

(1990) 12 KAR CK 0008

In the Karnataka High Court

Case No : M.F.A. No. 1422 of 1988 and W.P. No. 14411 of 1990

E.S.I. Corporation

APPELLANT

Vs

Sujirkar's Tile Works

RESPONDENT

Date of Decision : 18-12-1990

Acts Referred:

Employees State Insurance (General) Regulations, 1950 — Regulation 40
Employees State Insurance Act, 1948 — Section 75, 82

Citation : (1991) ILR (Kar) 1385

Hon'ble Judges : Rama Jois, J;Mirdhe, J

Bench : Division Bench

Advocate : R. Gururajan and U.P. Mallya, for the Appellant; U.P. Mallya and M. Papanna, for R-1, for the Respondent

Final Decision : Dismissed

Judgement

Rama Jois, J.—The Appeal is presented u/s 82 of the Employees' State Insurance Act ("the Act" for short) aggrieved by the order of the E.S.I. Court and the Writ Petition is presented by the respondent in the Appeal questioning the Constitutional validity of Regulation 40 of the E.S.I. Regulations which prescribes the period of limitation for making an application for refund of contribution erroneously paid.

2. Brief facts of the case, are these: The respondent is the Management of Tile Works at Mangalore. An Agreement was entered into between the Management and its employees in the course of conciliation. The agreement reads:

"Whereas an industrial dispute arose between the management of Tile Factories in Mangalore (as per Schedule) represented by the Western India Tile Manufacturers Association, Mangalore, and the workmen of Tile Factories in Mangalore represented by the Kanara Hanchu Kelasagara Sangha, Mangalore, Dakshina Kannada Hanchina Kelasagarara Sangha, Mangalore, the South Kanara Tile Workers Union, Mangalore and the Hanchu Mazdoor Sangha, Mangalore, regarding enhancement of wages of the workmen to the extent of 30% of their

existing wages.

Whereas, the matter was admitted in conciliation and consequent on failure a report was sent to the Government of Karnataka under No. IDA/SR-18/85-86 on 7-1-1986.

Whereas, the WITMA alleging that the workmen are not doing the customer quantities of work and that was also admitted in conciliation and the conciliation proceedings were held on 21-1-1986, 5-2-1986 and 25-2-1986 finally today the 5th March 1986.

Whereas, after prolonged discussions both the parties have agreed to settle the dispute on the following terms:

TERMS OF THE SETTLEMENT

1. The Member factories of WITMA have agreed to pay ex-gratia compensation to the workers who are on rolls of the respective factories as on the 10th February 1986 as follows:-

Each of the workers will be paid at the rate of 90 paise for each day for the number of days he has attended during the calendar year 1985 (excluding holidays, leave with wage days etc).

2. The said ex-gratia compensation will be paid on or before 20- 3-1986 by the respective factories.

3. The ex-gratia payment payable under this agreement is not a recurring liability and it shall not be a precedent for the future.

4. The said payment shall not be taken into consideration in computing bonus, E.P.F. E.S.I, annual leave with wages or overtime. It is specifically agreed that this payment is made only on humanitarian grounds to tide over the special circumstances and this cannot be claimed in future.

In view of this settlement, it is mutually agreed that the respective parties will withdraw their respective claims against each other either in respect of wages by the workers or for loss or damage to the management for the period from 28-11-1985 till this day either before the Assistant Labour Commissioner, Mangalore, or the Labour Officer, Mangalore, including civil suits in civil Courts, so far as this dispute is concerned.

Both the parties agree to the above in full satisfaction and affix their signature in token of acceptance."

Pursuant to the Agreement, a total amount of Rs. 26,612-33 was paid to the workmen. The inspector on the establishment of the Corporation, who inspected the establishment of the respondent on 14-7-1986, reported that a sum of Rs. 26,612-33 had been paid to the employees and therefore the respondent was liable to pay contribution at the rate of 7.25 per cent on the said amount, which came to Rs. 1,929-40. Thereafter, the Management remitted the amount on

22-7-1986. Within six days thereafter, on 28-7-1986 the respondent addressed a letter to the Regional Director of the Corporation stating that the amount had been paid under protest and in law they were not liable to pay and therefore their claim for refund should be admitted. A reply dated 11-11-1986 was given by the Regional Director to the respondent stating that the demand made by the Corporation and the amount paid by the respondent was in order and therefore the claim of the respondent was rejected. Thereafter, the respondent made an application u/s 75 of the Act before the E.S.I. Court, Mangalore, praying for ordering refund of Rs. 1,929-40. The ESI Court allowed the application and directed the Corporation to refund the said amount of Rs. 1,929-40. The relevant portion of the order reads:

"It is clear from the reading between the lines of each terms of settlement that the ex-gratia payment was paid only for a particular purpose for a particular period on humanitarian grounds. As rightly argued by the learned advocate for the applicant the payment made as per the terms of settlement is an ex-gratia compensation and not an interim relief so as to constitute a part of wages. He has placed reliance upon 1986(68) FJR 13. It is held:

"A percentage of the total wages of its employees was paid or was payable by the employer under successive settlements and agreements made between them. Though called as bonus, it was in the nature of ex gratia payment, or, as described in a settlement, it was paid as a gesture of goodwill on the part of the employer and was not in the nature of production bonus nor incentive bonus nor customary bonus nor any statutory bonus. It could not be regarded as part of the contract of employment. The concept of bonus has not been widened to include a payment made by the employer ex gratia or as an expression of goodwill towards its employees. Therefore, such a payment would not satisfy the definition of "wages" in Section 2(22) of the ESI Act 1948 and no contribution is payable by the employer under the provisions of the Act on such payments."

The contention put forth by the respondent to the effect that the amount paid to the workers in question as per the settlement dated 5-3-1986 constitutes an interim relief and thus it becomes a part of the wages, therefore it cannot be upheld.

Aggrieved by the said order of the ESI Court, the Corporation has presented the Appeal.

3. It is the contention of the Corporation that the amount paid under the Agreement to the employees of the respondent are "wages" as defined under the Act and therefore the contribution demanded and paid was in order and the view taken by the ESI Court that the amount did not constitute wages and therefore no contribution was payable, was not correct. Alternatively, it is also contended by the Corporation that the application for refund had been made after the time prescribed under Regulation 40 of the Employees' State Insurance (General) Regulations, 1950. The relevant portion of the said Regulation reads:

"40. REFUND OF CONTRIBUTION ERRONEOUSLY PAID: (1) Any contribution paid by a person under the erroneous belief that the contributions were payable by that person under that Act may be refunded without interest by the Corporation to that person, if application to that effect is made in writing before the commencement of the benefit period corresponding to the contribution period in which such contribution was paid."

Relying on the above Regulation, it is contended that the application of the respondent ought to have been rejected on the ground that it was made after the period of limitation prescribed.

4. In view of the contention taken by the Corporation relying on Regulation 40, the respondent has filed a Writ Petition questioning the Constitutional validity of Regulation 40 on the ground that the period of limitation fixed in the Regulation is such as it would render impracticable for any claim of refund to be made within the period prescribed in the Regulation and therefore unreasonable and arbitrary, and consequently violative of Articles 14 and 19(1)(g) of the Constitution.

5. As stated earlier, the respondent paid the contribution demanded, under protest on 22-7-1986. Any period of limitation has to be computed from the date on which the amount was actually paid. It is also seen from the records that the application for refund was made on 28-7-1986. The learned Counsel for the Corporation contended that the application was not in the prescribed Form. Whatever that may be, the fact remains the refund was demanded on 28-7-1986 and therefore it cannot be said that the application was barred by time as fixed in Regulation 40. If the application was not in the prescribed Form and if the respondent was really entitled to the refund, all that could have been done by the Regional Director was to ask the respondent to rectify the defect by making an application in the prescribed Form, but it could not be said that the application was barred by time. In the circumstances, we hold that the application filed by the respondent was in time and consequently the Writ Petition has become unnecessary.

6. Now coming to the merits of the case, the learned Counsel for the Corporation submitted that having regard to the contents of the agreement, as there was an increase of salary by 90 paise per day for the workmen in respect of days on which the workman concerned had worked during the whole of the year 1985, it was clearly an increase in salary notwithstanding the fact that it was described as ex-gratia payment. In support of this contention, the learned Counsel relied on the Judgment of this Court in the case of Hind Art Press, Mangalore Vs. E.S.I. Corporation and Another, The relevant portion is paragraph 11, which reads:

"11. We are unable to agree. There is no dispute that the Special Allowance as well as Midday meal allowance are paid in cash, namely, Rs. 15-00 and Rs. 10-00 respectively per month. It is also paid in terms of the settlement entered into between the Management and the workmen. Therefore, it is an amount paid in terms of the contract of employment. The said payment would also come under

"other additional remuneration" specified in Section 2(22) of the Act. The matter, in our opinion, is also covered by the decision of the Supreme Court in Harihar Polyfibres Vs. Regional Director, ESI Corporation, In the said decision, the Supreme Court held that House Rent Allowance, night-shift allowance, Incentive Allowance and heat, gas and dust allowance, come within the definition of the word "wages" as defined u/s 2(22) of the Act. The special allowance as well as mid-day meal allowance, which the appellant has been paying to the employees, are also of the same nature of incentive allowance and they being payments made in terms of the Settlement entered into between the workmen and the appellant, they constitute wages and fall within the first part of the definition u/s 2(22) of the Act."

Relying on the above paragraph, the learned Counsel contended that the amount paid under the Agreement in question was an additional remuneration paid to each of the workman concerned and therefore it was "wages" falling within the definition of that expression u/s 2(22) of the Act.

7. As against the above contention, Sri Panduranga Mallya, the learned Counsel for the respondent, contended that there was no periodicity in the payment and it was an ex-gratia payment made once under the Agreement, and therefore it could not be regarded as wages. In support of this contention, the learned Counsel relied on the Judgment of the Supreme Court 68 FJR 13, ESI v. Bata Shoe Co. (P) Ltd. on which the ESI Court relied in allowing the application presented by the respondent. The learned Counsel submitted that as the amount in question was not paid to all the workmen and was paid to only who were on the rolls on 10-2-1986 and as there was no periodicity, notwithstanding the fact that it was paid under the agreement, it would not constitute "wages". The learned Counsel submitted that in the aforesaid Judgment the Supreme Court held that the ex gratia payment made, though was described as bonus, was not in the nature of production bonus or incentive bonus or customary bonus or statutory bonus and therefore could not be regarded as falling within the expression "wages" u/s 2(22) of the Act.

8. As can be seen from the contents of the Agreement, there was a dispute between the workmen and the Management regarding increase of wages by 30 per cent. Even as that dispute was pending, there was a demand for increase in the wages, as an interim measure. When that matter was admitted in conciliation, the Agreement in question was entered into, under which the respondent-Management agreed to pay 90 paise per day per worker covered by the Agreement calculated on the basis of number of days he has actually attended the work during the whole of the year 1985. In other words, it was an increase in wages given for a period of 12 months during the year 1985 at the prescribed rate in the Agreement. Therefore, having regard to the nature of the Agreement, there is no alternative than to hold that it was increase of wages at the rate prescribed in the Agreement for a period of one year. The fact that the entire amount was paid in a lumpsum, is no ground to hold that it was not a

periodical payment, for the reason, the increased amount has to be paid having due regard to the number of days the workmen had worked every month. Realty speaking, it was a case of retrospective increase of salary for each month and therefore not only it constituted increase in wages but also a case of periodical payment every month for the whole of the year 1985. When this is the real substance of the Agreement, the fact that the Management chose to describe it as ex-gratia does not in any way avoid the operation of the provisions of the Act. Therefore, we are of the view that the amount paid in question under the Agreement constituted temporary increase in wages every month for the workmen concerned and the view taken to the contrary by the E.S.I. Court is erroneous.

9. In the result, we make the following order:

- (i) The Appeal is allowed;
- (ii) The order of the E.S.I. Court dated 28-4-1988 is set aside;
- (iii) The Writ Petition is dismissed as unnecessary.