

(1999) 07 KAR CK 0055

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 1571 of 1998

Employees" State Insurance Corporation, Bangalore

APPELLANT

Vs

Bhoruka Textiles Limited, Sattur, Dharwad District and Others

RESPONDENT

Date of Decision : 12-07-1999

Acts Referred:

Employees State Insurance Act, 1948 — Section 2 (22), 75, 82 (2)

Citation : (1999) 5 KarLJ 611 : (2000) 1 LLJ 583

Hon'ble Judges : M.P. Chinnappa, J

Bench : Single Bench

Advocate : Smt. Geeta Devi for Sri M. Papanna, for the Appellant; Sri S.N. Murthy and Sri Somashekar, for the Respondent

Judgement

1. The short but important substantial question of law involved in this appeal is as to whether the good work reward and ex gratia payment made by the employer to its employees constitutes wages within the meaning of Section 2(22) of the Employees" State Insurance Act (for short, the Act").

2. The brief facts of the case are the respondent 1 herein is covered under the Act. It made E.S.I. Application No. 18 of 1991 on the file of E.S.I. Court, Hubli, u/s 75 of the Act for setting aside the order dated 28-5-1991 passed by the E.S.I. Court for payment of contribution towards good work reward amount. The appellant herein filed objections and the E.S.I. Court after assessing the evidence let in by both the parties following the decision in S.T. Reddiar and Sons v Regional Director, Employees" State Insurance Corporation, held that the reward paid voluntarily by an employer as an incentive to its workman or any payment of gratuitous nature, otherwise than under the application either statutory, contractual and unrelated to the contract of employment cannot fall within the definition of "wages" u/s 2(22) of the Act. Being aggrieved by that order, the E.S.I. Corporation has preferred this appeal u/s 82(2) of the Act.

3. Heard Smt. Geeta Devi, learned Counsel for the appellant and Sri S.N. Murthy and Sri Somashekar, learned Counsel for the respondents.

4. The learned Counsel for the appellant has vehemently argued that any payment made by the employer to the employee is "wages" as defined under the Act. She also further submitted that the finding of the Court below that payment of good work reward and gratuitous payment are not Wages" is liable to be set aside. She further submitted that the respondent has failed to establish that the payments were not made exceeding two months and further it has failed to produce all the relevant documents to establish that the payments made do not come u/s 2(22) of the Act.

5. The learned Counsel for the respondents however submitted that the order passed by the learned Court below does not call for interference. The appellant has not made out that the payments made by it would come under the definition of Section 2(22) of the Act. Non-production of registers and also the agreement would not in any way affect the case of the respondent. There is no reason to interfere with the order passed by the Court below. Therefore, he submitted that the appeal may be dismissed.

6. The Hon"ble Supreme Court had an occasion to deal with the definition u/s 2(22) of the Act in Braithwaite and Co. (India) Ltd. Vs. The Employees" State Insurance Corporation, , wherein it is held:

"The payment of Inam, though remuneration, could not be said to have become a term of the contract of employment within the meaning of the definition of "wages" as given in Section 2(22)".

Further it is held:

"If the Inam had become an implied condition of the contract of employment the employer could not withdraw that right at its discretion without assigning any reason nor could the employer vary its conditions without agreement from the employers.

The exemption from payment of the Inams on grounds for which the employees could not be blamed and possibly for which the Company itself might be responsible clearly showed that the payment of the Inam was not enforceable as one of the terms of the contract of employment whether implied or express".

Subsequently, the Full Bench of this Court has held in N.G.E.F. Limited v Deputy Regional Director, E.S.I.C., Bangalore, that the amount paid by way of incentive under the scheme referred to in the settlement entered into between the management and its workmen falls within the definition of "wages" as defined u/s 2(22) of the Act. It has further held:

"The definition of wages in Section 2(22) could be conveniently divided into three parts: The first part deals with all remuneration paid or payable in cash to an employee under the terms of the contract of employment. The second part is the inclusive part of the definition. It covers any payment 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. The

third part excludes from the definition of certain types of payment provided under clauses (a), (b), (c) and (d) of Section 2(22) (para 4).

The second part of the definition is quite distinct and different from the first part. All the items of payments referred to in the second part apparently cannot have any reference to the terms of the contract of employment of any employee. But nonetheless they are also termed as wages because they are included in that definition. Therefore, clear implication of the second part of the definition is that any additional remuneration paid otherwise than under the terms of the contract should also be treated as wages for purposes of the Act provided that payment is made by way of remuneration i.e., a recompense for service rendered and not any ex gratia payment : and paid at periodical intervals not exceeding two months. If any additional remuneration paid satisfied these two conditions, Section 2(22) declares it to be "wages" though paid de hors the terms of the contract (para 8)".

Their Lordships of the Supreme Court in Harihar Polyfibres Vs. Regional Director, ESI Corporation, , held:

"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 and, 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.....".

The Supreme Court in Indian Drugs and Pharmaceuticals Ltd. and Others Vs. Employees" State Insurance Corporation and Others, , held:

"It is a settled legal position that the word "include" would be given wide interpretation so as to bring within its ambit exhaustively all entries akin to or analogous to the main part of wage, except to the extent the enumerated entitles except those expressly excluded by the legislation would be within its sweep. In other words, by employing the inclusive definition, the legislature intended to bring in, by legal fiction, something within the accepted connotation though not strictly included within its ambit".

In that case, their Lordships have further held that whatever remuneration, paid or payable for overtime work, forms wages under an implied terms of the contract. The object thereby is clear that the overtime work done by the employee is an implied contract to do overtime and the remuneration paid

therefore does form part of the wages u/s 2(22).

7. In *Regional Director, Employees' State Insurance Corporation and Another Vs. Bata Shoe Company (P) Ltd.*, , their Lordships have held:

"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".

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".

There is no pleading nor any evidence let in to show the existence of any agreement and as per the terms of the contract that the payment was made under the guise of good work reward to the employees. Further, there is no evidence to show that the payment was made at intervals not exceeding two months. It is not established that additional remuneration paid otherwise than under the terms of the contract to treat the payment as "wages" for the purpose of the Act and the payment is made by way of remuneration, i.e., a recompense for service rendered and not any ex gratia payment. It is no doubt true that E.S.I. Act being a welfare legislation has to be liberally construed but as stated above, the payment should come under any one of the three parts u/s 2(22) of the Act.

8. The Division Bench of the Kerala High Court in *Reddiar's case*, supra, which is also relied upon by the E.S.I. Court has held that ex gratia payment to some of the employees in a year for prompt completion of specific item of work assigned to them are not "wages" as defined in Section 2(22) of the Act. The burden of proof of nature of payment lies on the Corporation which demands the contribution. Such being the position, the argument of the learned Counsel for the appellant that the respondent has not produced other registers maintained in the office to show that this payment does not come u/s 2(22) of the Act is a slip on the case of the respondent. Therefore, the Court should have dismissed the application filed u/s 75 cannot be accepted. The respondent has specifically contended that the payment made as good work reward is not wages as held by the Corporation. Therefore, the Corporation should have placed materials before the Court to show that such payment also comes within the purview of Section 2(22) of the Act. When the Corporation has failed to make out the primary requirement, the burden does not shift on the respondents to prove the negative aspect. Therefore, the decision cited by the learned Counsel for the appellant in *Escorts Ltd. Vs. Regional Director, ESIC*, , holding that if either of the parties does not adduce sufficient evidence on any point, the matter will of course be regulated by the consequences that flow from a party who takes the risk of non-

pursuance, failing to discharge the evidential burden would not in any way come to the rescue of the Corporation.

9. Similarly, this Court in MFA No. 2094 of 1988 has held that if the person who is in possession of the documents fails to produce the same, adverse inference can be drawn. As far as the principles enunciated in both the decisions are concerned, there is absolutely no quarrel. But in this case as stated above, the respondent clearly admitted that the payments are made as good work reward and there is no denial. The evidence of R.W. 1 is also very vague on this aspect. However, the respondent has not produced the necessary documents either before the Corporation or before the Court to show that the payments made were good work reward and it is not clear from the evidence of the respondent who was examined as P.W. 1 as to the number of times the good work reward was given. These doubts can be clarified by only producing the documents before Court. No plausible explanation is forthcoming from the respondent herein as to why documents were not produced. It is necessary to find out whether the payments were made exceeding two months to avoid the payment of contribution. Under those circumstances and in the light of the discussions made above, I am of the considered view that the matter has to go back to the E.S.I. Court for proper adjudication with a specific direction to both the appellant and respondent to produce sufficient materials to establish their respective cases.

10. For the foregoing reasons, this appeal is allowed. The matter stands remitted to the E.S.I. Court and the ESI Application No. 18 of 1991 is restored on file with a specific direction to provide full opportunity to both the parties to lead evidence to establish the case, in the light of the observations made above.