
(2005) 08 KL CK 0007
In the High Court Of Kerala
Case No : M.F.A. No. 560 of 1998

E.S.I. Corporation

APPELLANT

Vs

EVI Industries

RESPONDENT

Date of Decision : 17-08-2005

Acts Referred:

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

Citation : (2005) 4 ILR (Ker) 351 : (2005) 4 KLT 539 : (2006) 1 LLJ 814

Hon'ble Judges : K.R. Udayabhanu, J; J.B. Koshy, J

Bench : Division Bench

Advocate : P. Sankarankutty Nair, for the Appellant; M.V. Joseph, for the Respondent

Final Decision : Dismissed

Judgement

J.B. Koshy, J.—The question involved in this case is whether incentive payments voluntarily paid by the employer at three months' interval is wages as defined u/s 2(22) of the Employees' State Insurance Act, 1948 (hereinafter referred to as "the Act"). The period for which the demand was raised is 1-10-1989 to 31-3-1992. The Employees' Insurance Court held that the above payments are not wages u/s 2(22) of the Act and the demands were set aside. E.S.I. Corporation questions the same in this appeal. Wages are defined u/s 2(22) of the Act as follows:

"(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 layoff 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;"

2. According to the E.S.I. Corporation, agreement was executed by the management and the workman on 20-8-1992 for payment of incentive. Therefore, it is wages under the first part of the definition of "wages" as it is remuneration paid in cash to an employee in terms of the contract of employment. In such cases, E.S.I. contribution is liable to be paid as held by this Court in *Carborundum Universal Ltd. v. E.S.I.C.* 1976 (I) LLJ 17 . The Apex Court also held that production bonus paid as per settlement is "wages" *Modella Woollens Limited v. Employees State Insurance Corporation and Wellman (India) Pvt. Ltd. Vs. Employees' State Insurance Corporation*, . By agreement dated 20-8-1992, the workman and management agreed to pay incentive payments on the basis of production subject to special exclusion of the same for taking it as wages for the purpose of E.S.I. Act and similar labour legislations. In *Braithwaite and Co. (India) Ltd. v. E.S.I.C.* AIR 1958 SC 413, the Apex Court held that the employer and employee can enter into such agreements and they are not wages under the first part of the definition of "wages" as first part covers only wages as per the terms of the contract. The above decision was followed by the Madras High Court in *E.S.I.C. v. E.I.D. Parry (India) Ltd.* 1984 Lab.IC 122 . Here, decision of the Corporation relates to periods before settlement. At that time, it was voluntary payment by the company. Even in such cases, it will be "wages" in view of second part of definition as additional remuneration if it is paid at intervals not exceeding two months as held by the Bombay High Court in *Mahalaxmi Glass Works Private Limited Vs. Employees' State Insurance Corporation*, . Even if incentive paid can be considered as additional remuneration it can be considered as wages for the purpose of Section 2(22) if it is paid at intervals not exceeding two months. Admittedly, here, incentive is paid voluntarily during the period in question at the interval of three months. According to the Corporation, in *United Breweries Ltd. Vs. E.S.I. Corporation*, it was held by this Court that if incentive payments are made on the basis of agreement, it is wages for the purpose of E.S.I. Act. There was also no specific exclusion in that agreement as in Ext.D1. The Court observed as follows:

"If the payment is arising out of contract of employment the periodicity of payment is irrelevant. On the other hand if the payment is made as an additional remuneration necessarily the periodicity has some relevance, to consider whether it forms part of wages."

3. What is the effect of exclusion clause in Ext.D1 agreement is not to be considered in this case as the period in question is prior to Ext.D1 agreement. Admittedly, there was no agreement at that time. Incentives were paid by the employer voluntarily at that time over and above the agreed wages at quarterly

intervals considering production made by each employees and the matter is covered by the decision of the Apex Court in Whirlpool of India Ltd. v. E.S.I.C.2000 (I) LLJ 1101. Here, during the period in question, employer was paying incentive payments voluntarily without agreement and the interval for demand was for more than two months. Apex Court observed as follows:

"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.

15. In view of the aforesaid, the payment of production incentive, on the facts of present case, does not fall either under the first part or last part of the definition of terms "wages" as defined in Section 2(22) of the Act."

The same view was held with regard to voluntary incentives paid for a period exceeding two months by the Supreme Court in Handloom House Ernakulam Vs. Regional Director, ESI, and in Harihar Polyfibres Vs. Regional Director, ESI Corporation, . Therefore, incentive paid during this period is not wages either under the first part of the definition or under the second part as "additional remuneration". It is contended by the respondent that if incentive payments are wages, almost all employees will be out of coverage as they will exceed the salary limit during the above period. Since we have held that the incentive payments made during the above period are not wages, that question need not be considered now.

4. It is contended by the E.S.I. Corporation that some amounts were deducted from the wages kept in the suspense account awaiting decision of the E.I.Court. Counsel for the respondent submitted that the company itself was closed and at the time of closure, the amount kept in the suspense account was refunded to the employees. E.I. Court also decided in favour of the company. We agree with the view of the E.I.Court that incentive wages in question are not wages during the period in question and hence the appeal is dismissed.