basic wage' for the purpose of the Act. However, this court is unable to agree with the said submission made by the learned Senior counsel appearing for petitioners.

29.The Supreme Court in Maharashtra State Cooperative Bank Ltd. v. Assistant Provident Fund Commissioner reported in (2009) 10 SCC 123 has held that the provisions of the Act has to be interpreted in purposive manner and principles set out in the Directive Principles of State Policy must be kept in mind. The following passage found in paragraph 30 may be usefully extracted below: "30.Since the Act is a social welfare legislation intended to protect the interest of a weaker section of the society i.e. the workers employed in factories and other establishments, it is imperative for the courts to give a purposive interpretation to the provisions contained therein keeping in view the Directive Principles of State Policy embodied in Articles 38 and 43 of the Constitution. In this context, we may usefully notice the following observations made by Krishna Iyer, J. in Organo Chemical Industries v. Union of India7: (SCC pp.587 & 591-92, paras 28 & 40-41) 8.The pragmatics of the situation is that if the stream of contributions were frozen by employers defaults after due deduction from the wages and diversion for their own purposes, the scheme would be damnified by traumatic starvation of the Fund, public frustration from the failure of the project and psychic demoralisation of the miserable beneficiaries when they find their wages deducted and the employer get away with it even after default in his own contribution and malversation of the workers share. Damages have a wider socially semantic connotation than pecuniary loss of interest on non-payment when a social welfare scheme suffers mayhem on account of the injury. Law expands concepts to embrace social needs so as to become functionally effectual. * * *

40. The measure was enacted for the support of a weaker sector viz. the working class during the superannuated winter of their life. The financial reservoir for the distribution of benefits is filled by the employer collecting, by deducting from the workers wages, completing it with his own equal share and duly making over the gross sums to the Fund. If the employer neglects to remit or diverts the moneys for alien purposes the Fund gets dry and the retirees are denied the meagre support when they most need it. This prospect of destitution demoralises the working class and frustrates the hopes of the community itself. The whole project gets stultified if employers thwart contributory responsibility and this wider fall-out must colour the concept of damages when the court seeks to define its content in the special setting of the Act. For, judicial interpretation must further the purpose of a statute. In a different context and considering a

fundamental treaty, the European Court of Human Rights, in the Sunday Times Case, observed: The Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty.

41. A policy-oriented interpretation, when a welfare legislation falls for determination, especially in the context of a developing country, is sanctioned by principle and precedent and is implicit in Article 37 of the Constitution since the judicial branch is, in a sense, part of the State. So it is reasonable to assign to damages a larger, fulfilling meaning.

30.The employer and employee would have settlement agreeing to keep certain payments outside the purview of Section 2(b) defining the term "basic wages" and the authorities cannot go into the term of the said settlement is concerned, it must be noted that once there is statutory definition of basic wages and if certain amounts which are otherwise liable to be included in the term 'basic wages', but nevertheless kept outside by the employer, such contracting out of statute can never be permitted and there cannot be any private arrangement in respect of such transaction. In essence there cannot be an estoppal against the statute.

31.The Supreme Court in Union of India v. Ogale Glass Works reported in (1971) 2 SCC 678 has held in paragraph 47 as follows:

"47.Admittedly the appellants were not parties to the award. No doubt under the Industrial Disputes Act the award will be binding, as against the respondent and its workmen. But the appellants are seeking in these proceedings to enforce the statutory duty cast upon them to collect the contributions due from the respondent which again is a statutory liability under the Act and the Scheme. The object of the appellants in enforcing the Act is only to discharge the statutory duty enjoined on them for the benefit of the employees concerned. In view of the decision of this Court, it is clear that the Act and the Scheme apply to all the sections of the respondent, and if so it follows that the respondent is liable to make contributions and that at the rate specified in the Act."

32.The said judgment of the Supreme Court was quoted and followed by the Bombay High Court in Gosalia Shipping Pvt. Ltd., Goa and another Vs. Regional Provident Fund Commissioner, Goa and another reported in 1997-II-LLJ 38 (Bom). In paragraph 11, the Bombay High Court had observed as follows: "11....This Judgment of the Apex Court should conclude the matter. Therefore any settlement and the Award between the parties cannot be binding on an Authority under the Act who can arrive at a conclusion based on all materials available including settlements if any produced before him."

33.The question as to the authority under Section 7A can go into the question as to whether certain items can come within the term "basic wags" and he can lift the veil to determine the issue has also been considered by the Supreme Court in Rajasthan Prem Krishan Goods Transport Co. Vs. Regional Provident Fund Commissioner reported in (1996) 9 SCC 454. The Supreme court in paragraph 6 of its judgment had observed as follows: "6....Now, this finding is essentially one of fact or on legitimate inferences drawn from facts. Nothing could be suggested on behalf of the appellant as to why could the Regional Provident Fund Commissioner not pierce the veil and read between the lines within the outwardliness of the two apparents. No legal bar could be pointed out by the learned counsel as to why the views of the Regional Provident Fund Commissioner, as affirmed by the Central Government, be overturned."

34.The learned Senior Counsel placed reliance upon a judgment of the Supreme Court in Bridge & Roof Company (India) Ltd. and others Vs. Union of India and others reported in (1963) 3 SCR 978 = AIR 1963 SC 1474. In that case, the Supreme Court held that production bonus cannot come within the term 'basic wages' for the purpose of the EPF Act. That case arose out of the decision rendered by the Central Government under Section 19A. In paragraph 11, the Supreme Court had observed as follows: "11....It is therefore not possible to accept the contention on behalf of the respondents that whatever is price for labour and arises out of contract is included in the definition of "basic wages" and therefore production bonus which is

a kind of incentive wage would be included." Further, in paragraph 12, the Supreme Court had observed as follows:

"12.....The scheme in force in the Company is a typical scheme of production bonus of this kind with a base or standard up to which basic wages as time wages are paid and thereafter extra payments are made for superior performance. This extra payment may be called incentive wage and is also called production bonus. In all such cases however the workers are not bound to produce anything beyond the base or standard that is set out. The performance may even fall below the base or standard but the minimum basic wages will have to be paid whether the base or standard is reached or not. When however the workers produce beyond the base or standard what they earn is not basic wages but production bonus or incentive wage. It is this production bonus which is outside the definition of basic wages in Section 2(b), for reasons which we have already given above. The production bonus in the present case is a typical production bonus scheme of this kind and whatever therefore is earned as production bonus is payable beyond a base or standard and it cannot form part of the definition of basic wages in Section 2(b) because of the exception of all kinds of bonus from that definition. We are, therefore, of opinion that production bonus of this type is excluded from the definition of basic wages in Section 2(b) and therefore the decision of the Central Government which was presumably under Section 19 A. of the Act to remove the difficulty arising out of giving effect to the provisions of the Act, by which such a bonus has been included in the definition of basic wages is incorrect. In view of this decision, it is unnecessary to consider the effect of Article 14 in the present case."

35.The learned Senior Counsel also referred to a judgment of the Supreme Court in T.I.Cycles of India, Ambattur, Chennai Vs. M.K.Gurumani and others reported in 2001-II-LLJ 1068 = (2001) 7 SCC 204, wherein the Supreme Court held that the production incentive cannot be brought within the term "basic wages". In paragraphs 16 and 17, the findings of the Supreme Court are set out, which are as follows: "16.Incentive payment is based on two components: group performance index and individual/sectional performance index. It was made clear that no incentive will be payable to workmen on leave, absent, away from duty or on holidays. The minimum performance level is indicated in each sectional incentive table and below which no incentive will be paid for any reason whatsoever. If a person works for more than one group during the month, he will be awarded incentive as per the performance of each group in the respective periods. Clause 9.1 also sets out that incentive payment payable under the Scheme will not be regarded as wages and, therefore, the payment shall not be taken into account for the purpose of leave wages, overtime wages, wages in lieu of notice, provident fund contributions, bonus, gratuity or any other allowance. However, this clause is subject to review in case of statutory amendments, if any.

17.The authorities were carried away by considering that the bonus is payable on the basis of output equivalent to certain pieces per man day. But it is made clear in the Scheme that each payment will be made not on the basis of pieces of per man day nor is it a piece-rate work for which wages are paid but it is an additional incentive for payment of bonus in respect of extra work done. The measure of extra work done is indicated by pieces and not wages as such that are paid on that basis. It is not that in respect of each piece any wages are paid but altogether if certain number of pieces are produced, additional incentive will be payable at a particular rate. Therefore, the authorities have completely missed the scope of the scheme and have incorrectly interpreted the same. Inasmuch as both the High Court and the authorities have incorrectly understood the position in law and have wrongly held that the concept of wages under the Act would include bonus and that even on facts the Scheme would attract Section 4(2) of the Act. Proviso to Section 4(2) of the Act is to the effect that in case of a piece-rated employee, daily wages shall be computed in a particular manner but that is not the rate at which the wages are paid in the present case at all. Therefore, Section 4(2) of the Act is not attracted in the case of the present Scheme with which we are concerned."

36.The learned Senior Counsel also referred to a judgment of the Supreme Court in Manipal Academy of Higher Education v. Provident Fund Commissioner reported in (2008) 5 SCC 428, wherein the Supreme Court held that leave encashment cannot attract deduction towards PF. There, the Supreme Court referring to the Bridge Roof's case (cited supra) and TI Cycles of India's case (cited supra), had observed in paragraphs 10

to 12 as follows: "10.The basic principles as laid down in Bridge & Roofs case2 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.

(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. (c) Conversely, any payment by way of a special incentive or work is not basic wages.

11.In TI Cycles of India v. M.K. Gurumani4 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. Regl. Provident Fund Commr.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 & Roofs case2 and TI Cycles case4 the inevitable conclusion is that basic wage was never intended to include amounts received for leave encashment."

37.The learned Senior Counsel took pain to contend that even before the Supreme Court's decision, this court in Thiru Arooran Sugars Ltd. (Industrial Alcohol Unit) and others Vs. Assistant Provident Fund Commissioner, Tiruchirapalli reported in 2007 (4) LLN 831 had taken a similar view. It was held by this court that deduction towards PF cannot be based upon different contingencies and uncertainties.

38.A careful reading of the decision in Manipal Academy of Higher Education's case as well as Thiru Arooran Sugars' case will show that payment based upon contingencies could not be made part of basic wages for the purpose of deduction towards PF. But payment made on monthly basis labelling it as various types of allowances is not a contingency payment and if the intention of the employer was to get over the payment under the PF Act, the same can never be allowed.

39.The learned Senior Counsel thereafter referred to a division bench judgment of this court in Regional Provident Fund Commissioner Vs. Wipro Limited and another reported in 2009-IV-LLJ-513 (Mad) and it was held that canteen subsidy and performance linked compensation will not come within the term "basic wages".

40.There was similar reference to an another division bench judgment of this Court in M/s.Gordon Woodroffe Ltd., Madras Vs. The Regional Commissioner, Employees Provident Fund, Madras reported in 2011 LLR 29, where the special allowance was considered as not falling under the term 'basic wages'.

41.The learned Senior Counsel also referred to the decisions in Assistant Provident Fund Commissioner, Gurgaon Vs. M/s.G4S Security Services (India) Ltd. and another reported in 2011 LLR 316 of the Punjab

& Haryana High Court, Burmah Shell Oil Storage and Distributing Co. Ltd. Vs. Regional Provident Fund Commissioner, Delhi reported in 1981-2-LLJ-86 of the Delhi High Court and Gujarat Cypromet Ltd. Vs. Assistant Provident Fund Commissioner reported in 2005-I-LLJ 484 of the Gujarat High Court in support of his contention.

42.Per contra, the learned counsel for the respondents referred to a judgment of the Supreme Court in Harihar Polyfibres v. Regional Director, ESI Corporation reported in (1984) 4 SCC 324 and relied upon the following passage found in paragraph 2, which reads as follows: "2.The Employees State Insurance Act is a welfare legislation and the definition of wages is designedly wide. Any ambiguous expression is, of course, bound to receive a beneficent construction at our hands too. Now, under the definition, first, whatever remuneration is paid or payable to an employee under the terms of the contract of the employment, express or implied is wages; thus if remuneration is paid in terms of the original contract of employment or in terms of a settlement arrived at between the employer and the employees which by necessary implication becomes part of the contract of employment it is wages; second, whatever payment is made to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off is wages; and third, other additional remuneration, if any, paid at intervals not exceeding two months is also wages; this is unqualified by any requirement that it should be pursuant to any term of the contract of employment, express or implied. However, wages does not include any contribution paid by the employer to any pension fund or provident fund, or under the Act, any travelling allowance or the value of any travelling concession, any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment and any gratuity payable on discharge. Therefore wages as defined includes remuneration paid or payable under the terms of the contract of employment, express or implied but further extends to other additional remuneration, if any, paid at intervals not exceeding two months, though outside the terms of employment. Thus remuneration paid under the terms of the contract of the employment (express or implied) or otherwise if paid at intervals not exceeding two months is wages. The interposition of the clause and includes any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off between the first clause, all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, was fulfilled and the third clause, other additional remuneration, if any, paid at intervals not exceeding two months, makes it abundantly clear that while remuneration under the first clause has to be under a contract of employment, express or implied, remuneration under the third clause need not be under the contract of employment but may be any additional remuneration outside the contract of employment. So, there appears to our mind no reason to exclude House Rent Allowance , Night Shift Allowance , Incentive Allowance and Heat, Gas and Dust Allowance from the definition of wages . A Full Bench of the Karnataka High Court in NGEF Ltd. v. Deputy Regional Director, E.S.I.C1 considering the question at some length held that the amount paid by way of incentive under the scheme of settlement entered into between the Management and its workmen was wages within the meaning of Section 2(22) of the Employees State Insurance Act. It was observed by the Full Bench of the Karnataka High Court as follows: It is true that the word remuneration is found both in the first and second parts of the definition. But the condition attached to such payment in the first part cannot legitimately be extended to the second part. The other additional remuneration referred to in the second part of the definition is only qualified by the condition attached thereto (that is, paid at intervals not exceeding two months). That was also the view taken by a Full Bench of the Andhra Pradesh High Court in ESI Corpn., Hyderabad, A.P. Paper Mills Ltd.2 and also the Bombay High Court in Mahalaxmi Glass Works Pvt. Ltd. v. ESI3. But this aspect of the matter has been completely overlooked by this Court in Kirloskar case4.

43.He also referred to a judgment of the Supreme Court in Prantiya Vidhyut Mandal Mazdoor Federation v. Rajasthan State Electricity Board reported in (1992) 2 SCC 723 and referred to the following passages found in paragraphs 9 and 10, which are as follows: "9.We do not agree with the Division Bench of the High Court that the wages which are substituted from back-date as a result of an award under the Act are not the basic wages as defined under the Fund Act. If the original emoluments earned by an employee were basic wages under the Fund Act, there is no justification to hold that the substituted emoluments as a result of the award are not the basic wages . The reference to the arbitration, the acceptance of the award by the parties

and the resultant wage-increase with retrospective effect, are the direct consequences of the settlement between the workmen and the Board. We are of the view that revision of wage-structure, as a result of an award under the Act, has to be taken as a part of the contract of employment in the context of the Fund Act. This Court in Harihar Polyfibres v. Regional Director, ESI Corporation 1 while dealing with the definition of wages under Employees State Insurance Act, 1948 held as under: (SCC p. 325, para 2)) Now, under the definition, first, whatever remuneration is paid or payable to an employee under the terms of the contract of the employment, express or implied is wages; thus if remuneration is paid in terms of the original contract of employment or in terms of a settlement arrived at between the employer and the employees which by necessary implication becomes part of the contract of employment it is wages.

10.The workmen have inherent right to collective-bargaining under the Act. The demands raised by the workmen through their unions are decided by conciliation, settlement or adjudication under the Act. These are time-consuming proceedings. When ultimately the dispute is settled/decided in workers favour the accrued-benefit may be made available to them from back date. This is what has happened in the present case. The award given in the year 1985 has been made operative from April 1, 1980. Under the circumstances it would be in conformity with the objects of the Fund Act, which is a social welfare legislation, to hold that the revised pay scales have become part of the contract of employment with effect from April 1, 1980."

44.The learned Standing Counsel also referred to a judgment of the Supreme Court in Daily Partap v. R.P.F. Commissioner reported in (1998) 8 SCC 90 and referred to the following passage found in paragraph 15 which reads as follows: "15.It, therefore, becomes clear that in order to become a genuine Production Bonus Scheme so as to get covered by exception (ii) to the definition of basic wages as found under Section 2(b) of the Act, it must be shown that the Scheme in question seeks to offer production bonus to the workmen concerned who put in extra output wherein either bonus be fixed to all of them collectively on the basis of total extra output on a sliding scale or may be paid individually to a given number of workmen who by their own efforts earn such bonus. Thus in each case, payment of bonus cannot be of a fixed or proven nature having no nexus with the quantity of extra output produced by them. As in the present case, the Scheme relied on by the appellants does not fulfil this legal test, it does not attract exception (ii) to Section 2(b). It remains in the realm of basic extra wage. The decision rendered by learned Single Judge of the High Court as confirmed by the Division Bench decision, cannot, therefore, be found fault with. The submission of learned counsel for the appellants that in the Scheme in question, there was no compulsion for the workman to put in extra work and the management could not compel him to do extra work nor can it allege any misconduct on the part of such workman who does not want to do excess work cannot be of any avail to the learned counsel for the appellants as even if this criterion may be common to the present Scheme as well as the genuine Production Bonus Scheme, the further requirement of the Scheme to become a genuine Production Bonus Scheme, namely, that the payment by way of bonus to the eligible workman concerned should vary in proportion to the extra output put up by him beyond the norms of output prescribed for him, is conspicuously absent in the present Scheme, as seen earlier, and on the other hand, this requirement which is the very heart of a genuine Production Bonus Scheme is missing in the present Scheme and therefore, similarity on only one aspect between the genuine Production Incentive Scheme and the present Scheme, namely, that the workman could not have been compelled to carry out extra work pales into insignificance on the facts of the present case. Therefore, the second question has to be answered against the appellants and in favour of the respondent."

45.The learned Standing Counsel also referred to a division bench judgment of the Calcutta High Court in Regional Provident Fund Commissioner (II), West Bengal and another Vs. Vivekananda Vidya Mandir and others reported in 2005 Lab.I.C. 1562 = 2005-2-LLN 214 = 2005-II-LLJ-721. In paragraph 19, the Calcutta High Court had observed as follows: "19.Having regard to the discussion made above, the special allowance in the facts and circumstances of the case appears to be the Dearness Allowance described by a different name or in the alternative it would be part of the basic wages. By no stretch of imagination, the special allowance paid in this case can be treated to be similar other allowance for the purpose of claiming exemption from contribution under Section 6. Therefore, the learned Tribunal had rightly held that

contribution was payable on the said amount. In the present case the special allowance has to be treated as part of the pay subject to the liability of contribution under Section 6 of the 1952 Act."

46.It will not be out of context to refer to a judgment of the Supreme Court in Regional Director, ESI Corporation v. Popular Automobiles reported in AIR 1997 SC 3956 = (1997) 7 SCC 665, wherein the Supreme Court held that even subsistence allowance will be wages within the meaning of Section 2(22) of the ESI Act. The Supreme Court while doing so referred to the earlier judgments of the Supreme Court in Harihar Polyfibre case (cited supra) and Modella Woollens Ltd case (cited supra), which arose under the PF Act and in paragraph 12 had observed as follows: "12.It is now time for us to briefly refer to various decisions of this Court to which our attention was invited by learned counsel for the parties. In the case of Modella Woollens Ltd.1 a Bench of two learned Judges of this Court had to consider whether the term wages as defined by sub-section (22) of Section 2 of the Act would cover production bonus. The Court observed that production bonus is nothing but remuneration for additional production which the employees have brought about. In the case of Harihar Polyfibres2 another Bench of two learned Judges of this Court had to consider the question whether the expression wages as defined by Section 2 sub-section (22) of the Act would include, amongst others, incentive allowance. Chinnappa Reddy, J. delivering the main judgment made the following pertinent observations in this connection at (SCR) page 714 of the Report: (SCC p.325, para 2) . The Employees State Insurance Act is a welfare legislation and the definition of wages is designedly wide. Any ambiguous expression is, of course, bound to receive a beneficent construction at our hands too. Now, under the definition, first, whatever remuneration is paid or payable to an employee under the terms of the contract of the employment, express or implied is wages; thus if remuneration is paid in terms of the original contract of employment or in terms of a settlement arrived at between the employer and the employees which by necessary implication becomes part of the contract of employment it is wages;

47.In the very same judgment, after referring to a case of Indian Drugs of Pharmaceuticals Ltd. (1996 (8) Scale 688), in paragraph 13, the Supreme Court had observed as follows:

"13.In the case of Indian Drugs & Pharmaceuticals Ltd.3 a Bench of two learned Judges of this Court, K. Ramaswamy and G.B. Pattanaik, JJ., considered the question of overtime wages in the light of the definition of wages as found in Section 2 sub-section (22) of the Act. In this connection it was observed that whatever remuneration paid or payable forms wages under implied terms of the contract. It is of course true that none of these judgments dealt with the question with which we are concerned in these appeals. However, the common thread which runs through these three judgments is to the effect that the definition of the word wages should be liberally construed as the Act is a welfare piece of legislation. On the interpretation of the relevant terms found in the definition of the term wages , as discussed earlier, it cannot be gainsaid that anything paid even by way of subsistence allowance to an existing employee though suspended by the employer cannot but be said to be remuneration paid to him under the terms of the contract of employment if they were fulfilled by the employee as well as by the employer...."

48.If it is seen in this context, then the orders passed by the Tribunal which are under challenge cannot be found fault with. The contentions raised by the petitioners are misconceived and bereft of legal reasons. The petitioners had an opportunity of putting forth their views before the Commissioner and also had a judicial review before the EPF Appellate Tribunal. The contentions raised by them were rightly rejected by the Tribunal.

49.In the light of the above factual matrix and the legal precedents set out above, this court is unable to countenance the prayers made by the petitioners. It is not a case where interference by exercising extraordinary jurisdiction of this court vested under Article 226 of the Constitution of India, is called for. Hence all the five writ petitions, i.e., W.P.Nos.19751 of 2010, 970, 3986,1853 and 2908 of 2011 are bound to fail.

50.In the result, all the 10 writ petitions will stand dismissed. However, the parties are allowed to bear their own costs. Consequently, connected miscellaneous petitions stand closed.

07.06.2011

Index : Yes

Internet : Yes

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To

1.The Regional Provident Fund Commissioner-II,

Employees' Provident Fund Organisation,

Sub Regional Office, Ambattur

Ministry of Labour, Government of India,

No.R-40A, TNHB Office-cum-Shopping Complex,

Mugappair, Chennai-600 087.

2.The Assistant Provident Fund Commissioner,

Employees' Provident Fund Organisation,

Sub Regional Office, Ambattur,

Ministry of Labour, Government of India,

No.R-40A, TNHB Office-cum-Shopping Complex,

Mugappair, Chennai-600 087.

3.The Assistant Provident Fund Commissioner,

Employees' Provident Fund Organization,

37,Royapettah High Road,

Royapettah, Chennai-600 014.

4.The Presiding Officer,

Employees' Provident Fund Appellate Tribunal

(Ministry of Labour and Employment,

Government of India),

Scope Minar, Core-II, 4th Floor,

Laxmi Nagar District Centre,

Laxmi Nagar,

New Delhi-110 092.

5.The Regional Provident Fund Commissioner,

EPF Organisation, Regional Office,

37,Royapettah High Road,

Chennai-600 014.

K.CHANDRU, J.

vvk

PRE DELIVERY ORDER IN

W.P.Nos.15823, 22480, 25442 and 25443 of 2010,

3427 of 2011,

19751 of 2010, 970, 3986,1853 and 2908 of 2011

07.06.2011