(1991) 05 P&H CK 0094

In the Punjab And Haryana At Chandigarh

Case No : F.A.F.O. No. 276 of 1988

E.S.I. Corporation APPELLANT

Vs

Nirbhai Roadways (P.) Ltd. RESPONDENT

Date of Decision : 23-05-1991

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(22), 45(2), 45A, 45A(1)

Citation : (1993) 3 LLJ 827

Hon'ble Judges : G.R. Majithia, J

Bench : Single Bench

Advocate : K.L. Kapur, for the Appellant; V.G. Dogra, for the Respondent

Final Decision : Allowed

Judgement

Majithia, J.—This Judgment disposes of First Appeal Order Nos. 275 and 276 of 1988 and First Appeal Order Nos. 500 and 501 of 1990 since common question of law and facts are involved therein. First Appeal Order Nos. 500 and 501 of ; 1990 are directed against the order of the Employees'' Insurance Court dismissing the petition filed by the employer u/s 75 of the Employees'' Insurance Court allowing the application u/s 75(1)(g) of the Act filed by the employer.

2. Reference to the relevant facts has been made from First Appeal Order No. 276 of 1988.

3. The Employees'' State Insurance Corporation (for short the Corporation) through its Regional Director, vide letter, dated 2 November 1983, called upon Nirbhai Roadways (Pvt.) Ltd., Ludhiana (for short, the management), to deposit Rs. 21,973 as contribution in respect of travelling allowance paid to the conductors. The management challenged the order before the Employees'' State Insurance Court, Ludhiana, in a petition u/s 75(1)(g) of the Act. The demand was assailed principally on the ground that the management does not pay any travelling allowance to the drivers and the conductors; it pays the amount to the conductors under a scheme to defray special expenses when they take the buses

outside Ludhiana. The decision to pay special allowance can be rescinded or modified unilaterally at any lime without notice to the employees, who could not claim the same as a matter of right. The scheme was oral and no contributions were chargeable on this amount. The ad-hocassessment was not envisaged under the provisions of Section 45A of the Act.

4. The Employees'' Insurance Court framed the following issues:

(1) Whether the claim of contribution made by the Employees'' State Insurance Corporation is illegal and ultra vires.

(2) Relief.

5. It found that the management pays commission to the drivers and conductors when they take the buses outside Ludhiana and that the Commission cannot be treated as "wages" u/s 2(22) of the Act. It also held that the Ad= hoc assessment is contrary to the provisions of Section 45A of the Act. The Corporation could not make ad= hoc assessment since the relevant information required from the management was duly suplied by it to the Corporation. On these premises, the assessment was quashed. The Corporation aggrieved by the decision of the Emloyces'' Insurance Court has come up in appeal to this Court.

6. Section 2(22) 1ftheAct defines the term "wages" 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, lock-out, 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."

7. The incentive under the scheme of settlement between the management and its workmcn is wages within the meaning of Section 2(22) of the Act. The Commission at the rate of 11/2 per cent on the actual booking is alleged to be paid to the drivers and conductors when the buses are taken outside Ludhiana. The Commission is in the form of incentive. It is either in lieu of dearncss allowance or travelling and in fact dearness allowance/travelling allowance have been given the nomenclature of commission to avoid employers'' contribution under the Act. In Harihar Poly fibres v. Employees State Insurance Corporation 1984 II L.L.R. 747, the question arose whether the expression "wages" as

defined in Section 2(22) of the Act includes house rent allowance, night shift allowance paid to those employees who are obliged to work in the night shift and the ''eat, gas and dust allowance" and "incentive allowance" paid by an employer to his employees. In that case, O. Chinnappa Reddy, J., after examining the definition held thus in Para 2, at page 74:

"...So, there appears to our mind no reason to exclude ''house rent allowance'' ''night shift allowance,'' ''incentive allowance'' and ''heat, gas and dust allowance'' from the definition of "wages."

8. Amarendra Nath Sen, J., concurring with the Judgment rendered by O. Chinnappa reddy, J., observed as under in Para 11 1984 II L.L.J 750.:

"I entirely agree with my learned brother that on a proper interpretation of the term ''wages'' the legislative intent is made manifestly clear that the term ''wages'' as used in the Act will include house rent allowance, night shift allowance, heat, gas and dust allowance and incentive allowance. The definition, to my mind, on its plain reading is clear and unambiguous. Even if any ambiguity could have been suggested, the expression must be given a liberal interpretation beneficial to the interests of the employees for whose benefit the Employees'' State Insurance Act has been passed.''"

9. The apex Court observed that the expression "wages" should be given a liberal interpretation beneficial to the interests of the employees.

10. The employer in the instant case adopted a novel method to come out of the rigour of the Act by labelling dearness allowance/travelling allowance as commission payable on the actual booking when the drivers and conductors take the buses outside Lundiana. The commission is noting else but an incentive to the drivers and conductors when they take the buses outside Ludhiana. It is an additional remuneration paid to the employees as laid down under s.2(22) of the Act. There is no escape from the conclusion that the commission allegedly paid by the management to the employees falls within the definition of'' ''wages'''' and the management is liable to make payment of the employer''s contribution.

11. The Employees'' Insurance Court came to the conclusion that the ad hoc assessement was not warranted by Section 45A of the Act. This section reads thus:

"Determination of contribution of certain cases.-(1) Where in respect of factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44 or any Inspector or other official of the Corporation referred to in Sub-section (2) of Section 45 is obstructed by the principal or immediate employer or any other person, in exercising his functions or discharging his duties u/s 45, the Corporation may, on the basis of information available to it, by order determine the amount of contributions payable in respect of the employees of that factory or establishment.

(2) An order made by the Corporation under Sub-section (1) shall be sufficient proof of the claim of the Corporation u/s 75 or for recovery of the amount determined by such order as an arrear of land revenue u/s 45B."

12. A plain reading of Sub-sec. (1) of Section 45A would show that an assessment thereunder can be resorted to only in the following situations:

(a) where in respect of a factory or establishment no returns, particulars, registers or records arc submitted, furnished or maintained in accordance with the provisions of Section 44; or

(b) any Inspector or other official of the Corporation referred to in Sub-sec (2) of Section 45, is obstructed by the principal or immediate employer or any other person in exercising his functions or discharging his duties underS. 45.

13. In the instant case, there is no allegation by the Corporation that any Inspector or other official of the Corporation was obstructed by the management in exercising his functions or discharging his duties so as to attract the second part of Section 45A of the Act. So far as the first part is concerned, there is not even an iota of evidence on the record to show that the employer is not maintaining the records in accordance with the provisions of Section 44 of the Act. The employer has disputed the liability to pay the contributions demanded by the Corporation. I have held in the earlier part of this Judgment that the employer is liable to pay the contributions under the Act. The assessment made at the back of the employer cannot be sustained. In the circumstances of the instant case, the assessment made by the Corporation is quashed and it is directed that the Corporation will make de novo assessment of the contributions payable by the employer in the light of the observations made above after hearing the management. Similar course was adopted by the apex Court in Royal Talkies v. Employees'' State Insurance Corporation 1978 II L.L.J. 268, wherein it was observed thus in Paral8,atpage275:

"...We agree. The assessment of the quantum of the employer''s contribution has now been made on an ad hoc basis because they merely pleaded non-liability and made no returns. On the strength of Section 45A, the contribution was determined without hearing. In the circumstances of the case and the learned Attorney-General has no objection - we think it right to direct the relevant Corporation authorities to give a fresh hearing to the principal employers concerned..."

14. For the reasons recorded aforesaid, First Appeal Order Nos. 275 and 276 of 1988 succeed as indicated above and first Appeal Order Nos. 500 and 501 of 1990 are dismissed, but there will be no order as to costs.