

(1994) 09 MAD CK 0076
In the Madras High Court
Case No : C.M.A. No. 335 of 1986

Employees' State Insurance Corporation	APPELLANT
Vs	
Enfield India Ltd.	RESPONDENT

Date of Decision : 07-09-1994

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(22)

Citation : (1995) 70 FLR 206 : (1999) 3 LLJ 218

Hon'ble Judges : Govardhan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Govardhan, J.—This Civil Miscellaneous Appeal arises out of the order passed by the E.S.I. Judge (First Additional Judge, City Civil Court), Madras dated February 24, 1984 in E. I. O. P No. 13/1983 filed u/s 75 of the Employees' State Insurance Act (hereinafter called as "the Act") to set aside the order passed by the Employees' State Insurance Corporation.

2. The petitioner's case is briefly as follows : The petitioner's company manufactures 350 cc. Bullet Motor Cycles at Tiruvottiyur which is covered under the Employees' State Insurance Act. The service conditions of the workmen of the petitioner's establishment are governed by long-term settlements reached from time to time. Apart from wages and dearness allowance the Petitioner used to provide free tea, milk and eggs to certain categories of workmen. Since there were, complaints with regard to the supplies made and the petitioner had also experienced difficulties in arranging to supply the above items, it was decided to pay cash, to the workmen to enable them to buy them. These payments were meant towards reimbursement of cost of milk, tea and eggs. It was not to be considered as emoluments for services rendered. The petitioner also used to pay incentive bonus and plant performance bonus to the workers. These payments were to be treated as wages for the purpose of E.S.I. as agreed between the parties. The contractor who was engaged by the petitioner would be present at

the time of inspection of the Motor Cycles supplied at the Central Vehicles Depot at Avadi. When defects are pointed out, the same will be attended to by the labour to be supplied by the Contractor one Mr. Basheer. He used to raise a bill claiming wages for number of vehicles attended to by him and his men, and he would disburse wages to the men engaged by him. The engagement of contractor Basheer was itself casual. The engagement of labourers by Mr. Basheer was even more remote as far as the work of the petitioner is concerned. The staking work will be done by the men, engaged by Venu. The petitioners have no knowledge as to the amount of wages paid by Venu to his men. The respondent, addressed a letter on February 26, 1981 to the petitioner demanding contribution on milk, tea and eggs allowance, incentive bonus and also the contribution on the amounts paid to contractors Basheer and Venu. The petitioner disputed his liability in his reply. But the respondent determined the contributions from April, 1979 to May, 1981 at Rs. 42,450.80 towards milk, tea and egg allowances, Rs. 1,61,775.18 towards the plant performance bonus for the period from February, 1980 to May, 1981. The petitioner sent a reply pointing out that even if the plant performance, bonus, milk, tea and egg allowances were to be treated as wages and additions were made to the wages of every insured person, the same will not result in any change in the daily rate of wages warranting payment of additional contribution. But the petitioner received a revenue recovery notice from the Collector of Chengleput. The proceedings of the respondent dated December 3, 1982 demanding Rs. 9,804.54 is illegal. Hence the petition.

3. The respondent in their counter has contended as follows: The petitioner has not been paying the contributions regularly. They are not even submitting the returns regularly. The petitioner failed to pay the contribution in respect of payments made to the employees which are wages u/s 2(22) of the E.S.I. Act. The employees employed by Basheer and Venu will also be covered under the Act, as employees of immediate employer. The respondent has sent a notice demanding to show cause as to why the contributions should not be recovered u/s 45B of the Act and as to why an order u/s 45A of the Act should not be passed. The question whether the plant performance bonus is wages is pending in appeal before the Supreme Court. The casual workers are also employees u/s 2(9) of the Act. The petition is without merits and is liable to be dismissed.

4. On the above pleadings, after enquiry, the learned E.S.I. Judge has held that the Corporation is not entitled to compel the petitioner to include the incentive and plant performance bonus, the cash payments towards tea, milk and egg for calculating contributions payable to the Corporation by the petitioner. He has also held that Corporation is entitled to call upon the petitioner to include the amounts paid to the contractors Venu and Basheer for calculating the contributions payable by the petitioner to the Corporation. After holding like that, the learned E.S.I. Judge has remitted the matter to the E.S.I. Corporation to investigate the quantum paid by the petitioner to the contractors Venu and Basheer.

5. Aggrieved over the said judgment of the E.S.I. Judge, the respondent has come forward with this appeal.

6. The point for consideration is: Whether the order of the E.S.I. Court is valid or not and whether it requires any modification ?

7. Point: The petitioner has filed the petition u/s 75 of the Act requesting the Court to declare the demand for contribution made by the Employees' State Insurance Corporation as illegal. The demand made by the Employees' State Insurance Corporation is three-fold. The first one is on incentive and plant performance bonus paid by the employer (petitioner) to the workmen. The petitioner challenges the same by contending that; the amount paid as incentive bonus and plant performance bonus cannot be considered as wages within the meaning of Section 2(22) of the Act. Section 2(22) of the Act is as follows : "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, lockout, 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"

As per the terms of the agreement between 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. The Management has been given the right to control the quantum of work and the programme for each group depending upon the contingencies arising from time to time. It is even provided for transferring an employee from one Section to the other which could result in the loss of incentive and plant performance bonus. But yet, the employees cannot make it as a grievance. It is thus seen that the payments made under these two heads cannot be tacked on with the general salary as the wages. As per Section 2(22) of the Act, remuneration paid or payable in cash if the terms of the contract of employment are fulfilled alone can be considered as wages. Any other sum paid to an employee to defray special expenses entailed on him by the nature of his employment cannot be considered as wages. Therefore, if certain amounts are

paid by way of incentive bonus or plant performance bonus, they can be considered only as a special expense for the employer and they cannot be considered as wages. The incentive bonus is the source of gain to productivity. It need not be paid if the Management is unable to provide sufficient work to the employee to gain productivity.

8. In the decision reported in *Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation*, the Supreme Court has held that the mere fact that a reward for good work offered by the employer is accepted by a workman after he has successfully satisfied the requirement laid down by the employer for earning the reward does not mean that the payment becomes a part of the contract of employment. Therefore, the incentive bonus and plant performance bonus which are offered as reward for the good work offered by the employer which has been accepted by the workmen cannot be considered as wages as defined u/s 2(22) of the Act and the learned E.S.I. Judge has correctly held that they are not considered as wages to demand contributions.

9. The next contention of the petitioner is demand for contribution on the amount paid in lieu of milk, tea and egg is not proper. In the decision reported in *W. P Nos. 193/1977 and 197/ 1977*, our High Court has held that payment made toward milk, tea and egg allowance cannot be considered coming under the definition of wages" as defined u/s 2(22) of the Act. The learned Counsel appearing for the respondent himself has brought to the notice of this Court that subsequent to these decisions, the Supreme Court has held that payments made in lieu of these allowances, has to be considered as wages; but he would argue that the Supreme Court has not set aside the Division Bench judgment and it still holds good and it is a bar to the present dispute being agitated again. The question whether the Division Bench judgment is to be considered as a bar on the principles of *res judicata* has therefore to be considered. According to the learned Counsel appearing for the respondent, as per the decision reported in *Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy*, , the Supreme Court has held as follows:

"In determining the application of the rule of *res judicata* the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the reason, be questioned in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11, CPC means the right litigated between the parties, i.e., the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of *res judicata* a party affected by the

decision will not be precluded from challenging the validity of that order because of the rule of res judicata, for a rule of procedure cannot supersede the law of the land"

After quoting the above decision, the learned Advocate for the respondent would argue that the question whether the payment of certain amount in lieu of milk, tea and egg allowances comes under the definition of wages or not is a mixed question of law and fact determined in the earlier proceedings between the same parties and therefore, with regard to the matter in issue viz, the facts on which the right is claimed or denied. Section 11 of the Civil Procedure Code is applicable and therefore under the principles of res judicata, this Court need not go into the question whether the allowances paid towards milk, tea and egg come under the definition "wages" as defined u/s 2(22) of the Act and it can be stated that it does not come under the definition in view of the decision rendered in W.P. Nos. 193 and 197/ 1977.

10. According to the learned Counsel appearing for the respondents, even though the Supreme Court has given a decision, subsequently to the effect that the allowance paid in lieu of tea, milk and egg is to be treated as wages, it cannot be stated that the decisions in W.P. Nos. 193/1977 and 194/1977 do not operate as a principle of res judicata in this proceeding and he relies upon the decision reported in Abdul Salam Vs. State of Jammu and Kashmir and Others, for the above proposition. The Full Bench of the Jammu and Kashmir High Court has held in the above decision as follows:

" A judgment inter parties of a competent Court in a previous writ petition would operate as res judicata in a subsequent suit between the same parties, where the issues directly involved in the two proceedings are same, irrespective of the fact whether or not the decision in the earlier writ petition was founded on a view contrary to the one subsequently expressed by the Supreme Court in a different case. The correctness or otherwise of the earlier decision is wholly irrelevant where the conditions for the application of the rule of res judicata are satisfied in the latter case."

According to the learned Counsel appearing for the respondent, the dispute is between the same parties viz., the petitioner and the Employees' State Insurance Corporation and the issue directly involved between the two is also the same and therefore under the principle of res judicata, the decision rendered in the Division Bench has to be followed in the present case also. Except stating that cause of action and the parties should be the same, to apply the principles of res judicata, the learned Counsel appearing for the appellant has not placed materials to hold that the principles of res judicata do not apply to the facts of the present case. In view of the decision reported in Mathura Prasad v. Dossibai. (supra) and in view of the decision reported in Abdul Salam v. State (supra), I am in agreement with the learned Counsel appearing for the respondent to hold that the amounts paid by way of allowances towards milk, tea and egg to the employees by the petitioner cannot be considered as wages coming under the

definition of Section 2(22) of the Act.

11. The only remaining question to be considered is whether the order of remand to the Employees' State Insurance Corporation to investigate the quantum paid by the petitioner to the contractors Venu and Basheer is to be upheld. The fact that there is no material for fixing the quantum of amount paid by the petitioner to the Contractors Venu and Basheer to fix the quantum of contribution is not disputed. Neither the appellant nor the respondent has stated the quantum of damages payable to be fixed on the materials available before the Court. Therefore, the order of remand made by the E.S.I. Court to the Employees' State Insurance Corporation to fix the same is to be upheld. Considering the materials placed before me, I am of opinion that the appellant has not established that the order of the learned E.S.I. Judge is erroneous to enable this Court to interfere with the same in any one or more points which are discussed. In that view, I am of opinion that the appeal is with merits and is liable to be dismissed.

12. In the result, the appeal is dismissed, No costs.