

(1998) 09 MAD CK 0125

In the Madras High Court

Case No : W.A. No. 254 of 1998, W.P. No's. 3117, 4270 and 8503 of 1997 and 479 and 3233 of 1998 etc.

Indian Oxygen Employees' Union and Others

APPELLANT

Vs

BOC India Ltd. (Formerly Indian Oxygen Ltd.) and Others

RESPONDENT

Date of Decision : 24-09-1998

Acts Referred:

Constitution of India, 1950 — Article 12, 226
Employees State Insurance (General) Regulations, 1950 — Regulation 92, 97
Employees State Insurance Act, 1948 — Section 72, 95
Industrial Disputes Act, 1947 — Section 19(1)

Citation : (1998) 2 LLJ 1248

Hon'ble Judges : M.M.S. Liberhan, C.J;E. Padmanabhan, J

Bench : Division Bench

Advocate : N.G.R. Prasad for Row and Reddy in W.A. No. 254/1998, W.P. Nos. 8503/1997 and 479/1998, Vaigai for Row and Reddy in W.P. Nos. 3117 and 4270/1997 and 3233/1998, for the Appellant; A.L. Somayaji, for Gupta and Ravi in W.A. No. 254/1998, S. Ramasubramanian, for S. Jayaraman in W.P. No. 8503/1997 and G. Subramanian, for T.S. Gopalan and Co. in W.P. Nos. 3117 and 1270 1997 and 3233/1998, for the Respondent

Final Decision : Dismissed

Judgement

E. Padmanabhan, J.—The above Writ Appeal and the writ petitions were taken up together for final disposal.

2. Mr. N.G.R.Prasad, learned counsel appeared for the appellant in W.A.No. 254/1998, W.P.Nos. 479/1998, 8503/1997. Mr. A.L.Somayaji, Senior Counsel appeared for the respondent in Writ Appeal No. 254/1998 for M/s. Gupta & Ravi. Mr. S.Ramasubramanian, Senior Counsel appeared for Mr. S.Jayaraman, Senior Counsel in W.P.No. 8503/1997, Ms. R.Vaigai appeared for the petitioners in W.P. Nos. 4270/1997, 3117/1997 & 3233/1998, Mr. G.Subramanian, Senior Counsel for M/s. T.S. Gopalan & Co. appeared for the respondents in W.P.No. 4270/1997, 3117/1997 and 3233/ 1998.

3. With the consent of counsel appearing for either side, the main Writ Appeal and the Writ Petitions were taken up for disposal.

4. The Writ Appeal No.254/1998 has been preferred by Indian Oxygen employees Union represented by its General Secretary being aggrieved by the order of dismissal dated January 28, 1998 made in W.P.No. 18098/1997.

5. In the said Writ Petition No. 18098/1997, the petitioners Union prayed for the issue of writ or direction in the nature of mandamus directing the respondent management not to discontinue the medical allowance and other benefits extended to the workmen/staff.

6. For convenience, the parties to the Writ Appeal will be referred to as arrayed in the writ petition.

7. In the affidavit filed in support of the writ petition, it has been stated that the petitioner is a trade union recognised by the respondent management and the petitioner union represents about 114 employees, who are drawing more than Rs. 3000/- per month and working under the respondent Company.

8. According to the Writ petitioner, the employees working in the respondent establishment are covered under Medical Benefit Scheme in terms of Settlement which the respondent establishment and Petitioner Union have concluded. All the members of the petitioners union were drawing more than Rs. 3,000/- per month. Till recently they were not covered under the E.S.I. Act. In terms of notification issued by the Government of India dated December 23, 1996, the Government of India has enhanced the coverage of the Act to such of those employees, who draw salary upto Rs. 6,500/- per month. Following the notification, the petitioner Union addressed the Secretary to Government, Labour & Employment Department, Government of Tamil Nadu on January 16, 1997 seeking for exemption of the factory from the coverage of the provisions of the employees State Insurance Act, 1948, while giving details of the various medical facilities, medical reimbursement schemes and medical welfare schemes, which were presently available to the employees.

9. According to the Writ Petitioner, the State Government by a letter dated March 7, 1997 required the Writ Petitioner Union to apply for exemption of the factory from the applicability of the provisions of the ESI Act through the management. However, the management had not taken steps in this respect, despite reminders. According to the petitioner, the employees of the respondent establishment enjoy better benefits under the Medical Benefits Schemes of the Company than that may be provided under the ESI Scheme.

10. In terms of the existing facilities, the petitioners claim that the respondent Company had provided such facilities as detailed hereunder:

"The Company gives the reimbursement of medical expenses incurred for domiciliary treatment for self and family has been raised to Rs. 200/- per month.

Part time services of the doctor will be arranged by the company for the purpose of chamber consultations.

Hospitalisation Expenses:

Rs. 3000/- per year to be accumulated upto Rs. 9000/- for a period of 3 years in the event of hospitalisation of the employee or the family members. Under hospitalisation scheme, any employee can choose any reputed Hospital/Nursing Home for getting treatment and there is no restriction in this respect.

Company's Golden Jubilee Scheme:

Under the scheme announced by the company, an employee in the event of his having to undergo major operations such as heart surgery will be reimbursed to the extent of 60% of the total expenses. Employees from Bombay Branch, Calcutta Branch, Hyderabad Branch and recently from this branch were beneficiaries under this scheme. Under this scheme, company pays 3 months full wages and further period of 3 months half pay for such employees.

Letter Ref:MD/RPM/Md-22 dated January 12, 1994 Medical Benefit Scheme:

Reimbursement of periodical medical check up (Pathological/Radiological) will be maximum of Rs.500/-.

Provision for Spectacles:

Reimbursement of expenses incurred for spectacles (including replacement of glasses) Rs.400/-."

11. According to the petitioner, the above facilities are far superior than that may be provided under the ESI Scheme and the benefits enjoyed by the members of the petitioner/Union are far superior than the benefits that may be provided under the E. S. I. Scheme.

12. The petitioner Union, further claim that its members have been enjoying the said benefits for years together and it had become part of the service conditions. According to the petitioner Union, the said service conditions cannot be withdrawn by the respondent management unilaterally. The petitioner complains that consequent to the amendment of the E.S.I. Act, enhancing the coverage of the Act to all the employees, who are drawing Rs. 6,500/- per month, the respondent employer wanted to deduct the employees contribution even from the salary for the month of February 1997 (with effect from January 1, 1997 onwards), to which the employees are objecting.

13. The petitioner Union had already filed W.P.No. 1484/1997 praying for the issue of mandamus directing the Government to dispose of the application dated January 16, 1997 for exemption which is pending before the Government in accordance with Section 87 of the ESI Act.

14. Pending the Writ Petition this Court granted interim orders restraining the

employer from recovering ESI contributions with effect from January 1, 1997 onwards from the employees on November 21, 1997. The said W.P.No. 1484/1997 had been dismissed by the Hon''ble single Judge holding that if the exemption application is pending the same could be disposed of by the Government.

15. According to the petitioner Union, once the management starts paying contributions, the management will deny the existing medical benefits to the members of the petitioner Union as E.S.I. Act has been extended to the employees and the respondent management is not willing to extend the existing medical benefits in view of the settlement arrived at u/s 18(1) of the Industrial Disputes Act, on December 19, 1996.

16. It is contended that the respondent employer cannot discontinue or reduce the benefits payable to the workmen, which is not permissible u/s 72 of the Act. It is being contended that Section 72 of the E.S.I. Act provides that the employer shall not reduce wages by reason only of his liability for any contributions payable under the Act. Placing reliance on the said provision, it is being contended by the petitioner that the respondent employer shall not discontinue the existing medical benefits, Hospitalisation benefits etc. as provided in the settlement and the action of the respondent is illegal, arbitrary and contrary to Section 72 of the Act.

17. It is being contended by the petitioner that the medical allowance and other benefits extended to the employees have become part of the service conditions as per Item 9 of the IV Schedule to the Industrial Disputes Act, 1947 and therefore, the employer cannot unilaterally withdraw the allowance and other benefits without a notice u/s 9-A of the Industrial Disputes Act, 1947.

18. It is further claimed that the medical allowances have become a part of the emoluments paid to the employees and it is their property, which cannot be denied and the right to property is guaranteed by Article 300-A of the Constitution. The petitioner also placed reliance upon certain interim orders passed in other writ petitions as well as the order passed by the Division Bench. Thus placing reliance on Section 72 of the ESI Act, it is being mainly contended that the respondent employer cannot deduct employees contributions that the deduction, if any, would be in contravention of Section 72 of the ESI Act and the deduction would also be illegal, arbitrary and impermissible as it would result in change of service conditions, which conditions according to the petitioner cannot be altered without a notice.

19. The respondent in the writ petition have filed a detailed counter contending that the writ petition is not maintainable as the respondent is only a public limited company and it is not a State within the meaning of Article 12 of the Constitution nor an authority amenable to writ jurisdiction of this Court under Article 226 of the Constitution.

20. It is further contended that no cause of action has arisen for filing of the writ

petition and that the petitioner is guilty of suppression of material facts, which disables the writ petitioner from getting any relief. According to the respondents, there is no infraction or violation of any of the statutory provisions, nor the petitioner had challenged the vires or the validity of the notification issued by the Central Government enhancing the wage limit in the writ petition.

21. According to the respondent employer, the conditions of service of the employees working at the factory is governed by periodical settlements entered into between the employer and employees u/s 18(1) of the Industrial Disputes Act. The latest settlement was entered on December 19, 1995 pursuant to the demand placed by the petitioner union dated, December 15, 1995. The settlement comprehensively provided for fixation of basic salary, DA and other benefits, which the employees are entitled to apart from fixing of productivity and efficiency on the part of the workmen. The settlement is valid for a period of four years commencing from October 1995.

22. In terms of the settlement, the Union had agreed not to raise or pursue during the currency of the said settlement any demand/dispute involving directly or indirectly financial commitment on the part of the employer in respect of matters, which finds place in the settlement.

23. The settlement dated December 19, 1996 also provided for a medical benefit scheme. It has been further provided in the settlement that as and when the provisions of the employees State Insurance Act applies to such of those employees, who were not covered on the date of settlement, the medical reimbursement of domiciliary treatment and hospitalisation/chamber consultation facilities will stand withdrawn with effect from the date such employees are brought under the purview of the ESI Act and the scheme. The relevant clause reads thus:

"As and when the provisions of employees State Insurance Act or any other enactment covering medical facilities for the time being in force or as may be in force in future are made applicable to those employees who are presently not covered by the said Act/such enactment, the above medical reimbursement of domiciliary treatment and hospitalisation/chamber consultation facilities will stand withdrawn with effect from the date such employees are brought under the purview of the ESI Act/such enactment."

24. According to the respondent during the year 1996, none of the 115 employees were covered by the ESI Act as all of them were in receipt of wages above Rs. 3,000/- per month and they have availed the medical reimbursement facilities. On and from January 1, 1997 in terms of the notification issued u/s 2(9) of the E.S.I. Act all employees, who are in receipt of salary above Rs. 3,000/- per month but below Rs. 6,500/- per month were also brought under the Scheme.

25. As a result of the notification on and from January 1, 1997, 51 employees who were in receipt of salary below Rs. 6,500/- are automatically covered by ESI

Scheme and they are not entitled to invoke the provision of Medical reimbursement scheme provided in the settlement entered u/s 18(1) of the Industrial Disputes Act. The remaining 64 employees, who draw more than Rs. 6,500/- per month are entitled to medical reimbursement scheme as they are outside the purview of ESI Act and the scheme and they are alone entitled to avail the benefit under the medical reimbursement scheme.

26. According to the respondent, the settlement is binding on the petitioner union and the petitioner union cannot complain that there has been withdrawal of the benefits as the very settlement provides for such a contingency. It is further contended by the respondent that in terms of the mutually agreed settlement, the employees, who are drawing less than Rs. 6,500/- and who are covered by the provisions of the E.S.I. Act are not entitled to avail the benefits of the medical reimbursement Scheme and they are automatically excluded from the said Scheme as they are covered by the ESI Act. The service conditions stipulated in the memorandum of settlement provides unequivocally that once the employees are covered under the E.S.I. Scheme, they will not be entitled to avail the medical benefit scheme.

27. There is no factual controversy with respect to the terms of Section 18(1) or 12(3) settlement and what is relied upon by the counsel for the petitioner is Section 72 of the E.S.I. Act, while the respondent contends that Section 72 of the E.S.I. Act has no application at all. It is being contended by the respondent that the petitioner Union or its members are not entitled to both the facilities/nor they could compel the respondent employer to continue the medical reimbursement scheme as they have already agreed to the settlement. The respondent is bound to implement the provisions of the E.S.I. Act and the scheme framed thereunder. The respondent has prayed for dismissal of the writ petition.

28. The writ petition, which came up for final disposal before the Hon"ble single Judge was dismissed as not maintainable and that the/ petitioner has to raise a dispute by approaching the machinery provided under the Industrial Disputes Act and the petitioner union will not be permitted to bypass the above regular remedy of industrial adjudication of dispute.

In respect of the reliance placed on Section 72 of the E.S.I. Act the learned single Judge held that it is a misconception and even in terms of the binding settlement, the moment an employee is covered by the provisions of the E.S.I. Scheme they have no right to insist for the continuance of the medical benefits scheme. Being aggrieved by the dismissal of the writ petition, the present Writ appeal has been preferred.

29. In the other writ petitions, the employees Union have prayed for identical reliefs in respect of their employer and there is no factual dispute. Even in respect of the other writ petitions, it is fairly stated that the employees with respect to whom, the E.S.I. scheme has been extended by the notification alone

are being denied of the medical reimbursement as set out in the settlement and in respect of others, the scheme is being implemented.

30. It is contended by the respondent employers that Section 72 of the Act has no application to the facts of the present case and at any rate, the employees in terms of the binding settlement cannot insist for the continuance of the medical reimbursement scheme as the very agreement itself provides for exclusion of such of those employees, who are brought under coverage of the E.S.I. Act by subsequent amendment.

31. In the circumstances, common contentions were raised by the counsel for the petitioner Union representing the employees and the counsel for the employers, who are the respondents in the other writ petitions. As the controversy between the petitioner union and the respondent employer in all the writ petitions are common and there being no factual dispute in all the writ petitions, all the matters are being disposed of by this Common Judgment.

32. It is also to be pointed out that as per the judgment dated August 26, 1997 made in W.A.No. 954 of 1997 the first Bench of this Court directed that the status quo to be maintained as it existed prior to coming into force of the amendment of ESI Notification with regard to payment of medical allowance and directed the respondents/managements to continue payment of medical allowance till the disposal of the writ petition.

33. The first Bench of this Court also directed that the ultimate rights of the parties will be subject to the decision in the writ petition, while taking note of the fact that the interest of the respondent management is squarely protected as the appellant/employee still continues to be in service. Based upon this order, the employees are admittedly availing the benefits of medical allowance Scheme arrived at in terms of Section 18(1)/ or 12(3) Settlements.

34. The said order of the Division Bench was taken up before the Apex Court in Civil Appeal No. 6455 of 1997 by the respondent employer and their Lordships of the Apex Court clarified the judgment of the Division Bench to a limited extent and made it clear that the appellant employer has to pay the medical allowance as per the settlement with effect from January 1, 1997 and not earlier as was agreed to by the counsel, who had appeared before their Lordships of the Apex Court.

35. Before taking up the contentions raised by the respective parties for consideration, it is essential to refer to the relevant clause in Section 18(1) or 12(3) Settlement atleast in one of the cases, as identical clauses have been set out in almost all the settlements entered into between the employer and employees represented by their unions u/s 18(1) of the Industrial Disputes Act.

36. In the memorandum of settlement entered into between the management of BOC India Limited and Indian Oxygen employees Union, Madras, the following clause, which is relevant finds a place. Article V of the settlement provides for

medical benefits scheme. Clause (d) of Article V of the Agreement, which is relevant for the purpose of present case reads thus:

"Article V

Medical Benefit Scheme

(a) Domiciliary Treatment

(b) Medical Consultations

(c) Hospitalisation

(d) ESI Act and Enactments

As and when the provisions of employees State Insurance Act or any other enactment covering medical facilities for the time being in force or as may be in force in future are made applicable to those employees, who are presently not covered by the said Act/such enactment, the above medical reimbursement of domiciliary treatment and hospitalisation/chamber consultation facilities will stand withdrawn with effect from the date such employees are brought under the purview of the ESI Act/such other enactment."

Such a clause it is admitted finds place in all the settlements entered into between the writ petitioner Union and the respondent employer in all the writ petitions.

37. The crux of the arguments submitted on behalf of the respondent is on the basis of the above stipulation, which had been agreed to by the Union representing the employees and the settlement has also been notified. Not only the current settlement, but also the settlements for the earlier periods also there had been identical stipulations of. This is not disputed by either parties.

38. By a notification dated October 23, 1996 made in exercise of the powers conferred by Section 95 of the employees State Insurance Act, 1948 amendment to the Employees" State Insurance (Central) Second Amendment Rules, 1966 was introduced with effect from January 1, 1997. In Rule 50 of the Employees" State Insurance (Central) Rules, 1950, for the words "three thousand", the words "six thousand" has been substituted. This amendment had come into force with effect from January 1, 1997.

39. It has to be pointed out that the Unions had not challenged the validity of the said amendment to Rule 50 of the Employees" State Insurance (Central) Rules, 1950 or that matter the amendment introduced to Rule 51 as well as 52 of the said Rules as well as the table set out in Rule 52 in these writ petitions.

40. It is also not in dispute that the various employees unions have applied to the State Government for grant of exemption and the State Government had not entertained their requests, while insisting that the employer has to apply for exemption. Till date, no exemption had been granted in favour of any of the respondents establishments according to Petitioners.

41. However, it is pointed out that in respect of the respondent in W.P.No. 3233 of 1998, the request for grant of exemption from the provisions of ESI Act, 1948 for M/s. Dharangadhara Chemicals Works Limited has been rejected by the State Government, as seen from its letter dated September 2, 1993 as according to the State Government the benefits provided by the employer to their employees are not equal or superior to the benefits as provided under ESI Scheme. Challenging the said rejection, three of the workers unions representing employees of the Dharangadhara Chemical Works Limited has filed W.P.No. 282 of 1994 and the said Writ Petition is pending.

42. In the light of the above facts, the first question that has to be decided in these batch of cases, would be as to whether the settlement arrived at by the employees Union and the employer u/s 18(1)/12(3) of the Industrial Disputes Act whether still holds good and what is the effect of the said settlement with respect to continuance of medical benefits and whether it is obligatory for the continuance of both the benefits.

43. There is no dispute and it is also not the case of the employees that the settlement is not binding on them. As such, it is fundamental and it is well settled that the terms of Section 18(1) settlement, which has been subsequently notified is binding on both the parties. In terms of the settlement, the scheme of medical reimbursement will cease to operate the moment the category of workmen are covered by the provisions of the ESI Act or the Rules framed thereunder and the medical reimbursement of domiciliary treatment and hospitalisation/chamber consultations facilities will stand withdrawn with effect from the date such employees are brought under the purview of ESI Act or such other enactment.

44. No exception could be taken to the said clause in the settlement. There is no escape for the workmen as they will not be entitled to the medical scheme facilities which hitherto they enjoyed under the medical benefit scheme as soon as they are covered by the provisions of the ESI Act. The workmen cannot avoid the settlement in the present proceedings nor they have attempted to avoid the said settlement, which is binding on either side.

45. The next substantial contention raised on behalf of the employees Union in the Writ Appeal and Writ Petitions relates to the construction placed on Section 72 of the ESI Act. According to the learned counsel for the workmen, Section 72 of the ESI Act prohibits or debars the employer from withdrawing the benefits under the medical scheme on coming into force of the ESI notification as such a withdrawal is opposed to Section 72 of the ESI Act.

46. The bone of contention by the learned counsel appearing for the respondent as well as the Writ Appeal, is whether despite clause in the binding Section 18(1) settlement, Section 72 of ESI Act is a bar, which prohibits or debars the employer from withdrawing the medical benefit scheme, even if the worker is covered by the provisions of the ESI Act.

47. In this respect, the learned counsel for the employees Union relied upon the decision of the Apex Court reported in Calcutta Electric Supply Corporation Ltd. Vs. Calcutta Electric Supply Workers' Union and Others, ; Bareilly Holdings Ltd. Vs. Their Workmen, and Som Prakash Rekhi v. Union of India and Anr. : (1981)ILLJ79SC and it was contended by the learned counsel for the employees union that the purpose of Section 72 of the ESI Act is to discourage the employer from using the benefits provided under the ESI Act as an excuse or justification for reducing or discontinuing the benefits available to the workmen under their conditions of service on the ground of similarity between the two types of benefits and that the benefits, which are available under the ESI Act are not applicable as substitutes for benefits to which the workmen are entitled under the conditions of service.

48. It was vehemently contended by Mr N.G.R.Prasad that withdrawal of the medical benefits scheme by the employer is impermissible merely because the employees in question are also covered by the ESI Act. It is further contended that there is nothing in the ESI Act, which enables the employer to withdraw such benefits merely because the employees came to be covered by the Act and Section 72 of the Act prohibits withdrawal of the benefits.

49. Per contra, the learned senior counsel appearing for the respondents contended that in the light of the specific clause in the Settlement the bar or prohibition imposed by Section 72 will have no application at all. Section 72 has no application at all to the cases on hand and Regulation 92 on the other hand permits the employer to discontinue the Scheme.

50. Section 72 of the ESI Act, which is relevant reads thus:

"72, Employer not to reduce wages etc. - No employer by reason only of his liability for any contributions payable under this Act, shall, directly or indirectly reduce the wages of any employee, or except as provided by the regulations, discontinue or reduce benefits payable to him under the conditions of his service which are similar to the benefits conferred by this Act."

51. Regulation 97, which is also relevant and appears in Chapter IV of the ESI Regulations,

reads thus:

"97. Discontinuation or reduction of benefits:- An employer may discontinue or reduce benefits payable to his employees under conditions of their service which are similar to the benefits conferred by the Act to the extent specified below, namely:

(a) from the date of the commencement of the first benefit period following the appointed day for his factory or establishment;

(i) sick leave on half pay to the full extent;

(ii) such proportion of any combined general purposes and sick leave on half pay

as may be assigned as sick leave but in any case not exceeding 50 per cent of such combined leave;

(b) any maternity benefits granted to women employees to the extent to which such women employees may become entitled to the maternity benefit under the Act:

Provided that where an employee avails himself of any leave from the employer for sickness, maternity or temporary disablement, the employer shall be entitled to deduct from the leave salary of the employee the amount of benefit to which he may be entitled under the Act for the corresponding period."

52. The learned counsel for respondent/employers also relied upon the decision of the Apex Court reported in *Calcutta Electric Supply Corporation Ltd. v. Workers' Union* (supra) and relied upon the following passage in support of their contentions:

"Dr. Ghosh, however, contended that Section 72 of the ESI Act prohibits discontinuance or reduction only of the monetary benefits except as provided by the Regulations made under that Act. It does not prohibit discontinuance or reduction of the other benefits. We are afraid the contention begs the question. The correct reading of the provisions of Section 72 will show that the discontinuance or reduction of benefits permitted by the said Section is only of the monetary benefits and no other benefits. There is no provision in that Act which permits tampering with the service conditions on account of the operation of the Act. Unless that Act or any other law permits the employer to effect a change in the service conditions of the employees, any change effected has to be held as illegal. To construe the provisions of the ESI Act and in particular of Section 72 of that Act and in permitting discontinuance or reduction of the other benefits is to construe the absence of provisions in the Act enabling such discontinuance or reduction as a positive permission or licence to effect such discontinuance or reduction. Such construction of the statute to say the least, is unwarranted. What is further necessary to remember in this connection is that the payment of contribution by and on behalf of the employee does not compel the employee to avail of the benefits under the Act. It is upto the employee to avail of the benefits to him under the service conditions or under the Act. The view which we are taking, viz., that the benefits which have become a part of the service conditions are not intended to be affected by the provisions of the ESI Act and its scheme except to the extent permitted by Regulation 97 and on the conditions mentioned therein is supported by a decision of this Court in *Bareilly Holdings Ltd. v. Workmen* (supra)".

53. It was brought to the notice of the Court at the hearing that one of the petitioner unions representing the employees challenged the notification raising the salary limits from Rs. 3,000/- to Rs. 6,500/- with effect from January 1, 1997 in W.P.No. 1484 of 1997 which had been dismissed by the Division Bench on January 21, 1997. As such the amendment has been upheld by this Court, as

pointed out by Respondent.

54. It is essential to refer to some of the provisions of the employees State Insurance Act, 1948. Section 2(22) defines the terms wages, and the definition reads as under:

"2(22) "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."

55. It has been rightly contended by the learned counsel for the respondents/ employers that the benefit conferred on the workmen in terms of the settlement either u/s 18(1) or u/s 12 of the Industrial Disputes Act providing for a scheme of medical benefit towards domiciliary treatment, hospitalisation etc. will not fall under the definition of wages as defined in Section 2(22) of the Act, while the term "wages" has been defined differently in other statutes.

56. The scope of settlement arrived at between the employer and employees was the subject matter of consideration before the Division Bench of this Court in The Employees State Insurance Corporation Vs. E.I.D. Parry (India) Ltd., and it has been held thus:

"Section 2(22) of the Act defines "wages" to mean "All remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled..."

Section 39(1) speaks about contribution payable by the employer. Section 39(2) lays down that contribution shall be paid at the rates specified to the First Schedule and the First Schedule gives the rates. The definition of the expression "wages" includes all remuneration paid or implied. The express terms of the settlement did not make the adhoc allowance and incentive earnings as part of the wages and expressly excluded them for the purposes of contribution under the Act. The settlement being a good settlement made u/s 18(1) of the Industrial Disputes Act, 1947 and Rule 25(1) of the Madras Industrial Disputes Rules, 1958, is binding between the parties. It does not become invalid for purposes of the employees State Insurance Act on the provisions relied on by the learned counsel for the appellant.

The argument of the learned counsel for the appellant is that the legislation being a benevolent piece of legislation intended for the benefit of the worker, should receive a liberal interpretation. That does not mean that something could be read in the legislation, which is not at all there. Firstly, the adhoc allowance and incentive earnings are not part of the wages, as held by the Supreme Court in the case of *Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation*, wherein it has been held:

"It was also made clear to the workmen in the scheme that this payment of reward was in no way connected with or part of wages. It was on these conditions that the employees were receiving the inam. Thus, though there was a payment to the employees and since the payment depended on their achieving certain targets, it has to be held remuneration, this payment of inam cannot be held to have become a term of the contract of employment.

Second, it was perfectly legitimate for the employee, while settling their disputes, to come to a settlement, that such payment shall not be reckoned for purposes of provident fund, bonus, gratuity, employees State Insurance contributions, etc., and to clarify: the matter when the provisions of the Industrial Disputes Act do not forbid such a settlement or makes such a provision in a settlement invalid."

57. The proposition of law laid by the Division Bench still holds good and the learned counsel for the appellant had not brought any binding pronouncement to the contra by the Apex Court.

58. Section 72 of the Act provides that an employer shall not reduce the wages of any employee or reduce the benefits payable to an employee under the condition of his service, which are similar to the benefits conferred by the ESI Act by reason of his liability for any contributions payable under the ESI Act. As already held the reimbursement under the Scheme does not form part of the wages and as such reduction of wages is neither contemplated nor arises on the facts of the case.

59. The second part of Section 72 provides that the employer could reduce or discontinue the benefits payable to the employee under the conditions of his service, which are similar to the benefits conferred by the ESI Act. The benefits, which the employees have been availing under the settlement namely medical benefits scheme as rightly pointed out by the counsel or the respondents are similar to the benefits conferred under the ESI Act.

60. Though Mr. N.G.R.Prasad, sought to contend that the benefits are neither similar nor identical, however Mr. Prasad is unable to point out to the satisfaction of the Court that the benefits are not similar, which an employee will be entitled to on and from the date on which the Act applies to the employees.

61. In *Bareilly Holdings Ltd. v. Workmen*, (supra) their Lordships of the Apex Court had occasion to construe the scope of Section 72 and Regulation 97 of the

ESI Act and held thus:

"The general purpose and effect of Section 72 is to deny to the employers the right or power to reduce or discontinue the benefits payable to the workmen under their conditions of service on the ground that the benefits available under the conditions of service and under the ESI Act being similar, the workmen would not be entitled to a double benefit. Section 72 provides in terms that the mere circumstance that an employer is liable to make a contribution under the ESI Act will not entitle him, directly or indirectly to reduce the wages of an employee or, insofar as the Regulation permits, discontinue or reduce the benefits payable to him under the conditions of his service even if those benefits are similar to the benefits conferred by the ESI Act. The case of the appellant before the Industrial Tribunal was that it was making a contribution to the ESI Corporation for the benefit of its employees and if any individual employee chose not to avail of the benefits due to him from the Corporation on account of the sickness benefit, it is he who ought to suffer and there would be no justification for obliging the employer to spend for his sickness benefit twice over. It is precisely this type of argument and attitude that the legislature anticipated and guarded against by incorporating the particular provision in Section 72. The purpose of that provision is evidently to discourage employers from using the benefits provided under the ESI Act as an excuse or justification for reducing or discontinuing the benefit available to the workmen under their conditions of service on the ground of similarity between the two types or benefits.

7. That leads to the question as to whether Regulation 97 can justify the deduction made by the appellant. Regulation 97 provides that an employer may discontinue or reduce the benefits payable to his employees under the conditions of their service which are similar to the benefits conferred by the ESI Act but only to the extent specified in Clauses (a) and (b) of the Regulation, We are not concerned with Clause (b) and Sub-clauses (i) and (ii) of Clause (a) have no application in the instant case. The appellant relies strongly on the proviso to Regulation 97 under which, where an employee avails himself of any leave from the employer for sickness, the employer shall be entitled to, deduct from his leave salary the amount of benefit to which he may be entitled under the Act for the corresponding period. The case of the appellant is that it is enough for justifying the deduction from wages due to the workmen for sick leave that the employee is covered by the ESI Act or the E.S.I. Scheme. It is not possible to accept this submission. In the first place, Section 46 of the E.S.I. Act would show that employees who are covered by the E.S.I. Act are entitled to certain benefits subject to the provisions of the E.S.I. Act. It is therefore, not as if the workmen are entitled to the benefits absolutely and without compliance with the conditions laid down by the Act or the Regulation. Secondly, the proviso to Regulation 97 says that the employer shall be entitled to deduce from the leave salary of the employee, "the amount of benefit" to which he may be entitled under the E.S.I. Act for the corresponding period of his sickness. A workman does not become entitled to the "amount" payable to him by way of sickness benefit unless, in the

first instance, he chooses to avail himself of the sickness benefit. That benefit cannot be forced on him. This would show that the employer's right to make a deduction from the employees sick leave wages can only be exercised in respect of those days of sick leave for which the workman has actually availed of the sickness benefit. Benefits which are available under the ESI Act are not intended as substitutes for benefits to which the work men are entitled under the conditions of their service. As stated earlier, a workman becomes entitled to sickness benefit only if he is qualified for it and he gets a cash benefit only if he avails himself of the sickness benefit. Thus it is only when a workman, in fact, obtains or receives a cash benefit that the employer can exercise his right to make a deduction from wages due to him by way of leave salary."

62. As laid down by their Lordships of the Apex Court, Regulation 97 provides that an employer may discontinue or reduce the benefits payable to the employees, which are similar to the benefits conferred by E.S.I. Act.

63. The Apex Court in *Calcutta Electric Supply Corporation Ltd. v. Calcutta Electric Supply Workers' Union and Ors.* (supra) had occasion to deal with a case, where no statutory Form "E" notice u/s 9-A was issued by the employer and in that context, it was considered as to whether after coming into force of the ESI Act, the employer was justified in withdrawing the medical benefits which were already given by the employer to the employees prior to the coming into force of ESI Act, 1948.

64. As on the facts of the case, it was found that the medical benefits available as a part of service conditions of the employees, and it was held that the discontinuance or reduction of benefits permitted by Section 72 is only the monetary benefits and no other benefits, besides, it has been pointed out that there is no provision in the ESI Act, which permits tampering the service conditions on account of operation of the Act. This is not the case here.

65. It is fairly stated that only in terms of the settlement, the medical allowance or medical benefit scheme was being provided. The very terms of the settlement which is binding on the employer as well as the employees provided for withdrawal of the medical benefits scheme, the moment the employee is covered by the provisions of the ESI Act. It is not the case of the employees that medical reimbursement scheme is an inviolable condition. However, it is not in dispute that the scheme could always be withdrawn the moment the particular employee is covered by the ESI Act even as per settlement.

66. As held by the Division Bench in *employees State Insurance Corporation v. E.I.D. Parry (India) Ltd.* (supra) the settlement being a good settlement is binding upon the parties and the employees will not be permitted to go back and still contend that they will have the benefit of medical benefit scheme as well as the benefit under the E.S.I. Act, which ultimately would ultimately would cause very heavy burden on the employer.

67. Thus on a consideration of Section 72 read with Regulation 97 of the ESI Act,

on the facts of the case the reimbursement scheme not forming the wages, nor it forms part of the inviolable condition of service, could be withdrawn by the employers in terms of the settlement and such a withdrawal is in no way barred by Section 72 of the ESI Act. The contention raised by the learned counsel for the appellant in the writ appeal and Petitioners writ petitions cannot be sustained and the view taken by the learned single Judge in this respect is acceptable and deserves to be upheld and sustained in any view of the matter.

68. The action of the respondent employer in withdrawing the medical allowance under the scheme, which is provided in the settlement, which settlement being binding on either side is justified and the discontinuance of the scheme is permissible in respect of those employees, who are covered by the provisions of the ESI Act and the Scheme and they can avail the benefits under the ESI Act only in every respect.

69. It has not been shown that the binding settlement entered into between the employers and employees in any one of the cases has been negated by Section 72 of the ESI Act nor it could be held that the stipulations in the settlement is opposed to public policy. Even assuming that the scheme providing medical benefits is part of the conditions of service, it could very well be withdrawn in terms of the bilateral settlement, which provides for such a contingency.

70. The withdrawal of medical benefits scheme is in terms of the agreement and Regulation 97 also provides for such a contingency. When the agreement provides for withdrawal of one of the conditions of service and when the agreement is binding, it is well open to the employer to enforce the particular clause in the agreement, which provides for withdrawal of the scheme in respect of those employees, who are brought under the coverage of the ESI Act.

71. It cannot be contended that it is a unilateral withdrawal or unilateral change of conditions. It is not in dispute that the employer had issued notices consequent to the amendment of ESI notification and the employer will be justified in withdrawing the benefits under the Scheme and there is no illegality.

72. Objections have been raised as to the maintainability of the writ petitions filed by the workmen in all the writ petitions. In fact one of the writ petitions against which writ appeal has been preferred had been rejected on the ground that the writ petition is not maintainable and the union has to go by regular procedure. There is no dispute that the workers/employees have the effective remedy under the Industrial Disputes Act which is the regular remedy, which is available to the employees in case of change in conditions of service and the remedy under Article 226 is not the regular remedy, which is available to the employees.

73. The objections raised by the learned counsel for the respondents deserve acceptance as it is fundamental that the employees cannot by pass the regular remedy and rush to this Court by making a hue and cry.

74. The direction issued by the Hon"ble Single Judge directing the writ petitioner union to raise an Industrial Dispute, in our considered view is also the correct view. The learned counsel for the appellant/writ petitioner heavily relied upon certain decisions of this Court. However the Division Bench of this Court in *Workmen of Buckingham and Carnatic Mills and Others Vs. State of Tamil Nadu and Others*, had occasion to consider the maintainability of writ petition, when the workmen of a company filed a writ of mandamus for enforcement of the terms of settlement arrived at between the employer and employees, before the Conciliation Officer.

75. The Division Bench held that if any of the parties to the settlement is aggrieved by non-implementation of the terms of settlement by another party then the remedy of the aggrieved party would be to move the Government for sanction to prosecute the party in breach u/s 29 of the Act. The very same Division Bench rejected the contention of the workmen that Buckingham and Carnatic Mills should be held to be an instrumentality or agency of the Government and other authority within the meaning of Article 12 of the Constitution of India.

76. The said Division Bench, while considering the scope and ambit of Article 226 held thus:

"From the above, the principle that emerges is that the scope and amplitude of Article 226 need not fall under the category of "other authority" within the meaning of Article 12 of the Constitution. The person referred to in Article 226 must be a person to whom a writ will lie according to the well established principles depending upon the nature of the writ sought for. As pointed out by Rajamannar, C.J. in *Indian Tobacco Corporation and Others Vs. The State of Madras*, and by Ismail C.J, in *United India Fire and General Insurance Co. Ltd. and Others Vs. A.A. Nathan and Another*, to hold that "person" referred in Article 226 of the Constitution, would include company irrespective of the question whether any one of the writs referred to in Article 226 would lie against them according to the established principles would mean that Section 9 of the CPC would be supplanted by Article 226 and it would be open to every citizen to approach the High Court under Article 226 of the Constitution for the redressal of his grievance."

77. Another Division Bench of this Court in *Madras Labour Union Vs. Binny Ltd. (Buckingham and Carnatic Mills)* and others, , while concurring the view of the earlier Division Bench in *Buckingham and Carnatic Mills and Ors. v. State of Tamil Nadu* (supra) and Ors. held that the writ petition is not maintainable in so far as it seeks to enforce the terms of the settlement, Srinivasan, J. as he then was speaking for the Bench after analysing the case law and after referring to *T. Gattaiah and Others Vs. Commissioner of Labour and Another*, held that the writ petition praying for the issue of writ of mandamus against a private company is not maintainable.

78. The said Division Bench also had occasion to construe the law laid down by the Apex Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, and *The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others*, and other pronouncements of the Apex Court and laid down the following proposition.

"1. A private body which is not a "State" within the meaning of Article 12 of the Constitution of India is not generally amenable to Article 226 of the Constitution.

2. A writ will issue against a private body to protect the fundamental rights declared under Part III of the Constitution of India.

3. A writ will issue in extraordinary circumstances, if the monstrosity of the situation warrants it.

4. A mandamus will be issued against a private body, if there is no equally convenient remedy and if there is a public duty.

5. The implementation of a settlement u/s 12(3) of the I.D. Act is not a public duty and no writ will lie against a private body.

6. If the features are patent and they establish gross violation of the mandates of law, the jurisdiction under Article 226 of the Constitution could be exercised to quash a settlement u/s 18(1) or Section 12(3) of the I.D. Act.

49. The main contention of the petitioner is that the impugned settlement dated January 29, 1994 u/s 18(1) of the I.D. Act is contrary to the terms of the settlement dated March 26, 1992 between the management and the petitioner-Union u/s 12(3) of the I.D. Act and that the terms of the prior settlement are being violated by the Management. In other words, the petitioner seeks implementation of the settlement u/s 12(3) dated March 26, 1992. As pointed out already, a Division Bench of this Court, has with reference to the very same company, held in *Workmen of Buckingham and Carnatic Mills v. The State of Tamil Nadu* (supra) that implementation of the settlement is not a public duty and no writ will lie against the company. We are entirely in agreement with the reasoning of the Bench and hold that the present writ petition is not maintainable in so far as it seeks to enforce the terms of the settlement dated March 26, 1992 u/s 12(3) of the I.D. Act".

79. We respectfully agree with the law laid down by the two earlier Division Bench of this Court and the respondents not being a State within the meaning of Article 12 of the Constitution is not amenable to writ jurisdiction under Article 226 of the Constitution. It is also made clear that the present writ petition is not for protection or enforcement of fundamental rights declared under Part III of the Constitution of India against the respondent, a private company.

80. It is also made clear that there is no extraordinary circumstances, nor it has been shown that there existed monstrosity of the situation, which warrants the issue of writ of mandamus. In the circumstances, we hold that the view taken by

the Hon"ble single Judge in dismissing the Writ Petition as not maintainable is correct and it has to be affirmed.

81. Though the maintainability of the writ petition has been raised as one of the main contentions, as the counsel for either side made submissions with respect to the applicability of Section 72 of the Act as well as Regulation 97 framed thereunder, this Court has to go into the merits of those contentions as well.

82. In the foregoing circumstances, the Writ Appeal is dismissed and all the Writ Petitions will stand dismissed, but without costs. It is made clear that the employer will be entitled to deduct the contributions payable under the provisions of the employees State Insurance Act, 1948 from the date of application of the provisions to the individual workman as interim orders have been passed safeguarding the interest of either side.

83. In the foregoing circumstances the Writ Appeal No. 254 of 1998 is dismissed, the order of the learned single Judge is confirmed and all the Writ Petitions Nos. 3117/1997, 4270/1997, 8503/1997, 479/ 1998 and 3233/1998 are also dismissed. So also C.M.P. No. 2319/1998, W.M.P. Nos. 5216/1997, 7122/1997, 17258/ 1997, 692/1998, 4814/1998 and 13514/1998 are all dismissed. No costs.