
(1984) 07 KAR CK 0007
In the Karnataka High Court
Case No : M.F.A. No. 2473 of 1981

E.S.I.C.

APPELLANT

Vs

Management of Kirloskar Systems Ltd.

RESPONDENT

Date of Decision : 27-07-1984

Acts Referred:

Employees State Insurance Act, 1948 — Section 2 (22), 39, 75 (1)

Citation : (1984) 49 FLR 438 : (1984) ILR (Kar) 965 : (1985) 1 LLJ 173

Hon'ble Judges : S.A. Rajasekaramurthy, J;G.N. Sabhahit, J

Bench : Division Bench

Judgement

Sabhahit, J.—The Employees" State Insurance Corporation demanded contribution with regard to the subsistence allowance of the employee, who was under suspension. That was challenged before the Employees" Insurance Court, Bangalore, by making an application under S. 75(1) of the Employees" State Insurance Act.

2. The Employees" State Insurance Corporation resisted the petition. According to the Employees" State Insurance Corporation, any amount paid to the Employee, during the subsistence of the relationship of master and servant would constitute wages.

The Employees" Insurance Court raised the following issues as arising for its consideration :

(1) Whether the subsistence allowance is wages as defined in the E.S.I. Act ?

(2) What order ?

The Employees" Insurance Court, after considering the facts and arguments addressed before it, came to the conclusion that the subsistence allowance paid to an employee during the period of suspension would not amount to wages and, in that view, the application made by the employer was allowed and the demand of contribution was set aside.

Aggrieved by the said order, the Employees' State Insurance Corporation has instituted the present appeal before this Court.

3. The learned counsel, Sri M. Papanna, appearing for the appellants, strenuously urged before us that any amount paid to the employee by the employer, when the relationship of master and servant subsists, would amount to wages and, as such, the employer would be liable for contribution under S. 39 read with the First Schedule to the Employees' State Insurance Act. He invited our attention to a decision of the Supreme Court in the case of R.P. Kapur Vs. Union of India (UOI) and Another, . In that case, the Supreme Court has ruled in para 10 of its judgment, inter alia, thus :

"The general law on the subject of suspension has been laid down by this Court in two cases, namely, The Management of Hotel Imperial, New Delhi and Others Vs. Hotel Workers' Union, and T. Cajee Vs. U. Jormanik Siem and Another, These two cases lay down that it is well settled that under the ordinary law of master and servant the power to suspend the servant without pay could not be implied as a term in an ordinary contract of service between the master and the servant but must arise either from an express term in the contract itself or a statutory provision governing such contract. It was further held that an order of interim suspension could be passed against an employee while inquiry was pending into his conduct even though there was no specific provision to that effect in his terms of appointment or in the rules. But in such a case he would be entitled to his remuneration for the period of his interim suspension if there is no statute or rule existing under which it could be withheld."

The rule thus is on the point whether the servant can be suspended and if so what should be his allowance during that period.

The learned counsel invited our attention to another ruling of the Supreme Court in the case of Balvantray Ratilal Patel Vs. The State of Maharashtra, It is laid down therein, inter alia, thus :

"It is now well settled that the power to suspend, in the sense of a right to forbid a servant to work, is not an implied term in an ordinary contract between master and servant, and that such a power can only be the creature either of a statute governing the contract, or of an express term in the contract itself. Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work, he will have to pay wages during the period of suspension."

It is thus clear that in this ruling also what is ruled by the Supreme Court is that unless there is express provision in the contract or in any statutory rule governing the contract, the master has no power of suspension. That contingency does not arise on the facts of this case because Standing Orders 30(3) specially empowers the master to suspend the servant during enquiry. This

is what it states :

"In case of misconduct, the workman is liable to be suspended pending enquiry, in which case, the payment of subsistence allowance shall be regulated as per the rules prescribed by Government in their Notification No. FCL 64 LBW 67, dated 13th December, 1968, appended hereto."

Thus, the master has power in the instant case to suspend the servant for misconduct and as such the suspension is valid in the eye of law.

4. The question before us is not directly one whether the master had power to suspend. The question before us is whether the subsistence allowance given during the period of suspension amount to "wages" as contemplated in the Employees' State Insurance Act. Section 2(22) of the said Act reads :

"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 entailed on him by the nature of his employment; or

(d) any gratuity payable on discharge."

Thus, wages would amount to remuneration paid if the terms of the contract of employment were fulfilled and it includes certain other things mentioned in the section. In the inclusive definition, the subsistence allowance during the suspension period is not included. Hence, we have to consider whether the subsistence would amount to remuneration paid to the employees for having fulfilled the terms of the contract. By no stretch of inference could it be said that subsistence allowance is remuneration paid to the employee for having fulfilled the terms of the contract of employment. On the other hand, suspension is the result of misconduct or breach of contract and it would be a travesty to call subsistence allowance as remuneration paid for fulfilling the terms of the contract of employment. Therefore, we are unable to agree with the learned counsel for the appellant that subsistence allowance also would amount to wages, because even during the period of suspension the relationship of master and servant exists, having regard to the specific definition of the term "wages".

5. The learned counsel for the respondent invited our attention to a decision of the Gujarat High Court in the case of Regional Director, ESIC, Ahmedabad Vs. New Asarwa Mfg. Co. Limited, Therein His Lordship of the Gujarat High Court has

made it explaining the term "wages" under S. 2(22) of the E.S.I. Act whether payment made to an employee towards paid holiday amounts to wages and whether the E.S.I. Corporation is entitled to contribution on such amount. The High Court has held thus :

"... remuneration must mean that it is payment for services rendered or to be rendered by the employee. On a paid holiday an employee cannot render any services and the employer cannot take any services from the employee on a paid holiday. Paid holiday is a holiday which cannot be substituted for another holiday and under the terms of the contract the parties agree that on that day no services would be rendered and yet payment would be made. The payment for such paid holiday cannot be considered - "remuneration, because it is payment not for service rendered or to be rendered by the employee ..."

In the instant case also subsistence allowance is not paid for services rendered. On the other hand, suspension means forbidding the servant to work. Therefore, subsistence allowance cannot be considered to be wages under S. 2(22) of the E.S.I. Act.

6. The learned counsel for the respondent further invited our attention to a decision of the Bombay High Court in *State of Maharashtra v. Devidas Khursange*. (1975) 47 F.J.R. 29. Therein the Division Bench of the Bombay High Court has observed thus :

"... In a case where payment is made in accordance with the rules governing the payment of suspension allowance or subsistence allowance as it is called, though such amount is normally less than the amount of wages to which the employee is entitled during the period when he is not under suspension, the difference between the two cannot be termed as deduction, much less a deduction illegality made ..."

This is not direct application to the facts of the present case. Thus, it is clear that subsistence allowance is paid during suspension for just bare subsistence of the employee. They are not remuneration paid for service rendered. Hence, they are not wages as contemplated under S. 2(22) of the E.S.I. Act. It may also be mentioned in this context that the Standing Orders do not provide for the stay of the employees suspended in the headquarters as in the case of Government servants.

In this connection, it is necessary to recall S. 39 of the Employees' State Insurance Act which speaks of recovery of contribution thus :

"(1) The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer (hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) and shall be paid to the Corporation.

(2) The contribution shall be paid at the rates specified in the First Schedule, and in case where the provisions of this Act are made applicable to any employee or

class of employees in any factory or establishment or class of factories or establishments in such manner that they are excluded from some of the benefits under this Act, at such rates as the Corporation may fix in this behalf."

The First Schedule states :

"1. The amount of weekly contribution payable in a contribution period in respect of an employee shall be calculated with reference to the average daily wages during the first wage period in respect of that employee ending in such contribution period."

7. Thus, it is clear that contribution is calculated on the basis of the average daily wages. It is, therefore, necessary to look into the definition of the term "wages" and it is for that that we have discussed whether subsistence allowance would amount to wages. If it does not amount to wages, there is no question of contribution on the same, because contribution shall be with reference to and in respect of average daily wages. In the circumstance, therefore, we are satisfied that the Employee's Insurance Court was justified in coming to the conclusion that the Employees' State Insurance Corporation was not entitled to any contribution on subsistence allowance as it did not amount to wages as defined in the Employees' State Insurance Act.

8. In the result, the appeal fails and is dismissed. No costs.