(1999) 10 MAD CK 0046

In the Madras High Court

Case No : C.M.A. No. 383 of 1992

Gem and Co. APPELLANT

Vs

E.S.I. Corporation RESPONDENT

Date of Decision : 07-10-1999

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

Citation : (2000) 2 LLJ 68 : (2001) 1 LW 466

Hon'ble Judges : K.P. Sivasubramaniam, J

Bench : Single Bench

Advocate : P. Ibrahim Kalifullah, for the Appellant; Radha Srinivasan, for the Respondent

Final Decision : Dismissed

Judgement

K.P. Sivasubramaniam, J.—This appeal is directed against the order of the learned I Additional City Civil Judge, Madras in E.S.I. O.P. No. 133 of 1988. The petitioner before the E.S.I. Court is the appellant in the above appeal.

2. As against the order passed u/s 45 of the Employees'' State Insurance Act, 1948 (hereinafter called as ''the Act'') by the Assistant Regional Director, O.P. 133 of 1988 came to be filed by the appellant. According to the appellant they are carrying on business of sales, service and repairs of fountain pens, employing 16 employees. It also employs salesman in all the above three show rooms and they are paid wages as per the scales prescribed. One month''s salary is paid as bonus at the time of Pongal. In order to motivate the individual salesmen to optimise the sales, the petitioner pays to them an annual commission on the sales effected by them during the period of April 1 of every year to March 31 of the following year. After the completion of the year, sales effected by each salesman is worked out and the commission is credited to the individual salesman. When the salesmen wishes to draw money from his sales commission account, he draws amount by submitting vouchers. Depending upon the performance and also the progress of sales, the petitioner in its discretion allows

the individual salesman to draw advance against commission in the course of the year also. The petitioner at his sole discretion increases or decreases the percentage of commission and the petitioner also has the right to discredit the claim. In other words the payment of the commission was not a condition of service nor does it form part of wages, to the salesman. The payment was only annual. The payment was to motivate them to maximise their efforts in achieving sales. They are not entitled to demand commission as a matter of right or as a matter of course. The amounts paid as commission to salesmen will not form part of their wages nor could it be treated as an additional remuneration within the meaning of ''wages'' as defined u/s 2(22) of the Act. The petitioner is covered under the Act from January 10, 1977 and has been making contribution in respect of its employees without any default. By a communication dated August 15, 1988 the respondent demanded that the petitioner should pay contribution on the sales commission paid to the salesmen and required the petitioner to send the declaration forms to the concerned local office. Simultaneously notice u/s 45A of the Act was issued claiming contribution on sales commission paid to salesmen during the period from April, 1985 to March, 1986. The petitioner produced all documents and accounts and contended that the sales commission was not paid at intervals not exceeding two months, and, therefore, it would not fall within the meaning of ''wages''. However by an order dated November 18, 1988, the respondent held that the sales commission would form part of the contract of employment. Therefore, the petitioner was directed to pay Rs. 3090.20 as contribution for the period April, 1985 to March, 1986. The petitioner further contended that the commission paid to salesmen was not ''wages'' and hence, the order passed by the respondent was illegal. There was no failure on the part of the petitioner to submit his returns or to pay contribution in terms of the Act. There was also a dispute between the petitioner and the respondent as to whether the commission payable to the salesmen would fall within the scope of wages and the dispute can be dissolved only by the E.S.I. Court u/s 75 of the Act. Therefore, the demand made by the respondent was invalid.

3. In the written statement filed by the respondent-E.S.I. Corporation, it was contended that even though the petitioner was complying with the provisions of the Act as a result of the inspection by the Inspecting Officer, it was found out that non-payment of contribution in respect of the period in question on the sales incentives paid to the employees form part of the ''wages''. The petitioner by his letter dated July 5, 1988 contended that the sales incentive cannot be taken for contribution since it was paid once a year. There was no agreement. But upon the verification of the records and when the employees were debited monthly, the sales commission as per the employees vouchers according to the respondent it was treated as wages and impugned order was passed after fully hearing the petitioner.

4. The payment of incentive was a contract of employment and it was not shown that it was discontinued or there were occasions when it was stopped. The

practice has been prevailing for long number of years and the amounts paid form part of the wages as per their contract of employment and it was not an additional remuneration. Even otherwise the period of such payment would also show that the employees were entitled to draw commission and were paid monthly and, therefore, the payment would attract the provisions under the Act.

5. On consideration of the said pleadings by both sides and evidence, the E.S.I. Court held that the incentive commission paid by the appellants to salesman would form part of the wages within the meaning of Section 2(22) of the Act. The Court held that the payment was also made to the employees once in a month and, therefore, the incentive payment has to be considered as part of the wages due to the salesman. Even though there was no sales agreement, the payment of commission was being paid regularly and also was treated as part of the salary. Hence, the present appeal.

6. According to Mr. Kalifullah, learned Counsel appearing for the appellant, the incentive bonus cannot be treated as part of salary or regular wages. Even otherwise, according to him, the payment was not meant to be made within the period of two months, but was calculated only on annual basis. The payment was made periodically only as advance towards accumulated commission and, therefore, the fact that the commission was being paid once in a month, will not have any relevance to the period of payment as contemplated u/s 2(22) of the Act. He has also pointed out that both the orders passed by the Assistant Regional Director as well as the E.S.I. Court, have recorded the positive finding that there was no agreement between the employer and the employees requiring the payment of the incentive commission arid, therefore, the commission cannot be considered as part of the wages.

7. He would also refer to the definition of wages as contained in Section 2(22) of the Act which is as follows:

"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.

8. On a reading of the above quoted provision, learned counsel for the appellant contends that the payment should form part of the contract of employment either express or implied and in the present case the authorities having held that there was no agreement, it was erroneous on the part of the E.S.I. Court to have treated the payment as wages. Even treating the payment as additional

remuneration, the payment was not paid at intervals, within a period of two months so as to attract the provisions. According to him, it was contended before the Assistant Regional Director as well as E.S.I. Court that the calculation of the total commission payable to each employee was calculated only on annual basis but was being paid to the employees only as advance.

9. Ms. Radha Srinivasan learned Counsel for the respondent would however contend that the fact that payment of the commission was being complied with for several number of years without any discontinuance, would entitle the respondent to treat the same as implied wages. u/s 2(22) of the Act, .the terms of the contract need not be express but could be implied. The fact that the payment of commission was being complied with by the management for several years without any interruption has not been denied. Even otherwise, on the very admission of the witness for the management, the payment was in fact made within short periods, that is, less than the period of "two months and, therefore, even considering the commission as additional remuneration, having regard to the period of payment, the amount was liable to be deemed as wages.

10. In support of his points as raised by the learned Counsel for the appellant, reference has been made to the following judgments. Reliance is placed on the observations contained in the Judgment of the Supreme Court reported in the Regional Director, Employees'' State Insurance Corporation and Another Vs. Bata Shoe Company (P) Ltd., . In that case the issue which was considered by the Supreme Court was as regards whether the attendance bonus of the particular percentage of salary was liable to be treated as wages under the Act. After holding that the attendance bonus paid pursuant to settlement between workmen and management, cannot be regarded as remuneration paid or payable in fulfilment of the terms of the contract of employment, the Supreme Court also considered as to whether the period of payment would qualify the terms as wages. The Supreme Court has further held that the attendance bonus paid one month after the end of each quarter will not fall in the second category of remuneration as defined in Section 2(22) of the Act.

11. In the present case, the payment was being made within a period of one month and, therefore, the above quoted judgment cannot apply to the facts of the present case.

12. Reference is made to another Judgment of the Supreme Court reported in Wellman (India) Pvt. Ltd. Vs. Employees'' State Insurance Corporation, wherein the attendance bonus payable as per the settlement in the conciliation proceedings were treated as wages. Reference is made to this judgment by learned Counsel for the appellant to show that it was treated as wages as the payment was made pursuant to the settlement reached in the conciliation proceedings and that, therefore, in the present case as no agreement was in force between the parties, the incentive bonus cannot be treated as wages.

13. Reference was made to the Full Bench of Karnataka High Court in N. G.E.F.

fid. v. Dy. Regional Director, E.S.I.C., Bangalore, 1980 Lab IC 431 wherein the incentive bonus was being paid under a scheme formulated by virtue of settlement entered into between management and the workmen which was treated as wages u/s 2(22) of the Act.

14. Further reliance is placed on the observations of the Supreme Court reported in Harihar Polyfibres Vs. Regional Director, ESI Corporation, . In that case also allowances which were paid in terms of the contract of employment, express or implied, were treated as forming part of the wages.

15. Learned Counsel for the appellant has referred to the above decisions only to substantiate his submission that any payment can be treated as wages only if they are paid consequent on a specific agreement between the parties and if the payment is intended to be made within a period not exceeding two months.

16. Learned Counsel for the respondent also referred to a judgment of the Supreme Court reported in Wellman (India) Pvt. Ltd. Vs. Employees'' State Insurance Corporation, which has already been referred to above.

17. Learned Counsel also made reference to the Judgment of JAYASIMHA BABU, J., made in W.P. No. 7933 of 1988 dated September 9, 1999 Savera Hotel, Madras v. Employees'' State Insurance Corporation, Madras 34. In that judgment the learned Judge was dealing with the service charges which was collected by the management in lieu of the tips which were received by the employees from the customers. The management instead of allowing its employees to seek to obtain tips from the customers, was collecting service charges directly from its customers and in the intervals of three months, the management disbursed the amount so collected among all the employees. Learned Judge has held that the object of the collection of service charges would definitely make it as wages.

18. In the present case, though in the orders of the Assistant Regional Director as well as of E.S.I. Court, it was held that there is no specific contract between employees and employer or any written agreement between the parties regarding the payment of incentive commission, the authorities below on detailed consideration of the facts and circumstances, have held that commission has to be treated as part of wages. Having taken into account the fact that the payment was being made for long number of years without any interruption, it was therefore held that it was always understood to be part of wages received by the salesmen. In this context it is also pertinent to note that THANICKACHALAM, J. as his Lordship then was, in the decision reported in Simpson & Company Ltd. v. Employees State Insurance Corporation, 1991 1 MLJ 292 has held as follows:

"Since the incentive payments are made permanently and regularly and there is no clause for withdrawal of the scheme unilaterally by the Management, the incentive payments would come under the purview of para III of Section 2(22) of the E.S.I. Act, 1948."

The abovesaid decision is no doubt based on the circumstance that there was a scheme but the scheme did not contain any provision for withdrawal by the management thereof unilaterally. It was therefore held to fall within the purview of para III of Section 2(22) of the Act.

19. Learned Counsel for the petitioners would of course distinguish the facts of the particular case with the present case on hand. There was no scheme at all in writing in the present case. But in the present case what is relevant is that when a condition of service has been implemented regularly, it could assume the status of an implied agreement between the parties.

20. Even otherwise, having regard to certain admitted facts, it is imperative to conclude that the payment was being made within the period not exceeding two months. The management has admitted that the sales commission can be received by the employees even once in a month. It was admitted that there was no hard and fast rule as regards the mode of payment. Some of the employees used to get commission during the accounting period. It is pertinent - to - note that liberty is given - to the employees to receive the amount even once in a month. Such a situation would definitely attract the latter portion of Section 2(22) of the Act being additional remuneration paid at intervals not exceeding two months. In this context, the observation of JAYASIMHA BABU, J., in W.P. No. 7933of 1988 would also be relevant, In the case decided by the learned Judge, the disbursement was being made at intervals of four months. As the service charges, according to the employer are collected for the purpose of disbursing the same to its employees it was open, to the employer and in fact, the employer ought to have disbursed the amounts so collected as expeditiously as possible to the employees, and not to retain the amount with itself and use the same for its own purposes. Once it is admitted by the employer that the amounts are collected for the benefit of the employees and are meant to be disbursed to them, the fact that such disbursement is made deliberately by the employer at intervals of three months, cannot be regarded as determinative of the question as to the excludibility of those payments from the definition of ''wages''. The decision to exceed two months as between any two disbursements is solely that of the employer. It is not possible to hold that parliament intended to permit an employer who is bound by the provisions of the beneficial legislation, to decide for himself merely by the timing of the disbursements and as to whether he will allow the object of the Enactment to take full effect. Learned Judge further held that the employer cannot therefore avoid liability for payment of contribution as the additional remuneration by way of ''service charges'' solely on the ground that he has chosen to unilaterally disburse the amount at intervals of three months and not at intervals not exceeding two months.

21. Afortiori, in the present case, when admittedly, the payments are permitted within a period, that is, not to exceed two months, and in fact the payments having been made to the employees once in a month, the provisions of Section 2(22) of the Act are automatically attracted. Therefore, I do not find any reason- to interfere with the ultimate decision arrived at by the Court below.

22. In the result, there are no merits in the above appeal and the same is dismissed. No costs.