
(1986) 09 RAJ CK 0032

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 19 of 1979

E.S.I. Corporation

APPELLANT

Vs

Laxmi Misthan Bhandar

RESPONDENT

Date of Decision : 17-09-1986

Acts Referred:

Employees State Insurance Act, 1948 — Section 15, 2

Citation : (1987) 2 WLN 578

Hon'ble Judges : Guman Mal Lodha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Guman Mal Lodha, J.—An interesting question of law is involved in this appeal about the nature of service charges of 10% collected and part of it paid to its employees by the respondent M/s Laxmi Misthan Bhandar. The important question is whether this amount is to be included in the wages of the Employees for the purposes of collecting the contribution under the Employees State Insurance Act.

2. The ESI Court has held that these service charges cannot be considered as wages for the purpose of ESI contribution.

3. In appeal Mr. Gupta has mainly relied upon an award between the parties, according to which it has not been left discretionary to the management of the respondent to pay or not to pay the whole or part of service charges. It has been directed that 66.6% of the service charges would be paid to the employees. Clause 22 of Section 2 of the ESI read as under:

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 entail on him by the nature of his employment; or
- (d) any gratuity payable on discharge;

4. The ESI Court in its impugned order has considered the various decisions and it would be useful to refer them.

5. In *Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation*, , the case of giving reward to the employees was considered. It was held that the Inam or reward was not mentioned upon at the original terms of contract of the employment and the employees were expected to work for certain periods at agreed rates of wages and the offer under the scheme was to make incentive payments, if certain specified conditions were fulfilled by the employees. The Supreme Court held that it was not the term of contract of employment within the meaning of the definition of "wages" as given in Section 2(22).

6. The Hon'ble Supreme Court observed as under:

It cannot, therefore, be held that remuneration payable under a scheme is to be covered by the word "wages", if the terms of contract of employment are taken to have been fulfilled."

"The mere fact that a reward for good work offered by the employer is accepted by the employees after he has successfully satisfied the requirement laid down by the employer for earning reward cannot mean that this payment becomes a part of contract of employment.

7. In *Employees' State Insurance Corporation, Hyderabad Vs. Andhra Pradesh Paper Mills Ltd., Rajahmundry*, the Andhra Pradesh High Court held that definition of "wages" includes all remuneration paid or payable in cash to an employee, It was pointed out that the Supreme Court did not consider whether Inam was another additional remuneration. The Andhra Pradesh High Court observed as under:

The result of the above discussion is that in order to fit into the definition of "wages" so far as the incentive bonus or productivity bonus scheme is concerned, the terms of scheme must be examined and it must be ascertained whether the bonus paid under the scheme is part of the terms of contract or employment, as was the case in *Hyderabad Asbestos Cement Products Ltd.*'s case 1977 Lab IC 313 AP before Chinnappa Reddy and Punneya, JJ. and before the Kerala High Court in *Corborundum Universal*'s case 1976 1 Lab LJ 17 and as

is not the case before us or, whether it is an additional remuneration within the meaning of the third part of Section 2(22) of the Act. If it does not fall either in the category of Part-I or Part-II, then contribution will not be payable on the amount of bonus paid by the employer to the employees in such a scheme. If as happened in *Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation*, or in *Vazir Sultan Tobacco's case* 1975 Lab IC 523 AP the bonus is paid at the discretion of the employer and can be withdrawn at any time without implementing it, then it would not be wages within Section 2(22).

8. In *Rambagh Palace Hotel Jaipur v. Rajasthan Hotel Workers Union Jaipur* AIR 1976 SCLJ 134 where in the service charges were discussed, Hon'ble Justice Krishna Iyer observed as under:

It is well known that in important hotels in the country...the applicant is now a five star hotel...the customs are of the affluent variety and pay tips either to the waiters directly or in the shape of service charges or otherwise to the Management along with the bill for the items consumed. In short, the true character of tips cannot be treated as any payment made by the Management out of its pocket but a transfer of what is collected to the staff as it is intended by the payer to be so distributed. It may also happen that more money comes in by way of tips into the pockets of the Management than is distributed by it. We cannot, therefore, consider the receipt of tips by the staff as anything like a payment made by the Management of its employment.

9. It would thus be seen that the above discussion is based on the question whether they are part of the terms of the contract and whether they can be rescinded or withdrawn unilaterally.

10. I accept the view taken by the ESI Court Jaipur and uphold the judgment because obviously at the time workmen joined the establishment of the non-applicants, there was no term of the contract ensuring payment of service charges. Moreover, it has also come on the record that service charges have been withdrawn somewhere in 1978 and that shows that they could be rescinded or withdrawn unilaterally.

11. There is additional reason for upholding the judgment of the ESI Court. In *Bala Subrahmanya Rajaram Vs. B.C. Patil and Others*, The important question which was considered by their Lordships of the Supreme Court was whether on account of an amount which is given to the workmen can be included in the wages. Their Lordships observed as under:

Where the bonus is payable not because of a contract but because of the award of an Industrial Court, it is not "wages" within the Payment of Wages Act as it stood before its amendment in 1957 and also after its amendment in 1957 and also after its amendment. AIR 1949 PC 142, followed.

Consequently, the Authority under the Act has no jurisdiction to entertain petitions made to it u/s 15 of the Act, in respect of much bonus.

12. Another significant feature which requires mention is that after the judgment of the Hon''ble Supreme Court it was probably realised by the Legislature that the workmen would be deprived of the benefit of wages, the legislature came in action and amended the definition of wages by addition of clause(a) in remuneration payable in any award or settlement between the parties or order of Court. This was inserted by the Act, No. 68 of 1957. Significantly the definition of wages under the Employees Insurance Act was not amended and this Clause (a) is conspicuously absent. It is well established principle of interpretation of statutes that when the legislature in one Act. used a particular phrase explanation or implication of the definition and abstains from using the same in the other Act, then while following some phrases or term in the one (first) Act, the meaning assigned in the other Act cannot be given the same effect. Consequently the absence of the above amendment in the definition of wages in the ESI. Act makes it very clear that the remuneration payable under any award or settlement between the parties or Court would not be treated as wages for the purpose of employee's contribution of the insurance.

13. In this view of the matter the judgment of the ESI Court calls for no interference.

14. Consequently the appeal fails and is here by dismissed without any order as to costs.