(2010) 09 KL CK 0410

In the High Court Of Kerala

Case No : Ins. Appeal No. 5 of 2008

Deputy Director, E.S.I. Corporation	APPELLANT
Vs	
Traco Cable Co. Ltd.	RESPONDENT

Date of Decision : 27-09-2010

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(22), 45A, 82(2)
Industrial Disputes Act, 1947 — Section 12, 18, 2, 9A

Citation : (2011) 3 LLJ 125

Hon'ble Judges : M.C. Hari Rani, J;K.M. Joseph, J

Bench : Division Bench

Advocate : T.V. Ajayakumar, for the Appellant; E.K. Nandakumar, A.K. Jayasankar Nambiar, K. John Mathai and P. Benny Thomas, for the Respondent

Final Decision : Allowed

Judgement

K.M. Joseph, J.—This is an Appeal filed u/s 82(2) of the Employees'' State Insurance Act, 1948 (hereinafter referred to as the Act). The Appellant challenges the order passed by the Insurance Court in I.C. No. 111 of 2003 which is an Application filed by the Respondent herein challenging the proceedings u/s 45A of the Act. The proceedings u/s 45A arose from a demand made for additional contribution from the Respondent for having paid certain sums to its employees by way of production incentive for the period September, 1999 to March, 2000. The Respondent is a Public Sector Unit of the Government of Kerala. The substantial questions of law framed are as follows:

(i) Whether the declaration made by the learned EI Court that the production incentive paid by the applicant is not wages and hence no ESI contribution is payable in this regard and all the findings made in its support are not erroneous, perverse and against the definition of wages u/s 2(22) of the ESI Act?

(ii) Whether the production incentive compelled to be paid by the applicant to the employees on the basis of an agreement arrived at between the Management and Union is not a contract of employment express or implied and would it not come within the definition of wages u/s 2(22) of the ESI Act?

2. It is the case of the Respondent that the amounts paid by way of production incentive to its employees was a voluntary payment under a voluntary scheme unilaterally initiated by it. It bagged an order from the BSNL. The contract with BSNL provided that if the Respondent did not honour its commitment under the contract within the time-limit, it will have to pay liquidated damages. According to the Respondent, it approached its employees and laid the facts before them. They were not agreeable, going by the averments. We will extract the case set up by the Respondent before the Court in regard to the matter as follows:

5. It is submitted that during the year 1999, there was more orders from BSNL which were to be delivered within the specified time failing which company has to pay liquidated damages. In spite of the repeated requests by the applicant, the workers were reluctant to give more production as according to them, the norm fixed only need be given. The applicant took up the issue with the unions and the unions insisted that more production can be given only on payment of incentive. The management was constrained to pay incentive based on the production given by the workers. The payment of incentive was only for a particular period and on attaining the target, the payment of incentive was stopped. The stoppage of incentive also was accepted by the unions as well as by the workers. This itself shows that it was never a service condition and the decision to pay incentive was only to encourage the workers to give more production.

Consequent upon the same, it is not in dispute that the Respondent proceeded to issue a Notice. The terms of the said Notice are as under:

TRACO CABLE COMPANY LTD.

Panampally Nagar, Kochi

No. 15/P&A/2926 7th October, 1999. NOTICE

The Management is pleased to introduce an Ad hoc Incentive Scheme for the JFDC unit, Thiruvalla with a view to enhance production and execute the order received from the Department of Telecommunications in time. Timely delivery will ensure proper share of orders from DOT in the coming year which is very important for the growth of our company. As per the scheme, incentive will be paid on monthly basis for a minimum production of 1 LCKM of cables. Incentive rates for attaining various production ranges are as shown below:

Monthly production Incentive in Remarks in LCKM Rs./p.m. Per employee

1.00 to 1.04 250 In the case of the 1.05 to 1.09 350 difference between the 1.10 to 1.l4 500 slabs, the incentive 1.15 to 1.19 650 corresponding to the 1.20 to 1.24 1,000 lower slab will be 1.25 to 1.29 1,300 applicable 1.30 & above 1,500

Eligibility for Incentive:

1. The incentive will be given in fall to all employees working in the factory side

except those belonging to the ministerial category.

2. Employees belonging to the ministerial category as well as other employees attached to the administrative office will be given 75% of the above incentive.

3. A minimum of 22 days attendance (including eligible leave) is required for getting the above incentive.

4. For those employees having attendance above 15 days and below 22 days (including eligible leave) will be getting only 50% of the above incentive.

5. Those employees having attendance below 15 days (inclusive of eligible leave) will not be eligible for any incentive for that particular month.

The above ad hoc incentive scheme will be in force from September, 1999 to March, 2000.

(Sd.) For Traco Cables Company Limited

It is on the said basis that the Respondent contended that the payments which were made would not qualify to be comprehended with the scope of Section 2(22) of the Act by which the word "wages" is defined. We extract the provision as hereunder

2(22): ''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

(d) any gratuity payable on discharge.

3. The Court proceeded to accept the contention of the Respondent that it is not wages. In doing so, the Court has proceeded on the basis that there is no basis for the case of the Respondent that the amount was paid on the basis of an agreement between the Respondent and the workers'' union, as there was no evidence for the same. It is found that the Scheme was introduced unilaterally and voluntarily by the Respondent, and that the production incentive was withdrawn in 2000 itself. It is found that the production incentive was introduced and implemented not on the basis of any contract of employment expressed or implied, but by a voluntary act. Reference is made thereafter to the judgment of a Division Bench in Carborundum Universal v. ESI Corporation 1976 (1) L.L.J. 17.

Thereafter, it is stated that the employees are not entitled to claim incentive as a matter of right, apparently for the reason that it was by a voluntary act which was introduced and the same was withdrawn subsequently and for this reason, it is stated that it is not remuneration either as contemplated in the First Part or in the Second Part or additional remuneration in the Third Part. The Court also drew support from the judgment in S.T. Reddiar & Sons v. Regional Director 1989 (1) L.L.J. 285 and Management of Kuttukkaran Engine Rebuilders v. Employees'' State Insurance Corporation 1999 (3) L.L.J. (Supp.) 31.

4. We heard Shri T.V. Ajayakumar, learned Counsel for the Appellant and Shri Benny P. Thomas, learned Counsel appearing on behalf of the Respondent

5. Learned Counsel for the Appellant would first submit that the nature of the payment made by the Respondent to its employees must be appreciated in the context of undisputed facts. As already noted, the Respondent bagged an order which involved increased production. Increased production was impossible with the level of work that was being turned out by its employees. Respondent had to approach its employees. They were not agreeable to increase production apparently on the basis of the payments which were made. Respondent, thereupon, agreed to increase the payment and this decision was notified to the workers. He lays stress on the word "constrained" in the Application. Therefore, he would contend that the payment would fall within the four corners of First Part of the definition of the word "wages", namely it was a contractual payment. He would further submit that, at any rate, the Court has acted illegally in not holding that the incentive would fall within the Third Part, namely, he would contend that it was additional remuneration.

6. He would contend that the matter is no longer res integra, as it is concluded by the Apex Court in the decision in Harihar Polyfibres Vs. Regional Director, ESI Corporation, . He would further bring to our attention the decision in Handloom House Ernakulam Vs. Regional Director, ESI, . He also referred to the decisions of this Court in United Brewaries Ltd. Vs. E.S.I. Corporation, and The Regional Director of E.S.I. Corporation Vs. Hotel Alukkas, .

7. Per contra, learned Counsel for the Respondent would submit that the payment was a voluntary payment made in the circumstances which we have already adverted to. There was no settlement within the meaning of Section 12 or Section 18 of the Industrial Disputes Act and without there being an agreement as settlement u/s 12 or Section 18, he would submit that it is inconceivable as to how it could be contended that the production incentive paid in this case could be said to be paid on the basis of the terms of the contract of employment. He would submit that the payment lasted only for a short period of time and it was unilaterlly withdrawn after the said period of time. He also drew our attention to the decision of the Apex Court in Whirlpool of India Ltd. v. E.S.I.C. (2000) 1 L.L.J. 1101. He also relied on the decision of the Apex Court in Regional Director, Employees'' State Insurance Corporation and Another Vs. Bata Shoe Company (P) Ltd., .

8. After having heard the learned Counsel appearing for the parties, we are of the view that this case can be disposed of with a reference to the Third Part of Section 2(22) of the Act defining the word "wages", that is to say, we do not deem it necessary to go into the question as to whether the payment can be said to have been made under a contract of employment express or implied, as we would think that the Appellant is justified in contending that the incentive bonus paid by the Respondent Company to its employees would fall in the Third Part, namely it would constitute additional remuneration paid for the following reasons:

The definition of the word "wages" has been subjected to interpretation at the hand of the Apex Court on a number of occasions. As far as the First Part is concerned, the payment must necessarily be in terms of a contract of employment, be it express or implied. The Second Part of the definition of the word "wages" need not detain us in the facts of this case. The Third Part of the definition of the word "wages" provides for including any additional remuneration, if it is paid at intervals not exceeding two months. However, it does not include any contribution paid by the employer to any pension fund or provident fund under the Act, any travelling allowance or value of travelling concession and any sum paid to a person employed, to defray special expenses entailed of him by the nature of his appointment and any gratuity payable on discharge. This is the statutory scheme of the definition "wages". In Harihar Polyfibres Vs. Regional Director, ESI Corporation, , the Apex Court considered the question as to whether among other things "incentive wages" could be treated as part of wages, as defined in the Act The Court, inter alia, held as follows:

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.

Thereafter, the Apex Court has further held as follows:

3. In Employees'' State Insurance Corporation, Hyderabad Vs. Andhra Pradesh Paper Mills Ltd., Rajahmundry, , a Full Bench (Divan, C.J., Raghuvir and Gangadhara Rao, JJ.) of the Andhra Pradesh High Court held that incentive bonus paid to an employee (which the Court, on the facts of the case, found was not remuneration in terms of the contract of employment, express or implied) fell within the third part of the definition of ''wages'' that is ''additional remuneration if any, paid at intervals not exceeding two months''. The Full Bench said (para 19):

The word ''other'' appearing at the commencement of the third part of the definition of wages u/s 2(22) indicates that it must be remuneration or additional remuneration other than the remuneration which is referred to in the earlier part of the definition vis., all remuneration paid or payable, in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and incentive bonus in the present scheme is certainly additional remuneration. 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''.

In The Regional Director, Employees State Insurance Corporation and Anr. v. Bata Shoe Co. (Pvt.) Ltd. 1986 L.L.J. 138, we notice that a Bench of two Judges of the Apex Court has proceeded to consider whether attendance bonus paid pursuant to a settlement between the workmen and management could be regarded as remuneration paid or payable. The Court proceeded to hold as follows:

The attendance bonus paid to the employees is an exgratia payment and is paid as a gesture of goodwill. It is neither production bonus nor any customary bonus nor any statutory bonus. It cannot be regarded as part of the contract of employment. The standing orders which originally dealt with attendance bonus was subsequently amended, excluding attendance bonus from its purview. In our opinion, bonus paid under successive settlements and agreements cannot be regarded as a remuneration paid or payable to the employees in fulfilment of the terms of contract of employment.... The concept of bonus is that it is a cash incentive paid in addition to wages and given conditionally on certain standards of attendance and efficiency being attained. When wages fall short of living wages and when the Industry makes huge profits part of which are due to the contribution which the workmen make in increasing production, the demand for bonus becomes an Industrial claim. Payments made by employer as an expression of goodwill towards its employees does not fall within the concept of bonus. Hence attendance bonus will not fall in the first category of remuneration enumerated in the definition of wages under Employees State Insurance Act.

But, more importantly, in regard to the contention based on the attendance bonus being wages, as it was additional remuneration, the Court held as follows:

9. The second category of remuneration defined within the expression ''wages'' by Sub-section (22) of Section 2 of the Act speaks of other additional remuneration paid at intervals not exceeding two months. It cannot be disputed that the bonus under consideration here is not paid at intervals not exceeding two months. It is payable ''one month after the end of each quarter.

10. We have carefully perused the terms of the definition of ''wages'' set forth in

Sub-section (22) of Section 2 of the Employees'' State Insurance Act, 1948, and we are satisfied that the bonus in question in these appeals does not fall under any category or class mentioned in the definition.

That was a case where the payment did not fall under the third part of the word ''wages'' having regard to the fact that the amount was payable only one month after the end of each quarter. Having regard to the embargo in the third part against reckoning any payment made when the payment is made at the interval exceeding two months, clearly the payment would not qualify as additional remuneration. We further notice that this is a judgment which was rendered by the Apex Court without referring to the earlier judgment of a two Judge Bench in Harihar Polyfibres Vs. Regional Director, ESI Corporation, . In Handloom House Ernakulam Vs. Regional Director, ESI, , the Apex Court considered the question whether incentive bonus and sales commission were part of "wages" u/s 2(22) of the Act. The Court referred to the decision in Harihar Polyfibres'' case (supra) and also the decision in Modella Woollens Limited v. Employees State Insurance Corporation . The Court approved of the decision of the Apex Court in Harihar Polyfibres'' case. In Whirlpool of India Ltd. v. E.S.I.C. 2000 (1) L.L.J. 1101, the Court was considering the question as to whether production incentive paid under a production incentive scheme was to be included in the "wages" for determining the contribution payable under the Act. Therein, the Court, inter alia, held as follows:

13. Learned Counsel for the Respondent made a feeble attempt to contend that the payment in the present case would fall within the first part of definition of ''wages'' as mere is an implied contract for payment of the said amount. As already noticed, none of the Courts has held that the amount in question was paid or was payable on fulfillment of terms of contract of employment. Further, learned Counsel fairly conceded that the payment under the scheme cannot be termed as payment under settlement as contemplated by Section 2(p) of the Industrial Disputes Act. It also cannot be held that the payment in question under the scheme would amount to a condition of service requiring compliance of Section 9A of the Industrial Disputes Act, for effecting any change in the conditions of service. The payment thus does not fall within the first part of definition of ''wages''.

However, it is more important to notice that in paragraph 14, the Court also held as Mows:

14. It is evident that the additional remuneration to become wages has to be ''paid'' at intervals not exceeding two months as distinguished from ''being payable''. Thus, under the last part there has to be actual payment. 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.

Therefore, this is also a case where apparently matters turned on the fact that the payment was being made quarterly and we are of the view that this decision will not advance the case of the Respondent 9. In The Regional Director of E.S.I. Corporation Vs. Hotel Alukkas, , a fairly large sum of money, namely Rs. 4,24,940 was paid by the employer to the employees. The employer contended that it was a gift. The Court rejected its contention and proceeded to, inter alia, hold as follows:

The definition Clause would clearly indicate that 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. Expression ''additional remuneration'' has to be noted. Additional remuneration in the nature of incentive is paid to the employees for the service rendered by them. It cannot be said that those payments have got the character of gift. First of all, there is nothing to show that it partakes the character of a gift and that the employer can always recover it from the employees. A. W. 1 deposed before the court that at any moment the employer could withdraw the said amount and that it would not be a remuneration under any settlement or part of service conditions. We find it difficult to accept that contention. It is difficult to believe that an amount of nearly Rs. 4 Lakhs paid to the employees by way of gift. On the other hand, it is the specific stand of the Corporation that incentive was paid to the employees in all the months at fixed rates.

In Braithwaite & Co. (India) Ltd. v. Employees'' State Insurance Corporation 1968 (1) L.L.J. 18 the Court was dealing with the question as to whether inam paid or to be paid under Inam Scheme initiated was "wages" under the Act. The Court held as follows:

The features of the scheme which indicate that the payment of the inam did not become a term of the contract of employment are the following:

(1) The payment of inam was not among the original terms of contract of employment.

(2) The only offer under the scheme was to make an incentive payment, if certain specified conditions were fulfilled by the employees.

(3) Payment of inam was dependent upon the employee exceeding the target of output appropriately applicable to him.

(4) If the targets are not achieved due to lack of orders, lack of materials, break-down of machinery, lack of labour, strikes, lock-outs, go-slow or any other reason whatsoever, no inam was to be awarded. This is inconsistent with the payment of inam having become an implied term of the contract of employment.

(5) It is also made clear in the scheme that the payment of inam was in no way connected with wages.

We must notice that the Court did not consider Section 2(22). Thirdly, namely, the Court did not consider whether it is additional remuneration. At any rate, we must not overlook the fact that the Apex Court has in subsequent rulings, namely, Harihar Polyfibres Vs. Regional Director, ESI Corporation, , Handloom House Ernakulam Vs. Regional Director, ESI, , and a Bench of this Court in The Regional Director of E.S.I. Corporation Vs. Hotel Alukkas, approved of the view taken in Harihar Polyfibres Vs. Regional Director, ESI Corporation, namely that any amount which is paid without the support of an agreement as understood in the first part of Section 2(22) will still be additional remuneration, subject to it not falling in any excepted categories and it not being paid at intervals exceeding two months.

10. We would not think that the Court was justified in relying on the decision in S.T. Reddiar & Sons v. Regional Director 1989 (2) L.L.J. 285 and Management of Kuttukkaran Engine Rebuilders v. Employees'' State Insurance Corporation 1999 (3) L.L.J. (Supp.) 31 having regard to the law laid down by the Apex Court in Harihar Polyfibres Vs. Regional Director, ESI Corporation, which we have adverted to. Similarly, we are not impressed by the reliance placed by the Court on the decision of a Bench of this Court in Carborundum Universal v. ESI Corporation 1976 (1) L.L.J. 17. We notice that it related essentially to payments made under a contract. We must also notice that this is a case where the pleading in the application of the Respondent which we have adverted to itself would show that the Respondent was faced with the prospect of being saddled with liability to pay liquidated damages, if it did not honour its commitment under the contract with BSNL whose orders it had bagged. The workers were reluctant to give more production, as according to them, they were obliged only to perform in accordance with the norm which was fixed. That itself means that they had agreed for a particular norm which transforms into a particular production figure or in substance the work was to be pegged at a particular level. The performance of the obligations of the Respondent under its contract with BSNL within the time provided for in the contract, necessarily involved the workers giving more out turn. That is to say, they were called upon to work more. They were not agreeable to work without being paid more, apparently. It was at that stage and being constrained to do so, as the application eloquently shows on its own wording the management introduced the incentive based on production. Of course, learned Counsel for the Respondent would point out that it could not be said to be a contract for the reason that faced with the attitude of the workers, the management only unilaterally and voluntarily introduced a production based incentive scheme. The actual rates at which the amounts were to be paid based on the increase in production attained, etc. were never actually agreed upon, it is contended. These arguments really need not detain us, for, the fact of the matter is, as held by the Apex Court, to invoke the Third Part of Section 2(22), additional remuneration paid, what is relevant is whether it is

paid. It is not necessary to dwell further into the question as to whether the payment became obligatory on the basis of a contract, express or implied, which is a question which would be germane, only in an enquiry whether it was wages under the first part of Section 2(22). The word "remuneration" signifies essentially payment for work done. The Respondent in this case wanted the workers to churn out an increased out-turn having regard to the constraints, namely to the unenviable position, it would have been placed in, namely its obligation to pay liquidated damage to BSNL for supplies made beyond the time-limit. We have already referred to the notice. The notice provides for the amounts to be paid on attainment of various levels of production. It is not in dispute that these amounts were paid every month along with wages. Therefore, the payments in question also satisfied the further requirement that it is not paid in intervals of excess of two months. The Respondent does not have a case that it falls within any of the categories, namely Clauses (a) to (d) of Section 2(22). We must also refer to Anr. contention raised by the learned Counsel for the Respondent. He would contend that accepting the reasoning of the Appellant would result in great prejudice. There is a ceiling limit which, at the relevant time, was Rs. 6,500 and if the incentive payments were to be added to the wages, many of the employees concerned would be out of the ceiling limit and the resultant position would that they would go out of the ambit of the word "employee" and no contribution would be payable under the Act and the amount already paid may have to be refunded. Learned Counsel for the Appellant, on the other hand, would point out the proviso in the definition of the word "employee" and contended that this eventuality may not occur. For answering the questions of law which have been framed in this case, we do not think it necessary to go into the said question and we leave it open. Accordingly, we answer the substantial question of law raised by the Appellant in favour of the Appellant and hold that the production incentive paid by the Respondent/applicant is wages being additional remuneration and hence ESI compensation is payable in regard to the same.

The Appeal is allowed as above.

