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Bangalore, Dated: 01.03.2019

The Hon'ble Supreme Court, in a judgment passed on 28.02.2019 in the matter of Regional Provident Fund Commissioner, West Bengal Vs. Vivekananda Vidyamandir, and other connected appeals considered the scope of definition of "basic wages" as defined under Section 2(b) of the EPF and Miscellaneous Provisions Act, 1952. The definition of `basic wages' reads thus:

*"*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;*

Unfortunately, a golden opportunity to set right the confusion caused by various High Court judgments and orders of the provident fund commissioners is missed by the Hon'ble Supreme Court. The Supreme Court did not decide any legal issue. The position of law remains as it were before the judgement. All that the learned judges have done is, to reproduce the definition of "basic wages" and Section 6 of the EPF Act and some relevant paragraphs from three earlier judgements of the court.

The argument of the department advanced through Additional Solicitor General was limited to the question as to whether special allowance falls within the definition of basic wage though the appeals by the managements were in respect of/travel allowance/canteen allowance/management allowance/conveyance allowance, education allowance/food concession and medical allowance/night shift incentive and city compensatory allowance being wrongly treated as `basic wages' on which contribution was demanded and the demand being upheld by the high courts. The counsel referred to Bridge and Roof India Limited Vs. Union of India reported in (1963) 3 SCR 978. The submissions of the counsels who appeared for the management in connected petitions was that the basic wages defined under Section 2(b) contains exceptions and will not include what would

ordinarily not be earned in accordance with the contract of terms of appointment. Even with regard to payments earned by the employees in terms of the contract, the basis of inclusion and exclusion is, that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose of contribution. But, whatever is not payable by all concerns or may not be earned by all employees of a concern are excluded for the purpose of contribution. The example of house rent allowance was taken to show that it is not paid in many concerns and sometimes in some concerns to some employees but not to others, and would therefore be excluded from basic wage. The same is the case with overtime allowance.

The learned judges referred extensively to paragraph Nos.7 and 8 in Bridge and Roof case and reproduced the entire paragraphs 7 and 8 of the said judgement. Thereafter, para-11 of the judgment in Muir Mills Company Limited, Kanpur Vs. Workmen AIR 1960 SC 985 has been reproduced. The judgment of the Hon'ble Supreme Court in Manipal Academy of Higher Education Vs. Provident Fund Commissioner (2008) 5 SCC 428 was referred to and para-10 of the judgment is reproduced. At para-12 of the judgment, surprisingly, the judgment says that the term "basic wage" has not been defined under the Act. This is unfortunate because the definition of `basic wage' under Section 2(b) has been extracted at para-8 of the judgment. Para-9 from the judgment of the Court in Kichha Sugar Company Limited Vs. TaraiChini Mill Majdoor Union (2014) 4 SCC 37 has been reproduced. The court in the said case had gone into the dictionary meaning of 'basic wage'. In fact, all this was not necessary as basic wage is defined under the Act right from its inception.

The judgment refers to The Daily Partap case only to say that the Act is a piece of beneficial social welfare legislation.

After reproducing all the above paragraphs, the Court says in para-14 thus:

"14. Applying the aforesaid tests to the facts of the present appeals, no material has been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become

eligible to get this extra amount beyond the normal work which he was otherwise required to put in. There is no data available on record to show as to what were the norms of work prescribed for those workmen during the relevant period. It is therefore not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen. The wage structure and the components of salary have been examined on facts, both by the authority and the appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. There is no occasion for us to interfere with the concurrent conclusions of facts. The appeals by the establishments therefore merit no interference. Conversely, for the same reason the appeal preferred by the Regional Provident Fund Commissioner deserves to be allowed."

In the above paragraph, which is the only paragraph where the learned Judges could be said to have analysed the case, refers only to the fact that employer-petitioners before it were not able to show that the allowances paid were not paid across the board to all the employees in a particular category. According to the Court, in order to contend that the payment goes beyond the basic wages, it has to be shown that the workmen became eligible for extra amount beyond normal work. No law has been laid down in the judgment. The learned judges only say that the facts have been examined by the appellate authority and a factual conclusion is arrived at. Beyond this, the judgment does not give any insight into the scope of definition of `basic wage'. This leaves us where we started, and that is, confusion still prevails.

When the Section specifically excludes house rent allowance, there is no point in saying that if house rent allowance is paid to all the employees, it would fall within the basic wage. So also, one has to keep in mind that all remuneration paid to an employee by an employer is paid under a contract express or implied. As such, to say that all remuneration paid under a contract should be treated as basic wage is also not correct. In fact, issue before the court was, as to whether conveyance allowance, education allowance, food concession, medical allowance, special holidays, night shift incentive and city compensatory allowance constitute part of basic wages. No discussions have taken place on these issues and nothing

has been said as to whether any of these components of wage should be treated as `basic wage' or otherwise.

Even now, employers will have to go by the judgment of the Hon'ble Supreme Court in Bridge & Roof case and in Manipal Academy of Higher Education case decided by the Hon'ble Supreme Court. As of now, components like overtime wages, leave encashment, production incentive for production given beyond the expected eight hours production, allowance paid for defraying extra expenses in connection with work are excluded from the definition of basic wage. Effectively, what the earlier judgments have said is, if a component of wage is paid to all the employees across the board, it would fall within the definition of basic wage, except those that are expressly excluded like for example, house rent allowance. The Hon'ble Supreme Court in none of the earlier judgments nor in the present judgment considered the scope of the words "or any other similar allowance payable to the employee in respect of his employment or of work done in such employment" under Section 2(b)(ii). While the dearness allowance which is excluded in Section 2(b)(ii) has been included in Section 6, similar inclusion is not found in respect of other allowances. This should be taken as having been done deliberately by the Parliament to see that other allowances such as conveyance allowance, uniform allowance, washing allowance, overtime allowance, bonus & commission do not fall within the definition of basic wages. The Hon'ble Supreme Court is neither prepared to say this nor consider arguments on these lines. May be, the matter will have to be taken again to the Hon'ble Apex Court for a clear verdict on the scope of the words *"or any other similar allowance payable to the employee in respect of his employment or of work done in such employment"* under Section 2(b)(ii) of the EPF Act, 1952.

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ABOUT THE AUTHOR

Mr. S N Murthy, designated Senior Advocate, is a Post Graduate in Industrial Laws and Administrative Laws with over 44 years of practice at the bar. Mr. S N Murthy has been advising corporates on labour-management policies and is also engaged in drafting service contracts, confidentiality agreements, compensation packages to various cadres of employees. In addition Mr. Murthy represents Corporates before the Hon'ble Supreme Court, High Courts, Tribunals, Labour Courts, etc.