

(1998) 11 MAD CK 0087

In the Madras High Court

Case No : A.A.O. No"s. 773 and 774 of 1990

Management of Kaveri Engineering Industries Ltd.

APPELLANT

Vs

Employees' State Insurance Corporation

RESPONDENT

Date of Decision : 30-11-1998

Acts Referred:

Employees State Insurance (Amendment) Act, 1989 — Section 45A
Employees State Insurance Act, 1948 — Section 2(22)

Citation : (2000) 2 LLJ 196

Hon'ble Judges : K. Gnanaprakasam, J

Bench : Single Bench

Advocate : Meenakshisundaram, for the Appellant; G. Desappan, for the Respondent

Final Decision : Dismissed

Judgement

K. Gnanaprakasam, J.—The respondent, the Employees' State Insurance Corporation, passed an order on January 6/8, 1988, u/s 45-A of the Employees' State Insurance Act, 1948 (hereinafter referred to as "the Act"), calling upon the appellant to pay contribution in respect of "house rent allowance" paid to the employees as "wages" for the period from October 1, 1984, to August 31, 1986, and against the same, the appellant filed an application u/s 75 of the Act, before the E.S.I. Court, Trichy, in E.S.I. O.P. No. 5 of 1998 and the same was dismissed by order dated April 23, 1990. As against the same, the appellant has preferred Civil Miscellaneous Appeal No. 773 of 1990.

The respondent by an order dated December 28, 1988, passed u/s 45-A of the Act calling upon the appellant to pay the contribution in respect of several heads, such as (1) Short payment contributions, (2) house rent allowance, (3) special allowance, (4) and (5) ex gratia payment, (6) job and other expenses account, and (7) and (8) maintenance of building (works) and (administration). The appellant questioned the same by filing an application u/s 75 of the Act in E.S.I. O.P. No. 2 of 1989 before the Employees' Insurance Court, Trichy, and the same

was dismissed by order dated April 23, 1990. As against the same, the appellant has preferred Civil Miscellaneous Appeal No. 774 of 1990.

2. Both the appeals arise out of the common order dated April 23, 1990. Though the contribution demanded on several heads, the appellant disputes its liability only with respect to (1) house rent allowance, (2) conveyance, (3) special allowance, (4) ex-gratia payment, and (5) job and other expenses account.

3. The appellant is a factory covered under the Act. The appellant has been maintaining the registers required under the Act. Though a question has been raised by the appellant that when the appellant is a covered establishment and it has been maintaining the registers required under the Act, no order u/s 45-A of the Act could be passed. An order u/s 45-A of the Act could be passed only when the establishment failed to file returns, particulars, registers or records as required u/s 44 of the Act, or when an Inspector or other official of the Corporation referred to in Sub-section (2) of Section 45, is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties u/s 45 of the Act. In this case, the appellant has been maintaining all the relevant registers and also submitting returns periodically and the inspectors have been inspecting the books and as such, the order passed u/s 45-A of the Act is not proper. Originally, a show-cause notice was issued under Form C-18 with draft order showing the particulars of contribution claimed and, thereafter, an action would be taken straightaway u/s 45-B of the Act for recovery of the contribution amount, if it is not paid. The said procedure was under attack before the several Courts and, thereafter, after issuing the show-cause notice under Form C-18, an order u/s 45-A of the Act was passed. This was done only to avoid further attack that would be made by several establishments that no recovery proceedings u/s 45-B of the Act could be taken before an order u/s 45-A of the Act.

4. There were disputes with regard to the question whether the establishment should be given a personal hearing before passing an order u/s 45-A of the Act as the Courts had expressed different opinions, and, in order to put an end to the controversy, the Act itself was amended by the Amendment Act 29 of 1989, by which a proviso was added to Section 45-A of the Act which states as follows:

"Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard."

5. In view of the changes taking place during the course of time, even though the establishments maintained the registers, filed returns and inspection was made periodically, an order u/s 45-A of the Act is passed and the said procedure cannot be stated as an irregular procedure, as submitted by the appellant and, hence, the argument advanced on behalf of the appellant that the order passed u/s 45-A of the Act was not proper, cannot at all be countenanced.

6. Let us now deal with the claims made by the respondent in seriatim:

House rent allowance: Learned advocate for the appellant has submitted that there was a dispute between the appellant and its employees and the same had ripened into settlement u/s 18(1) of the Industrial Disputes Act, reached on December 14, 1985, whereunder the establishment agreed to give (1) dearness allowance, (2) house rent assistance, (3) conveyance allowance, (4) washing allowance, (5) service weightage, (6) death relief payment, (7) retirement benefit, and (8) marriage gift. Another agreement was also reached u/s 12(3) of the Industrial Disputes Act on July 21, 1986. By settlement dated December 14, 1985, the house rent allowance was given to the workers on the specific agreement and understanding that "it shall not rank for provident fund, E.S.I., bonus, gratuity, over-time and all such payments related to wages." This house rent allowance has been paid in pursuance of the contract entered into between the appellant and its employees and as such, it cannot be construed as "wages" and that, therefore, the contribution demanded in respect of this amount is not sustainable. Much emphasis was made by the employer with regard to the words in the agreement that "this amount shall not rank for provident fund, ESI, bonus, gratuity, over-time, and all such payments related to wages". Learned counsel for the appellant has pointed out that there was a specific agreement that this amount shall not relate to wages and that, therefore, the amounts paid under the said head cannot be tagged on to the "wages" and in the said circumstances, the appellant is not liable to pay contribution for the said amount. The appellant has also relied upon the decision rendered in *Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation*, . But the apex Court in the case of *Harihar Polyfibres Vs. Regional Director, ESI Corporation*, took a view that:

"Wages defined u/s 2(22) of the Employees' State Insurance Act includes remuneration paid or payable under the terms of the contract of employment, express or implied but further extends to other additional remuneration, if any, paid at intervals not exceeding two months, though outside the terms of employment. Thus, remuneration paid under the terms of the contract of employment (express or implied) or otherwise, if paid at intervals not exceeding two months is wages. The interpretation of the clause, includes any payment to an employee in respect of any, period of authorised leave, lock-out strike which is not illegal or lay off, between the first clause; and, all remuneration paid or payable in cash to an employee if the terms of the contract of employment express or implied was fulfilled, and the third clause, other additional remuneration, if any, paid at intervals not exceeding two months, makes it abundantly clear that while remuneration under the first clause has to be under a contract of employment express or implied, remuneration, under the third clause need not be under the contract of employment but may be any additional remuneration outside the contract of employment. So there is no reason to exclude house rent allowance, night shift allowance, incentive allowance and heat, gas and dust allowance from the definition of wages."

Therefore, "wages" as defined includes remuneration paid or payable under the terms of the contract of employment, express or implied, but further extends to

other additional remuneration, if any, paid at intervals not exceeding two months, though outside the terms of employment. So there appears to our mind no reason to exclude house rent allowance, night shift allowance, incentive allowance and heat, gas and dust allowance from the definition of "wages".

7. Even the definition of "wages" u/s 2(22) of the Act envisages a position that even if any amount has got to be construed as "wages". On the contrary, if the amounts paid under the terms of contract of employment are excluded from wages, a situation would arise, where the employer and the employee would collude together and bring several payments under the contract of employment and would try to get exemption from the payment of contribution, which is not the aim and object of the Act. The Act being a social welfare legislation to provide certain benefits to the employees in the case of sickness, maternity and employment injury, one should not be a party to defeat the very noble object of the said Act and that, therefore, the amounts covered under the contract of employment cannot at all be excluded from the definition of "wages". In the said aspect of the case, I cannot come to a conclusion other than one which has already been arrived at by the Apex Court and also followed by the Employees' Insurance Court.

8. Conveyance: Learned advocate for the appellant has submitted that the amount payable under the head "Conveyance" is also covered under the settlement dated December 14, 1985, and that, therefore, the appellant is not liable to pay contribution. The said conveyance was agreed to be paid at the rate of Rs. 25 per month per workman. Though it is stated that the conveyance assistance shall not rank for provident fund, etc., related to wages, this amount is paid every month and any remuneration paid or payable in cash to an employee, paid at intervals not exceeding two months would come under the definition of "wages" and that, therefore, the respondent is justified in having claimed contribution in respect of this amount also. Conveyance paid would not fall outside the definition of "wages".

9. Extra special allowance: the appellant has submitted that no contribution is leviable under this head also. The appellant has not placed the proper material to find out what for this amount has been paid. If this amount was spent for tea or coffee expenses, it will not come under the definition of wages. If the said amount is paid as incentives, then it will attract contribution. This aspect may be considered by the respondent at the time of enforcing the order.

10. Ex gratia payment: The term ex gratia is defined as "as a favour rather than from an obligation (especially legal) obligation." (THE CONCISE OXFORD DICTIONARY, New edition 1990s). Amount paid at times to grace the employees or to encourage them and if it is paid at intervals not exceeding two months, it will form part of the wages. If the said amount is paid once or twice in a year, then it can be construed as one time payment and then, it will not attract the definition of wages. From the materials available, I am not able to decide whether these amounts are paid periodically or at intervals exceeding two

months. If the amounts are not paid periodically and if these had been paid once or twice in a year, the appellant is not entitled to pay contribution. This aspect may be considered by the respondent at the time of enforcing the order.

11. Contract workers: Mr. Meenakshi-sundaram, counsel for the appellant, has also submitted that certain works are given to private contractors and the works are done outside the appellant's premises and the appellant is not exercising any manner of control over such employees and there is no relationship of "master" and "servant" in between the appellant and the workers, and for work done under the private contractors in the said circumstances, the appellant is not liable to pay contribution for the amount paid to the private contractors. It has been repeatedly held by our Court and also by the Apex Court that if the works done by the private contractors are done as per the specifications given by the employer and if the employer exercises the control or power of supervision or rejection, then the said employees would also come within the definition of Section 2(9) of the Act as the works done by them are in connection with the factory or the establishment. It is not in dispute that the appellant is exercising the right of supervision or rejection of the work given by them to private contractors and that, therefore, the amounts paid to them would definitely come within the definition of Section 2(22) of the Act and the appellant is liable to pay contribution for the said amount also, .

12. From the foregoing, it has to be held that the appellant is liable to pay contribution amount as demanded by the respondent and the respondent is hereby directed to check and consider the amounts spent under the heads "Special allowance" and "Ex gratia payment", before enforcing the order, in the light of the observations made supra.

In the result both the civil miscellaneous appeals are dismissed with the above-said observation. No costs.