
(1999) 08 MAD CK 0101

In the Madras High Court

Case No : A.A.O. No"s. 325 of 1992 and 566 of 1993

Ratna Cafe

APPELLANT

Vs

E.S.I. Corporation

RESPONDENT

Date of Decision : 27-08-1999

Acts Referred:

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

Citation : (2001) 1 LLJ 37

Hon'ble Judges : K. Gnanaprakasam, J

Bench : Single Bench

Advocate : A. Krishna Rao, for the Appellant; Radha Srinivasan, for the Respondent

Final Decision : Dismissed

Judgement

K. Gnanaprakasam, J.—Both the appeals in C. M. A. No. 325 of 1992 and C.M.A. No. 566 of 1993 have been filed by the establishment, viz. Ratna Cafe, against the order dated September 4, 1990, passed by the E.I. Court (First Additional City Civil Judge), Madras, in E.I.O.P. No. 122 of 1986 and 4 of 1989, respectively.

Brief facts of the cases are:

2. The appellant has been carrying on a restaurant business under the name and style of "Rama Cafe" at No. 425, Triplicane High Road, Madras-5, and also running a canteen at "Ezhilagam", to cater to the needs of the employees at Ezhilagam. It is stated that foods were prepared at Rama Cafe and taken to Ezhilagam. Both the establishments were treated as one establishment, and the workmen employed at Ratna Cafe are on the rolls of Ratna Cafe only, and used to be engaged for service at the canteen at Ezhilagam. The appellant is also covered as an establishment and has been paying ESI contribution for:

1. Salary paid to the staff for the period from January 16, 1977 to December 31, 1982.

2. Salary paid to the workers for the very same period.
3. Holiday wages paid for the period from 1/1981.
4. Short payment as per C.S. Unit II for the period 3/1985 and short payment as per letter dated December 14, 1985.

To the said show-cause notice, the appellant gave a reply on May 19, 1986, wherein he has furnished the details of the payments made by them under the heading "gratuity" and "service pay" for permanent workmen at the time of the settlement and "extra wages" paid to the extra employees. In the said reply, the appellant had stated that the payment of "extra wages" occasioned at the time only when they engage extra hands during peak hours business, i.e., lunch time between 1.00 to 3.00 p.m. Those extra hands were casuals, work for one or two hours in a day and they were paid on hourly basis. After the receipt of the reply and after having conducted due enquiry, the respondent passed an order on July 31, 1986, u/s 45-A of the Employees' State Insurance Act, 1948 (hereinafter called as "the Act"), holding that the appellant is liable to pay contribution in "respect of "extra wages" paid to extra hands, and "food allowance", treating them as wages, and determined the amount at Rs. 1,98,325.18 and directed the appellant to pay a sum of Rs. 13,903.86, as the contribution for the period from January 16, 1977 to December 31, 1982.

3. The respondent issued another show-cause notice to the appellant on March 3, 1988, calling upon them to pay contribution in respect of "service charges" (including the final settlement bills made to the employees, and the amount paid as "food allowance"), to which, the appellant gave a reply on March 26, 1988, and after due enquiry, the respondent passed an order on October 14, 1988/October 27, 1988, u/s 45A of the Act, calling upon them to pay contribution in respect of "service charges" and "food allowance" to the extent of Rs. 35,249.45.

4. Aggrieved by these orders dated July 31, 1986, October 14, 1988, the appellant filed petitions u/s 75 of the Act before the Employees Insurance Court in E.I.O.P. Nos. 122 of 1986 and 4 of 1989, respectively. Both the petitions were tried together and the E.I. Court, after taking into consideration all the aspects of the case and also the materials placed before it, came to the conclusion that the orders passed by the respondent u/s 45A of the Act, are valid, and directed the appellant herein to pay the amounts as demanded in the above said orders. As against the same, the establishment has preferred these appeals.

The amounts for which contribution was demanded by the respondent could broadly be brought under three heads:

1. Amounts paid to the casual employees as extra wages in "Ratna Cafe" at Triplicane and at Ezhilaeam.
2. Amounts paid to the employees as "food allowance".

3. Amounts paid to the employees as "service charges".

Now, the question is as to whether the payments referred above, would fall within the definition of "wages" and would warrant contribution, as demanded by the Corporation?

5. Admittedly, the appellant has been carrying on restaurant business under the name and style of "Ratna Cafe" at No. 425, Triplicane High Road, Madras-5, and also running a "canteen" at Ezhilagam. The appellant had contended that foods were prepared at Ratna Cafe and taken to Ezhilagam, and as such, no cooking process was carried on at Ezhilagam. But, however, the Accountant of the appellant, viz., Gopalratnam, who has been examined as P.W. 1, had deposed that there were about 125 persons employed at "Ratna Cafe" and about eighteen persons at "Ezhilagam". He had also stated that the salary payment register, attendance register and other registers were all destroyed. In fact, he had admitted that "cash books" and other books for the relevant period were available, but destroyed only after 1987. From this, it is evident that the appellant had instituted the proceedings before the Employees Insurance Court in 1986 and only after the institution of proceedings, the appellant is said to have destroyed all the books of accounts for the relevant period, for obvious reasons.

6. The appellant further contended that the amount shown as "extra wages" paid to the extra hands who are engaged for one or two hours in a day, during peak hours at "Ratna Cafe" and they were paid on hourly basis and the said persons were engaged as "extra hands" and they were not "employed" in the appellant establishment, and that, therefore, the appellant is not liable to pay contribution in respect of the said payment. The appellant alone is the fit and proper person to adduce evidence about the payments said to have been made to "casuals" or extra workers, during peak hours for running of the business and also to account for the various amounts paid by them to various persons under various heads. But, the appellant had not chosen to do so. The appellant also had not produced all the account books before the authorities concerned nor before the Employees Insurance Court. On the other hand, the appellant had very confidently deposed that all the books of accounts were destroyed only after 1987, i.e., after the commencement of the proceedings before the Employees Insurance Court, and, hence, his evidence that the payment said to have been made to "extra hands" engaged during peak hours and the payments made as "food allowance" for labourers, had to be viewed with care and caution.

7. Wages, additional wages, omitted wages paid to the employees: The learned advocate for the appellant has submitted that the "wages" paid to the casuals at "Ratna Cafe" at Triplicane and additional wages paid to the extra employees at Ezhilagam are not at all "wages" and that, therefore, the appellant is not liable to pay contribution. He has also contended that the burden is upon the respondent-Corporation to prove that the appellant is liable to pay the contribution in respect of amounts paid as wages and also relied upon the case of *S. T. Reddiar and Sons v. Regional Director* 1989 II LLJ 285 (Ker), wherein the High Court of Kerala

in paragraph 5 of its judgment has said, 1989 II LLJ 285 "in a case where a demand, which is made under a statute is challenged, that demand has to be justified by the authority which imposes, demands or collects the amount. The contribution is on the wages and the Corporation which demands contribution, has to make out, in all cases where the employer disputes his liability, that such amounts were remuneration paid or payable on fulfilment of the contract of employment, whether express or implied". In the same paragraph, it is also stated "it is true that in a case where a person claims exemption from a statutory provision, it is for him to prove that he is entitled to such exemption".

8. The appellant admitted that the wages were paid to the canteen workers at Ezhilagam, and what all they say is that, the said wages was paid to the casual employees, and that, therefore, they are not liable to pay the contribution.

9. The appellant also relied upon the case of Regional Director, Employees' State Insurance Corporation v. P.R. Narahari Rao, 1987 70 FJR 160, wherein the High Court of Kerala had drawn the distinction between the "casual employees" not "employed" but "engaged" for specific item of work, and it has been held in paragraph 11 of its judgment, "the employer used to make use of the services of P.W. 1 as an independent contractor, who in turn, used to get the additional work done by engaging casual workmen. P. W. 1 was engaged for similar operations by other hotelier establishments as well. During some of the months, such work may be of greater volume while during other months there would be no, such work at all. The appellants have no case that the workmen are "employees" by virtue of Section 2(9)(ii) or (iii) of the Act. We have, therefore, to consider only the effect of Section 2(9)(i) of the Act. The essential question, which we have to deal with is, whether there is a "contract of employment" between the casual workmen engaged by P. W. 1 and the employer establishment. The evidence indicates that the employer was not aware of the number of workmen engaged by P.W. 1. He did not know the names and other details of such persons. He was not aware of the amount payable to each of the workmen. He could not have insisted upon the attendance of these persons at any point of time. He had no control over the manner in which the work was performed by them. Nor was there any evidence relating to the existence of master and servant relationship between such casual workmen and the employer establishment." But, in our case, P.W. 1 had categorically admitted that 125 persons were employed at Triplicane, and 18 persons were employed in the canteen at Ezhilagam, which canteen is run only by the appellant and not by any separate contractor. The hotel/canteen business is run every day from morning to evening and it is a permanent feature, for which, workers are necessary to carry on the business every day. The appellant was also exercising control and supervision over all the employees employed in both the places. The appellant alone was making payments to all the workers. The case of the appellant that the workers from other establishments were temporarily employed during peak hours, was not at all proved and established, and in the absence of the same, it is very difficult to accept that the wages, additional wages and omitted wages paid to these

employees would not attract contribution as contended by the appellant, and on the other hand, the appellant is liable to pay contribution.

10. Section 2(22) of the Act defines "wages" which states, "wages means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lockout, strike which is not illegal or lay off and other additional remuneration, if any, paid at intervals not exceeding two months". "The additional remuneration" comes within the definition of wages and further more, it is proved that remuneration has been paid periodically and as such, the wages paid to the canteen employees, squarely falls within the definition of wages as defined under the Act and that therefore, the appellant is liable to pay the contribution.

Food allowance: The appellant also denied its liability to pay contribution in respect of amount spent for food allowance. The amount said to have been paid towards food allowance, has also been paid periodically, and hence, it could only be construed as an additional remuneration paid to the employees, which would fall within the definition of "wages" as defined u/s 2(22) of the Act, and, therefore, the appellant is liable to pay contribution.

Service charges: Payments made to the employees as "service charges" it is contended that these service charges were paid by the employer as "Inam " and the said amount was not collected from the customers. It is contended that the appellant has been paying the "service charges" out of his pocket and there is no contract of employment to pay service charges and, it is open to the appellant to stop or withdraw the said payment at any time and even without notice to the employees. But, at the same time the appellant admitted that these payments were paid to all the workers uniformly and periodically to avoid any manner of disparity among them.

The case of *Braithwaite and Co. (India) Ltd. v. Employees State Insurance Corporation*, 1967 33 FJR 247 (SC), was cited by the appellant as reference for the above said proposition, wherein the Supreme Court has held that "the appellant-company introduced the Inam scheme in December, 1955. This payment of Inam was not amongst the original terms of contract of employment of the employees of the company. In those terms, there was no offer of any reward or prize to be paid for any work done by the employees. The employees were expected to work for certain periods at agreed rates of wages. The only offer under the scheme was to make incentive payments, if certain specified conditions were fulfilled by the employees. The company, however, reserved the right to withdraw the scheme altogether without assigning any reason, or to revise its conditions at its sole discretion. The payment of the Inam was dependent upon the employees exceeding the target of output appropriately applicable to him. But, though primarily the right to receive the Inam depended on the efficient working of the employee, there was another clause which laid down that, if the targets were not achieved, due to lack of orders, lack of

materials, breakdown of machinery, lack of labour, strikes, lockout, go slow or any other reason whatsoever, no Inam was to be awarded. The company had also laid down that, if any, deterioration of workmanship was noticed on the part of the employees in order to achieve the targets prescribed for earning the Inam, the scheme could be abandoned forthwith. It was also made clear to the workmen in the scheme that the payment of reward was in no way connected with or part of wages". But, there is no such scheme in our case and the appellant has not established that these service charges were paid pursuant to such a scheme and also failed to prove that these amounts were paid at his whims and fancies. That in the absence of any scheme to pay "Inam " and in the absence of the terms and conditions under which the Inam has been paid, and in the absence of any evidence that the payment of Inam shall be withdrawn or stopped, if conditions agreed are not complied with, the appellants contention would feign into reality. The argument of the appellant is quite amusing that they have been paying the "service charges" out of their pocket, reason being to extract or exploit more and efficient work. If that be so, the said payment would be considered as "additional remuneration", which would fall within the definition of "wages" as set out in Section 2(22) of the Act and that, therefore, the said payment would attract contribution.

11. From the foregoing, it is seen that the Employees Insurance Court, in my view, as could be seen from the impugned order, have considered all the relevant materials on record and came to the right conclusion that the appellant is liable to pay contribution on all the heads, stated supra. I do not find any patent error of law or perversity of approach in the findings rendered by the Court below, which warrants any interference by this Court. That in the said circumstances, it is not possible for me to reach a finding, other than the finding reached by the Employees' Insurance Court.

12. In the result, the civil appeals are liable to be dismissed and the same are hereby dismissed. But, however, there will be no order as to costs.