

(2004) 04 KAR CK 0026
In the Karnataka High Court
Case No : MFA No's. 1879 of 1999 Etc.

Rajashree Cement and Others

APPELLANT

Vs

The Dy. Director (I) and Others

RESPONDENT

Date of Decision : 17-04-2004

Acts Referred:

Employees State Insurance Act, 1948 — Section 2 (22)
Employees State Insurance Regulations, 1950 — Regulation 40

Citation : (2004) 102 FLR 836 : (2004) ILR (Kar) 2460 : (2004) 7 KarLJ 281 :
(2004) 3 KCCR 1629 : (2004) 3 LLJ 1039

Hon'ble Judges : Tirath S. Thakur, J; Mohan Shantanagoudar, J

Bench : Division Bench

Advocate : S.V. Shastri, M.P. Geethadevi and B.C. Prabhakar, for the Appellant;
M.P. Geethadevi, S.N. Murthy, Somashekar, M.R.C. Ravi and B.C. Prabhakar, for
the Respondent

Judgement

Tirath S. Thakur, J.—A common-question of law arises for consideration in all these cases which were heard together and shall stand disposed of by this common order. The question precisely is whether conveyance allowance paid by the Management to its employees is a wage within the meaning of Section 2(22) of the State Employees Insurance Act so as to entitle the Corporation to demand contribution under the said Act. The ESI Courts have taken the view that the payment of allowance is a wage especially when the same is under a settlement arrived at between the employees and the Management. Aggrieved by the said view, the Corporation had filed M.F.As.No. 2251, 2657, 2655, 132, 3594 and 2240/2001 inter alia contending that the payment of conveyance allowance was not a part of the wage as defined under the Act and therefore the Management were not entitled to seek exclusion of employees whose wage would go beyond the prescribed limit by clubbing the payment made on account of conveyance allowance with the admitted wages drawn by them. The Corporation's worry it appears was that if conveyance allowance was treated to be a part of the wage, a large number of employees who were otherwise covered by the Act could go out

of its coverage on account of their wage exceeding the prescribed limit.

2. After the matter was argued at considerable length by counsel for the parties and reserved for pronouncement of orders, the Corporation appears to have examined the correctness of its stand in the light of the legal position settled by the decisions of the Supreme Court and the language employed by the parliament in Section 2(22) of the ESI Act. It has based on a review of its stand filed a synopsis in M.F.A.No. 1879/1999 interalia stating that the Corporation has reconsidered the matter in the light of the judgments of the Supreme Court and those delivered by this Court and formulated its stand according to which any remuneration paid or payable to the employees in terms of the contract of employment express or implied or by a settlement entered between the employees and the management falls within the first part of the definition of wages, given in Section 2(22) of the Act and consequently fixed conveyance allowance paid to all the employees flowing out of their contracts of employment or settlements entered into between the employees and the management also falls within the first part of the definition of wages. "Travelling allowance paid to defray specific expenses incurred by the employees by reason of the nature of their employment including travelling allowance paid or reimbursed to any employee for specific duty related journey and reimbursement of actual cost of the journey subject to proof of actual expenditure could constitute a wage within the meaning of Section 2(22) of the Act. Also liable to be excluded are payments of certain amounts for vehicle maintenance subject to production of records demonstrating actual maintenance of the same. The Corporation has further stated that upon review of the facts and circumstances relevant to the appeals filed by it, it has noticed that the conveyance allowance paid in the same is a fixed amount payable to all the employees. Such payments flow from the contract of employment or the settlements arrived at between the management and the employees. The Management are therefore liable to pay contributions on the said amount except in cases where the income upon inclusion of the conveyance allowance in the same crosses the ceiling limit fixed for coverage of risks. The synopsis in the light of the above accepts the ESI Court's view to be correct and seeks to withdraw the appeals filed by the Corporation in terms of separate memos filed in each one of them. In the light of the said specific stand taken by the Corporation as also the memos filed by it in each one of the appeals, the appeals filed by the Corporation shall have to be dismissed as withdrawn.

3. That leaves us with M.F.As.No. 1879/99, 2031/01 and 3165/ 01. In so far as M.F.A.No. 1879/1999 is concerned, the same has been filed by the Management of Rajashree Cement, Aditya Nagar, Gulbarga, against an order passed by the ESI Court dt.27.2.1999 whereby the said Court has held that conveyance allowance paid pursuant to a settlement arrived at between the Management on the one hand and the employees on the other is not a wage within the meaning of Section 2(22) of the ESI Act. M.F.A.No. 2031/01 has also been similarly filed by the Management of the appellant therein against an order passed by the ESI

Court whereby the said Court has also held that conveyance allowance paid to the employees forms part of the wages and that the Management is not liable to pay contribution on the salaries of such of the employees as go out of coverage after inclusion of the said allowance. The ESI Court has in that case declined the claim made by the Management relying upon the decision of this Court in *MYSORE KIRLOSKAR LTD., v. DEPUTY REGIONAL DIRECTOR, EMPLOYEES' STATE INSURANCE CORPORATION* 1999 FJR 94 333. The grievance of the appellant in the appeal is however limited to the extent the ESI Court has declined refund of the amount paid by the Management. M.F.A.No. 3165/01 too arises out of an order made by the ESI Court in which the said Court has allowed the application filed by the appellant-Management in part and while setting aside the demand for payment of interest raised by the ESI Corporation declined to order refund of the amount already paid.

4. The short question that falls for consideration in the appeals filed by the Management therefore is whether the conveyance allowance paid by the Management to their employees in terms of the contracts of employment/settlement arrived at with the employees forms a part of the wage within the meaning of Section 2(22) of the Act and if so, whether payments made by the Management qua employees who would have gone out of the coverage by inclusion of the allowance was liable to be refunded to them.

The term wages is defined by Section 2(22) of the ESI Act as under

"(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, lockout, strike which is not illegal or lay-off, 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;"

A careful reading of the above would show that all remuneration paid or payable in cash to an employee in terms of the contract of employment whether it is express or implied are wages within the meaning of the said expression. In addition any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off is also a part of the wages. Additional remuneration if any paid at intervals not exceeding two months are also wages within the meaning of the definition provided in the Act. The payment of conveyance allowance in the present cases is made either under the contract of employment or in terms of a settlement arrived at between the Management

on the one hand and the employees on the other. That payments made by the Management under a settlement with the employees would constitute payments made under the contract of employment is fairly well settled by the decisions of the Supreme Court in *Wellman (India) Pvt. Ltd. Vs. Employees' State Insurance Corporation*, and *MODELLA WOOLLENS LTD. v. EMPLOYEES' STATE INSURANCE CORPORATION* AND ANR 1994 SU(3) SCC 580. To the same effect is the decision of this Court in *ESCORTS LIMITED AND ANR. v. THE REGIONAL DIRECTOR, ESI CORPORATION*, M.FA.No. 5626/1998 C/W 1339/1999 DD 17.12.2003. If that be so, as it indeed is the payment of conveyance allowance made in terms of the contract of employment or the settlement would be a wage u/s 2(22) of the Act especially when such payment is made to all the employees and regardless whether they are using any conveyance and if they are the type of conveyance which they are using. The Corporation has in our opinion rightly come to the conclusion after review of the facts and a proper appreciation of the pronouncements of the Supreme Court and those of this Court that conveyance allowance is different from travelling allowance or travelling concession referred to in Clause (b) of Section 2(22) of the Act. Travelling allowance referred to in Clause (b) is a payment meant to defray specific expenses incurred by the employees by reason of the nature of his employment and may include any allowance paid or reimburse to any employee for specific duty related journey. It may also include reimbursement of actual cost of journey subject to proof of actual expenditure. Payment of conveyance allowance on a uniform basis regardless whether the employee concerned has or has not incurred any expenditure on his journey to a place of his work is not however synonymous to travelling allowance as is envisaged under Clause (b) of Section 2(22). The ESI Courts were in that view of the matter perfectly justified in holding that the payment of conveyance allowance to the employees was a part of the wage payable to the employee and would therefore be relevant for purposes of determining the liability of the Management to pay contribution. The appeals filed by the Management to that extent do not make out a case for interference with the orders passed by the ESI Court, except in M.F.A.No. 1879/1999 where the Court has taken a contrary view which shall stand reversed in the light of the synopsis filed by the learned Counsel for the Corporation and in the light of what we have said herein above.

The second facet of the question which arises for consideration is from the point of view of the Managements more important. The question is whether payments made by the Management pursuant to the demands raised against them even in respect of employees who would go out of coverage if the conveyance allowance was included as a part of the wage can be refunded to the Management. The ESI Courts have declined claims for refund of the payments already made primarily on the ground that the claim is not in accordance with the provisions of the Act and the Regulation framed thereunder.

5. A correct answer to the question whether a refund can be claimed by the Management is possible only if the scheme underlying the ESI Act is properly

appreciated. According to the provisions of the Act and the Rules and Regulations framed thereunder, the contribution paid entitles the workmen to the benefits admissible under the Act. The Act does not however provide for refund of any contribution if the workmen does not qualify or avail of any benefit otherwise due to him. The contribution made by the workmen or by his employer is credited to the Insurance Fund created under the Act which then becomes available for other employees during other benefit periods. Significantly, there is no co-relation between the amount paid towards contribution and the benefit availed of by the workmen nor is there any co-relation between the risks against which the workmen stand statutorily insured and the amount contributed. In *Employees' State Insurance Corpn. Vs. M/s. Harrison Malayalam Pvt. Ltd.*, their Lordships while referring to the above features found that the scheme of the Act was more akin to Group Insurance and is distinct from the contract of insurance in general.

6. Regulation 40 of the Regulations framed under the Act envisages refund of contributions erroneously paid. It inter alia provides that any contribution paid by a person under the erroneous belief that the contributions were payable by that person under that Act may be refunded without interest by the Corporation to the person, if an application to that effect is made in writing before the commencement of the benefit period corresponding to the contribution period in which the contribution was paid. It further provides that where any contribution has been paid by a person at a rate higher than that at which it was payable the excess of the amount so paid over the amount payable may be refunded without interest by the Corporation to that person, if an application to that effect is made before the commencement of the benefit period corresponding to the contribution period in which such contribution was paid. In terms of Sub-section 3 of Regulation 40 while calculating the amount of refund to be made, the amount if any paid to any person by way of benefit on the basis of the contribution erroneously paid and for the refund of which the application is made may be deducted. Regulation 4 of the Regulations deals with the contribution and benefit periods and reads as under:

"4. Contribution and benefit periods:

Contribution periods and the corresponding benefit periods shall be as under:

Contribution Period	Corresponding benefit period
1st April to 30th September	1st January of the year following to 30th June
1st October to 31st March	1st July to 31st December

Provided that in the case of a person who becomes an employee within the meaning of the Act for the first time, the contribution period shall commence from the date of such employment in the contribution period current on that day

and the corresponding benefit period for him shall commence on the expiry of the period of nine months from the date of such employment."

It is on a conjoint reading of the above Regulation and Regulation 40 manifest that a request for refund of contribution erroneously paid can be made only in terms of an application submitted in the prescribed form and supported by the documents prescribed for that purpose before the commencement of the benefit period corresponding to which the contribution was erroneously paid. It is not in the instant case disputed that no application as envisaged by Regulation 40 supra was made to the authority competent within the time prescribed for that purpose. The prayer for refund made before the ESI Court after the period prescribed for making such applications was therefore meaningless. It is well settled that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. See *Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others*, .

7. A prayer for refund otherwise than in accordance with Regulation 40 was on similar grounds rejected by a division bench of this Court in *MYSORE KIRLOSKAR LIMITED v. DEPUTY REGIONAL DIRECTOR, EMPLOYEES' STATE INSURANCE CORPORATION*. Reference may at this stage also be made to the judgment of the Supreme Court in *Koluthara Exports Ltd. Vs. State of Kerala and Others*, where their Lordships were dealing with the constitutional validity of Kerala Fishermen's Welfare Fund Act, 1985. The impugned legislation in that case inter alia envisaged the establishment of Fishermen's Welfare Fund Scheme to which contributions had to be made by those made liable u/s 4 of the Act. The Court however declined to direct refund of the contribution so paid even after Section 4 of the Act was declared to be unconstitutional. It held that since the amount credited to the Welfare Fund by dealers u/s 4(2) of the Act had been expended by the Board for purposes of the Act and the Scheme, the amounts already paid were not liable to be refunded to the dealers-contributors.

In the present cases also, the amount contributed by the Management has since been transferred to the fund and even made use of for the benefit of the employees covered- by the scheme. No application in the manner prescribed having been filed within the time permissible under Regulation 40 for refund, the prayer for refund was rightly declined by the Courts below. In the result, M.F.As.No. 2251, 2657, 2655, 132, 3594, 2240/2001 filed by the ESI Corporation are dismissed as withdrawn. M.F.As.No. 2031 & 3165/01 are also dismissed. M.F.A.No. 1879/ 1999 shall however stand allowed, the order passed by the ESI Court shall stand set aside and the demand for payment of Rs. 4,50,983/ - towards contribution raised against the appellant in that case set aside. No costs.