
(2014) 07 KL CK 0154
In the High Court Of Kerala
Case No : Ins. APP. No. 57 of 2012

B.G.R. Hotels Pvt. Ltd.

APPELLANT

Vs

The Regional Director

RESPONDENT

Date of Decision : 23-07-2014

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(13), 2(13A), 2(22), 2(9), 39(4)
Industrial Disputes Act, 1947 — Section 2(s)

Citation : (2014) 3 ILR 944

Hon'ble Judges : B. Kemal Pasha, J

Bench : Single Bench

Advocate : U.K. Ramakrishnan (Sr.) and U.K. Devidas, Advocate for the Appellant; T.V. Ajayakumar, Advocate for the Respondent

Judgement

B. Kemal Pasha, J.—The questions of law involved herein are,

(i) Whether the amount being paid as "performance allowance" by the employer to an employee will come within the scope of the definition of "wages" in Section 2(22) of the Employees' State Insurance Act, 1948 ("the ESI Act", for short); and

(ii) Whether an amount paid by an establishment to another establishment as "deputation charges", for works done by trainees supplied by such another establishment, is "wages" within the meaning of Section 2(22) of the ESI Act.

2. M/s. Bharath Hotel, Ernakulam is conducting a training centre for imparting training to hotel employees of persons in the reception, house keeping, etc. By way of practical training, it is alleged that they are deploying such trainees in their other concerns, one among which is the present appellant. By way of practical training, those trainees used to work at the hotel of the appellant, for which the appellant used to make payments to M/s. Bharath Hotel. Such payments were traced out by the officials of the Employees' State Insurance Corporation ("the ESI Corporation", for short) on inspection. The said payments

being made under the caption "deputation charges" have been considered by the ESI Corporation as "wages" within the meaning of Section 2(22) of the ESI Act. Therefore, the appellant was asked to pay an amount of 34,257/- as well as an amount of 63,234/- for two periods by way of contribution on such deputation charges. Over and above it, the appellant used to pay allowances to its employees under the head "performance allowance", which, according to the appellant, is inam or gift. The ESI Corporation has treated the said payments under the head of "performance allowance" as "wages" within the meaning of Section 2(22) of the ESI Act, and directed the appellant to pay an amount of 5,256/- by way of contribution. The matter was challenged by the appellant before the court below by challenging Ext. P5 order by which the payment was directed, as I.C. No. 57/2002. Initially, the court below allowed the I.C. in part by finding that any contribution need not be paid in the case of "performance allowance" whereas, contribution has to be paid with regard to "deputation charges". The matter was challenged in appeal before this Court. As this Court found that the ESI Act being a beneficial legislation to the employees, representative of the employees should also be impleaded in the matter for a proper hearing and disposal, for which the matter was remitted to the court below, after setting aside the order passed by the court below. The matter was re-numbered as I.C. No. 9/2011 before the court below. The court below, through the impugned judgment, dismissed the I.C. The applicant before the court below has come up in appeal.

3. Heard the learned Senior Counsel Sri. U.K. Ramakrishnan for the appellant and the learned Standing Counsel for the ESI Corporation Sri. T.V. Ajayakumar.

4. Admittedly, Ext. P5 order is one passed under Section 45A of the ESI Act. The learned Senior Counsel has invited the attention of this Court to Section 2(9) of the ESI Act, which deals with "employees". The said provision as it then stood till 20.10.1989, did not contain the inclusive portion "or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961)". The aforesaid terms were included as an amendment with effect from 20.10.1989 in the said provision. Presently, Section 2(9) of the ESI Act reads:-

"S. 2(9). "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and-

(i) who is directly employed by the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to

the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment of any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961)....."

5. The learned Senior Counsel has argued that even though such terms have been incorporated in Section 2(9) of the ESI Act through an amendment, no consequential amendments have been carried out in other related provisions of the ESI Act. It has to be noted that unlike the term "employees employed for wages", what has been included through the amendment in Section 2(9) is the terms "any person engaged as apprentice". Section 2(13) defines "immediate employer". In that provision also, the terms used are "employees employed". Similarly, in Section 2(13A), "insurable employment" is defined as "an employment in a factory or establishment.....". There also, the word used is "employment" and not "as engagement". In Section 39(4) also, the terms used are "an employee is employed.....". Similarly, in Sections 40, 41(1) and 41(1A) and 41(2) also the terms used are "employee employed".

6. The learned Senior Counsel has argued that when amendment was carried out in Section 2(9) of the ESI Act, similar amendment should have been carried out with regard to the definition of "wages" as contained in Section 2(22) of the ESI Act also. Even though the amendment incorporating the inclusive portion with regard to "any person engaged as apprentice" has been incorporated in Section 2(9) of the Act, it seems that no consequential amendments were made in Section 2(22) of the ESI Act. In Section 2(22) of the ESI Act, "wages" has been defined:

" "wages" means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled 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 and other additional remuneration, if any, paid at intervals not exceeding two months, but does not include-

(a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;

(b) any travelling allowance or the value of any travelling concession;

(c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or any gratuity payable on discharge."

7. The said definition clause has four parts. The first part is "remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled". The second part is the inclusion of "any payment to an employee in respect of any period of authorised leave, lock-out, strike, which is not illegal or lay-off". The third part is with regard to the inclusion of "other additional remuneration, if any, paid at intervals not exceeding two months". The fourth part is with regard to the exclusion of items (a) to (d) whereby certain specified payments have been excluded from the category of additional remuneration. It seems that as far as Section 2(22) is concerned, the "remuneration paid or payable" is applicable only as far as part 1 and 2 are concerned; but, with regard to part 3, what is applicable is "other additional remuneration, if any, paid". Therefore, it is evident that the legislature has intended with regard to the applicability of additional remuneration to be included within the definition of "wages", only when such an additional remuneration is paid. Whereas, as far as the remuneration to an employee coming within the first part is concerned, it need not always be paid. The said provision is applicable even in a case wherein such remuneration is payable.

8. The learned Senior Counsel has invited the attention of this Court to the decision in *Tungabhadra Sugar Works (P) Limited Vs. Labour Court, Mangalore and Another*, , which clearly deals with the definition of workman as contained in Section 2(s) of the Industrial Disputes Act, 1947, which, according to me, cannot be extended to the definition of "employee" within the meaning of Section 2(9) of the ESI Act. The learned Senior Counsel has invited the attention of this Court to the decision in *President, K.P. Co-operative Society Vs. Regional Director, E.S.I. Corporation, Trichur and another* [1975 KLT 670 (DB)]. True that it is a decision that was rendered prior to the aforesaid amendment in Section 2(9) of the ESI Act. True that it was in the backdrop of the absence of such terms in Section 2(9) of the ESI Act, a Division Bench of this Court had considered the issue with regard to an apprentice in that case. At the same time, paragraph 4 of the decision noted *supra* shows that the discussions made therein were quite independent of the discussions with regard to Section 2(9) of the ESI Act. In paragraph 4 of *President, K.P. Co-operative Society (supra)*, it was held that the term "employment" denotes a larger concept than what is denoted by the term "engagement". One cannot say that the said observation was made by the Division Bench of this Court on the unamended provisions of Section 2(9) of the ESI Act. The said finding is totally independent of such discussion.

9. It was further held in paragraph 4 of *President, K.P. Co-operative Society (supra)* that "an apprentice is allowed to work in order that he may learn the trade. In fact, he is a student and the premises are his training ground. Even if he is paid any allowance, it would not be "wages" as the term is defined in section 2(22) of the Act for such wages should be remuneration paid or payable in terms of the conditions of employment". It seems that even the said finding entered by the Division Bench of this Court is also quite independent of the discussions made with regard to the definition of "employee" as then contained

in Section 2(9) of the ESI Act. It was further held therein that the idea with regard to payment is that it is the remuneration which the person executing the work can claim as of right for the work he does.

10. Regarding performance allowance, the learned Senior Counsel has pointed out that as such performance allowance is not being paid as a condition of service, and especially when it is being paid just as an inam or gift, it cannot form additional remuneration within the meaning of Section 2(22), especially when the employee has no right to claim the same as of right. It has been argued that at any point of time, the appellant can stop such payment or deny such payment to anybody. If it comes within the purview of the first part of the definition of "wages" as contained in Section 2(22) of the ESI Act, even without any payment, the ESI Corporation could have claimed contribution on such payment, as it was payable. It is true that even according to the learned Senior Counsel for the appellant, such performance allowance is not payable. When the legislature has carefully worded the third part of Section 2(22) and limited the inclusive portion to additional remuneration paid, there is no meaning in arguing that it is not payable as of right and the employee cannot claim it as of right. True that the ESI Corporation has no case that the performance allowance is payable through the contract of employment either express or implied. Even when such a payment is specifically noted in the contract of employment as additional remuneration, it squarely falls within the category of the third part of the definition of "wages" as contained in Section 2(22) of the ESI Act, only when such payment is made.

11. The learned Senior Counsel has invited the attention of this Court to the decision in *Dy. Director, Employees' State Insurance Corporation Vs. Traco Cable Company Ltd.*, wherein the management was constrained to pay incentive based on the production given by the workers. In that case, it was held that, additional remuneration paid under the third part of Section 2(22) need not be based on any contract of employment. Even without a contract, if any such additional remuneration has been paid by styling it as an incentive, it is additional remuneration within the meaning of the third part of Section 2(22) of the ESI Act on which contribution has to be paid. The said decision has been cited by the learned Senior counsel in order to fortify his proposition that in that case an incentive was paid as additional remuneration, on the basis of a contract between the union as well as the management. Whether such a contract is there or not, if any amount is actually paid as incentive for more work done on the basis of the performance of such an employee, it will come within the category of additional remuneration paid within the meaning of the third part of Section 2(22) of the ESI Act.

12. The learned Senior Counsel relies on the decision of the Madras High Court in *Employees' State Insurance Corporation Vs. Enfield India Ltd.*, wherein it was held in paragraph 7 that "as per the terms of the agreement between the management and the employees Union, which provides for incentive and plant

performance bonus, the employees cannot claim these two as of right and even if the performance index has been lowered due to want of work or other causes, over which the employees have no control resulting in reduction of these bonuses, they cannot claim the same as of right contending that they were not responsible for the reduction in the performance. I do not think that, that observation made by the Madras High Court has any application to the facts and circumstance of this case. The attention of this Court has been invited to the decision in *Whirlpool of India Ltd. Vs. E.S.I.C.* [2001 LLJ 1101], wherein it was held,

"Under 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 Clauses (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."

13. It seems that the learned Senior Counsel is harping upon the term "only" used in the last sentence of the said paragraph to argue that there has to be payment of such remuneration and not only payability and the payment has to be done at intervals not exceeding two months. The learned Standing Counsel for the ESI Corporation has invited the attention of this Court to the decision in *Harihar Polyfibres Vs. Regional Director, ESI Corporation*, . It seems that the Apex court has relied on the decision in *Harihar Polyfibres* (supra) in paragraph 11 of *Whirlpool of India Ltd.* (supra). In *Whirlpool of India Ltd.* (supra), apart from a passing remark with regard to the payment that "not only payability it has to be paid", no other discussions on that point is there whereas, in *Harihar Polyfibres* (supra) the said aspect has been considered in detail with a threadbare discussion on all aspects. In paragraph 2 of *Harihar Polyfibres* (supra), it was held,

"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 term; 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 layoff" 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."

14. In Harihar Polyfibres (supra), it was categorically held that the remuneration paid under the terms of the contract of employment or otherwise if paid at intervals not exceeding two months, it will be an additional remuneration within the meaning of Section 2(22) of the ESI Act. Reliance was placed in the said decision on a Full Bench decision of the Andhra Pradesh High Court in Employees' State Insurance Corporation, Hyderabad Vs. Andhra Pradesh Paper Mills Ltd., Rajahmundry, , wherein it was held,

"It must be emphasized at this stage that under the third part of the definition of "wages" it is actual factum of payment which counts because the word used is "paid" as distinguished from "paid or payable". The moment you get any additional remuneration other than the remuneration payable under the contract of employment and if this additional remuneration is paid at intervals not exceeding two months, it becomes wages by virtue of the third part of the definition of "wages"."

15. As is evident from paragraph 5 of Harihar Polyfibres (supra), the Apex court has fully relied on the aforesaid dictum of the Full Bench of the Andhra Pradesh High Court. Much discussion is not required to conclude that performance allowance is nothing but an additional remuneration. Even though it has been argued that it is an allowance being paid purely at the discretion of the management to the employees as an incentive, it seems that the same is being paid as an incentive for better performance from such employees. To each and every employee, such a payment is not being made. Such a payment is being made, by assessing the performance and output of the employees. When such an intensive is being paid by expecting better performance on account of the better output by certain employees, it is nothing but an additional remuneration paid within the meaning of the third part of Section 2(22) of the ESI Act. Therefore, it comes within the category of "wages" whether it is being paid through a contract of employment or otherwise. Therefore, the appellant is bound to pay contribution on such performance allowance.

16. The next question is with regard to the "deputation charges". On this aspect, it need not be considered whether the stipend being disbursed to an apprentice or trainee can be considered as wages or not within the meaning of Section 2(22) of the Act. In this particular case, admittedly those so-called trainees, who were working at the hotel of the appellant, were not apprentices appointed by the appellant. It seems that their services were supplied to the appellant by M/s. Bharath Hotel, which is allegedly conducting a training centre. When such services were supplied, the appellant cannot claim that those persons can be treated as apprentices under the appellant. It seems that under the guise of imparting training, a sister concern of the appellant, who is conducting a training centre which is also a sister concern, was supplying such trainees for doing work

at the hotel of the appellant. If as a matter of fact, the said persons were being considered as the apprentices under the appellant, the appellant ought not to have paid any amount to M/s. Bharath Hotel for the services being rendered by the said trainees at the hotel of the appellant. Why the appellant has made payment to M/s. Bharath hotel? Definitely, it is for the services rendered by those persons deputed by M/s. Bharath hotel, at the appellant's hotel. It is a fact that such persons have worked at the appellant's hotel, for which remuneration was paid by the appellant to M/s. Bharath hotel. It seems that it is an indirect method of employing such persons for performing work, with a view to evading payments of contribution to which the ESI Corporation is legitimately entitled. Matters being so, this Court finds that the appellant cannot escape from the clutches of Section 2(22) of the ESI Act in the case of "deputation charges". They are liable to pay contribution to the ESI Corporation.

In the result, this appeal is dismissed. No order as to costs.