

(1981) 04 MAD CK 0014

In the Madras High Court

Case No : Appeal Against order No's. 152 of 1979 and 42 of 1981

Employees' State Insurance Corporation, Madras	APPELLANT
Vs	
Amalgamations Repco Limited, Madras	RESPONDENT

Date of Decision : 03-04-1981

Acts Referred:

Employees State Insurance Act, 1948 — Section 2, 22(2), 39, 75

Citation : (1983) 2 LLJ 193

Hon'ble Judges : Sengottuvelan, J

Bench : Single Bench

Judgement

1. Both the above civil miscellaneous appeals arise out of the orders of the First Additional City Civil Judge, Madras, in E.I.O.P. No. 11 of 1976,

E.I.O.P. No. 11 of 1976, is a petition filed by Amalgamations Repco, Ltd., Madras-60, under S. 75 of the Employees' State Insurance Act,

1948, for declaration that the payments made under the incentive scheme and the night shift allowance payable to the workmen of the factory are

not wages within the meaning of S. 2(22) of the said Act. The case of the management is as follows.

2. The company pays night shift allowance at the rate of 70 paise per shift, as an inducement to the workers, so as to keep themselves awake and

with a view reimburse them for the expenses that they might incur by way of tea, snacks, etc., during night hours. Apart from this, the company has

introduced incentive bonus to the workers for higher production over and above the norms set out by the management. The incentive bonus is paid

on the principle that the workmen should be given a share in the profits of productivity. One of the features of the incentive bonus scheme is that

the company has no obligation to provide work to workmen to enable them to

earn incentive and the incentive scheme can be withdrawn at any time. The incentive scheme is not one of the terms of the appointment and it has been introduced voluntarily by the management. The workers are not entitled to incentive payment as a matter of right, as they are expected to give optimum level of production during the normal working hours for the basic wages and dearness allowance paid to them in terms of the letter of appointment. The company has not been treating the incentive payments, namely, production incentive bonus and night shift allowance as wages for the purpose of calculating the employees' State insurance contribution. The Employees' State Insurance Corporation also did not treat the night shift allowance and production incentive bonus as wages till March 1974. Surprisingly, on 12 September, 1974, the Employees' State Insurance Corporation wrote to the company that, for the period from 1 October 1972 to 30 June, 1973, there were arrears to the tune of Rs. 1,001, towards contribution, due to non-inclusion of the payments made under the heads of production incentive bonus and night shift allowance. The case of the Employees' State Insurance Corporation is that the aforesaid payments constitute wages under sub-s. (22) of S. 2 of the Employees' State Insurance Act and on that basis the company was asked to submit revised returns. The company sent a reply on 17th October, 1974, pointing out the reasons as to why the incentive bonus and night shift allowance would not constitute wages within the meaning of the abovesaid Act. The Employees' State Insurance Corporation, by its letter dated 12th December, 1974, reiterated its stand that the incentive bonus would be wages. The company also once again conveyed to the Employees' State Insurance Corporation, by its letter, dated 18th July, 1975, that both the abovesaid payments will not come under the definition of "wages as per S. 2(22) of the Employees' State Insurance Act. The Employees' State Insurance Corporation refused to accept the explanation of the company and by its notice, dated 18th September, 1975, determined the arrears of employees' State insurance contribution treating the abovesaid payments as wages which resulted in the filing of E.I.O.P. No. 11 of 1976, on the file of the City Civil Court, Madras, by the company. The learned First Additional City Civil Judge after considering the pleadings of both the sides framed following issues :

(1) Whether the incentive payments/night shift allowance falls under the definition of wages under S. 2(22) of the Act ?

(2) Whether contributions are payable on incentive payment/night shift allowance ?

(3) To what relief are the parties entitled ?

The learned First Additional City Civil Judge after considering the definition of wages under S. 2(22) of the Employees' State Insurance Act, and

after taking into consideration the terms of the agreement between the company and workers relating to the payment of night shift allowance and

incentive bonus and also after considering the decided cases under the Employees' State Insurance Act, which are referred to in the judgment

came to the conclusion that the night shift allowance and the incentive production bonus paid by the company to the workers are wages as defined

under S. 2(22) of the Employees' State Insurance Corporation is entitled to recover contribution on the same. However, the learned First

Additional City Civil Judge decided that the Corporation is not entitled to recover contribution for the period prior to the letter exhibit P3, dated

12th February, 1976, by the company.

3. The Employees, State Insurance Corporation filed the Civil Miscellaneous Appeal No. 152 of 1979, challenging the orders of the lower Court

holding that the Employees' State Insurance Corporation is not entitled to recover contribution for the period prior to the receipt of exhibit P3, viz.,

dated 12th February, 1976. The company filed the Civil Miscellaneous Appeal No. 42 of 1981, against the finding of the lower Court that the

payment made by way of night shift allowance and incentive bonus constitute wages within the meaning of S. 2(22) of the Employees' State

Insurance Act, and in respect of which the employees' State insurance contribution is payable. Both the abovesaid appeals were heard together at

the request of both the parties.

4. The points for determination in both the appeals are as follows :

(1) Whether the night shift allowance and the incentive bonus paid by the company to the workmen are wages paid to workmen as defined under

S. 2(22) of the Employees' State Insurance Act ?

(2) In any event, whether such contribution can be levied prior to exhibit P3, dated 12th February, 1976, by which the Employees' State

Insurance Corporation intimated its decision that the night shift allowance and the incentive bonus are wages as per S. 2(22) of the Employees"

State Insurance Act.

5. Firstly, we will have to examine the definition of wages in the Employees" State Insurance Act, 1948, in order to ascertain whether the

abovesaid payments will come within the definitions of wages in the above said Act, S. 2(22) of the Employees" State Insurance Act, 1948,

defines wages, 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 authorized 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;

6. According to the definition the term ""wages"" will comprise of -

(1) all payments paid or payable to an employee according to the terms of employment, express or implied;

(2) the payments made to an employee in respect of the leave period, the periods covered by lockout and strike which is not illegal and the lay-off

period; and

(3) any other additional remuneration, if any, paid at intervals not exceeding two months excluding the payments set out in sub-ss. (a) to (d) of S.

2(22) of the Employees" State Insurance Act.

The case of the Employees" State Insurance Corporation is that the night shift allowance and incentive bonus fall within the third limb of S. 2(22)

and as such they amount to wages payable to the workmen in respect of which employees" State insurance contribution is leviable under S. 39 of

the above said Act. According to the management the incentive bonus cannot be

termed as wages for the following reasons :

(1) The incentive bonus is not a remuneration regularly payable but only paid if and when certain improved levels of performance is achieved and

consequently it would not amount to "wages."

(2) The fixation of levels of performance is entirely at the discretion of the management and consequently the payment was entirely at the discretion

of the management and would not, therefore, constitute "wages" under the Act.

(3) The workmen have no absolute right to the payment of incentive bonus unconditionally.

(4) The very nature of the incentive bonus is based on increased production, and it was under the absolute control of the employer who may

withhold or limit such additional production and in fact the employer had often done so in the past.

(5) The incentive bonus is not a regular or invariable part of the remuneration claimable by the employees and, therefore, it would not constitute

wages.

(6) The incentive bonus does not partake of the same character as "wages" in the first part of S. 2(22) of the Act, and hence it cannot be called

additional payment envisaged in the last limb of S. 2(22).

7. The contentions of the management will have to be examined with reference to the terms of the scheme providing for incentive bonus. The

incentive bonus scheme was brought about as a result of bilateral agreement entered into between the management and the workers, which is

marked as exhibit R2. Clause 1 of exhibit R2 runs as follows :

The incentive payment is payable to all direct workmen. All indirect workmen, namely, workmen working in raw material stores, tool room,

inspection, finished product, stores, maintenance (both electrical and mechanical) sections will be paid 60 per cent to direct workmen. All

supervisory staff will be paid 75 per cent of the incentive payment paid to the direct workmen.

All other staff members will be paid 60 per cent of the incentive payment paid to the direct workmen.

Clause 6 of exhibit R2 runs as follows :

It is agreed that should there be a change in the methods of production or

additions to the plant and equipment, the incentive scheme will be modified suitably in consultation with the unions.

Clause 7 of exhibit R2 runs as follows :

The incentive payment becomes payable only when the workmen who are eligible for this payment achieve the outputs indicated in Sch. B-1.

Thus it is seen that certain turnover is fixed for workmen as per Sch. B-1. Any workmen who turns out more work over and above the norms

fixed as per Sch. B-1 becomes entitled to the payment of incentive bonus. Such incentive bonus is payable to all direct workmen as well as indirect

workmen at the rates mentioned in Clause (1) of exhibit R1. Similarly, the night shift allowance is payable as per terms of the settlement, arrived at

between the management and the workmen on 15th November, 1973. Clause (6) of the extract of the memorandum of settlement, dated 15th

November, 1973, reads as follows :

It was agreed to revise the existing night shift allowance from 40 paise to 50 paise and from 70 paise to 75 paise.

The case of the management is that the night shift allowance is paid to the workmen only with a view to provide them with tea or snacks during

nights so as to enable them to keep awake and as such the said payment will not come within the definition of wages under S. 2(22) of the

abovesaid Act.

8. We will have to examine whether the abovesaid two payments will fall within any one of the three limbs of S. 2(22). In the case of Regional

Director, ESIC Vs. M.M. Rubber Co. (P) Limited, the question arose whether the production bonus paid to the workmen will fall within the

definition of wages under S. 2(22). In that case, there was an agreement between the management and the workers by which the production bonus

was made payable. The bonus scheme is based on the total number of ""cures"" produced free of defects over the minimum ""cures"" fixed for each

box"". The minimum ""cures"" fixed for each ""box"" would not earn any production bonus, but when the production exceeds the minimum cures,

production bonus was payable. If the production was less than the minimum prescribed for any reason whatsoever, no production bonus would be

payable. Production scheduling was entirely at the discretion of the management. Similar argument as in this case was advanced in that case, viz.,

that the production scheduling was entirely at the discretion of the management and if the production is so scheduled as not to make the workmen

eligible for the payment, then it would be a case of unilateral withdrawal of the payment of such a bonus. This argument was not accepted since

even in the case of such re-scheduling of production, so long as the employees is in a position to earn the bonus, the amount will fall within the

scope of S. 2(22) of the above said Act.

9. In the case of Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation, , it has been held that the remuneration paid

to an employee can be covered by the definition of wages if it is payable under a clause of the contract of employment. In the case of Regional

Director of Employees' State Insurance Corporation Vs. Management of Mysore Kirloskar Ltd., , a Bench of the Karnataka High Court held that

the incentive payments made voluntarily by an employer which he has a right to withdraw and revise and which is not paid or payable under any

term of employment, express or implied are not ""wages"" and the employer is not liable to make contribution under the Act in respect of those

payments. In the case of Carborundum Universal Ltd. v. Employees' State Insurance Corporation, Trichur 1976 I L.L.J. 17, a Bench of the

Kerala High Court held that everything that is paid in cash to employees by an employer may not be remuneration. There may be cash payments

which the employees may not be entitled to insist upon. Just as there is an obligation on the employer to pay, there must be a right in the employees

to demand as of right; then only it would become remuneration payable. That is, it must be payable under the contract of employment. When an

employer makes payment as a result of a settlement binding on both the parties, necessarily the terms of the settlement become terms of the

contract of employment between parties. If payment is made under a scheme under which it is open to the employer to withdraw it, alter, vary or

modify it without reference to the employees and without their consent or without any binding settlement, it is a payment for which the assent is

unilateral and, therefore, cannot be said to be payment made in accordance with the terms of the employment. Where, therefore, an employer

made incentive bonus payments to his employees by reason of a settlement binding upon both the parties, since such payments could not be varied

unilaterally by the employer without recourse to proceedings warranted by law and the employees also got their payments as of right, such

payments are ""wages"" as defined in S. 2(22) of the Employees' State Insurance Act, 1948. In the case in Employees' State Insurance

Corporation, Hyderabad Vs. Andhra Pradesh Paper Mills Ltd., Rajahmundry, , a Full Bench of the Andhra Pradesh High Court held that for the

incentive bonus and the productivity bonus to fit into the definition of wages, the scheme under which it is paid must be examined and it must be

ascertained whether the bonus paid under the scheme is part of the terms of the contract of employment or whether it is an additional remuneration

within the meaning of the third part of S. 2(22) of the Act. It is does not fall either in the category of Part I or Part III, then only it can be said not

to be wages and hence only then contribution will not be payable on the amount of bonus paid by the employer in such a scheme. If the bonus is

paid at the discretion of the employer and can be withdrawn by him at any time, then also it would not be ""wages"".

10. Bearing in mind the principles laid down in the above decisions we will have to examine the facts of the present case to see whether the

incentive bonus and the night shift allowance in the present case will amount to ""wages"" as defined in S. 2(22) of the Employees' State Insurance

Act. From the facts of this case, the following are evident : The incentive bonus is payable in this case to all workmen in pursuance of a scheme

arrived at and in the scheme itself there is a clause that if there be a change in the terms of the scheme and having received payments on that basis,

the payment became a part of the contract of employment. On behalf of the management a Bench decision of the Calcutta High Court in

Employees' State Insurance Corporation (by Regional Director, West Bengal Region) v. Bengal Potteries, Ltd. (1973) LIC 1328 47 FJR 428

was cited in support of the proposition that the incentive bonus will not amount to wages under S. 2(22) of the aforesaid Act. The facts of that case

are entirely different from the facts of this case. In extracting the term under which the incentive bonus was payable in that case it is stated that the

management has the right to withdraw the scheme and substitute any alternative scheme. In the present case, no such right is available to the

management and they are bound by the agreement in pursuance of which the incentive bonus scheme was introduced. Hence the principle laid

down in the above said decision of the Division Bench of the Calcutta High Court cannot be applied to the facts of this case. Considering the entire

circumstances, there is no difficulty in coming to the conclusion that the incentive bonus payable to the workmen will fall within the definition of S.

2(22) of the Employees' State Insurance Act.

11. With reference to the night shift allowance there is absolutely no difficulty inasmuch as the same is payable in pursuance of the terms of the

settlement, dated 15th November, 1973, between the management and the workmen. As per Clause (6) of the settlement it was agreed between

the management and the workmen that the existing night shift allowance should be enhanced as mentioned in the terms of settlement. In view of the

fact that the night shift allowance is payable in pursuance of the agreement is squarely falls within the definition of ""wages"" under S. 2(22) of the

Employees' State Insurance Act.

12. The Court below held that for incentive bonus and night shift allowance paid prior to exhibit P3, the Employees' State Insurance Corporation

is not entitled to recover contribution. Exhibit P3 is a letter, dated 12th February, 1976, by the State Insurance Corporation to the management

demanding payment of employees' State insurance contribution. Contribution under the Employees' State Insurance Act is leviable under S. 39 of

the Act by which the management is liable to contribute on its own accord and such payment is not made conditional on any demand by the

Employees' State Insurance Corporation. Hence the view taken by the lower Court that the contribution is leviable only from the date of the

demand is not correct. Such contribution is leviable from the date of enforcement of the production incentive bonus scheme and from the date of

commencement of the payment of night shift allowance. In view of the above discussion Civil Miscellaneous Appeal No. 152 of 1979, is allowed

and Civil Miscellaneous Appeal No. 42 of 1981, is dismissed. However there will be no order as to costs.