(1996) 07 AP CK 0083

In the Andhra Pradesh High Court

Case No : AAO No. 1646 of 1996

Regional Director, ESI Corporation — APPELLANT

Vs

K.F. Pestonji — RESPONDENT

Date of Decision : 13-07-1996

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(22), 75

Citation : (1998) 5 ALD 204 : (1998) 5 ALT 110

Hon'ble Judges : A.S. Bhate, J

Bench : Single Bench

Advocate : Mr. V. Venkateswara Rao, for the Appellant; Mr. Y. Jagan Mohan, for the Respondent

Judgement

1. The respondent in this appeal is the proprietor of the firm Cherma''s Extension. The said firm is covered under the Employees State Insurance Scheme and is therefore falling under Employees State Insurance Act, 1948 (hereinafter referred to as ''the Act''). The appellant-Corporation issued notice on 14-2-1994 calling upon the respondent to pay a sum of Rs.31,786/-. The said demand was made as the alleged dues towards the contribution required under the Act, on the incentives paid to the employees of the respondent between the period April, 1990 to March, 1991. The respondent immediately responded by stating that the payments made under the head "incentive'' to the workmen were not covered by the Act and therefore, the contribution claimed was unjustified and unsustainable. The appellant continued to issue notices demanding contribution. The said notices were issued on more man three occasions and even then the respondent stood by his stand that there was no liability to contribute in respect of payments made by him as incentives. The respondent also clarified that the payment was not made under any term of contract of employment nor, was it paid under any settlement. The employees had no right to claim the said amount and the payment was purely a discretioanry act on the part of the respondent. Inspite of such contention having been raised by the respondent, the appellant issued another notice raising the same demand. On

6-1-1995 the Recovery Officer of the appellant-Corporation visited the establishment of the respondent and ultimately threatened to initiate recovery proceedings. On such threat, the respondent approached the Industrial Tribunal, u/s 75 of the Act with a request to set aside the notice dated 15-2-1995 received by the respondent whereby he was called upon to contribute on the incentives paid to the workers working under him.

2. The learned Tribunal, after considering the stand taken by the appellant and after recording the evidence, found that the respondent was not liable to pay the contribution on the incentive amount paid by him to the employees. The amount paid by the respondent under the head "incentive" did not fall within the definition of the term "wages" as per the provisions of the Act. Holding thus, the learned Tribunal allowed the petition of the respondent by the impugned order dated 11-1-1996. The Corporation has taken exception to the said order by the present appeal.

3. The learned Counsel for the appellant, Sri Venkateswara Rao, has contended that from the material available on record it is clear that the incentive paid by the respondent to his employees was quite regular. The said incentive, from facts and circumstances of the case, should be construed as paid on account of implicit agreement between the employer and employees and therefore falls within the term "wages" as defined under the Act. Consequently, it is argued that the Corporation was entitled to claim contribution from the respondent and the order under challenge should be set aside. The learned Counsel for the respondent has supported order.

4. The factual position may also be stated before I consider the arguments touching the legal aspect. There is no dispute that the establishment of the respondent is covered under the E.S.I, scheme. It is found from the material on record that the respondent has been making payment of incentive to some of his employees intermittently. The statement proved by Ex. P-11 before the Tribunal shows the details of number of employees, wages, sales and the amounts paid by way of incentives to some of the employees. The period covered is from June, 1990 to the end of March, 1991. The total amount of Rs.4,19,736/- was paid under the head "incentive'' to the various employees working under the respondent. There is no dispute that in respect of these payments, no contribution under the Act was made by the respondent.

5. The evidence in the case was given by the respondent, through PW1. The evidence has disclosed that there was no fixed criteria or requirement to be performed by the workmen for payment of incentive. The payment was not based on performance of the employees or the wages drawn by the employees during any relevant period. The payment has nothing to do with the sales effected by a particular workman or by the section in which a particular workman is posted. There is no specific period or duration for which the incentive is paid. Furthermore, there is no compulsion for the employer to pay the said incentive. Lastly, it was stated that there was no agreement or commitment/ settlement

between the employer and employees with regard to payment of incentives. The record shows that such incentive amount was paid to some of the employees on 7-6-1990, 11-8-1990, 20-10-1990, 3-1-1991 and 18-3-1991. As pointed earlier, the incentive amount has not been paid to all the workers, but paid to some selected persons. The material also shows that the incentive paid on each occasion is not necessarily to the same persons. The employees differ in various periods.

6. The learned Counsel for the Appellant submits that the term "wages" includes such payment. There is no doubt that if the term wages under the Act includes the payment of the type made by the respondent to his employees, then liability of the employer to make contribution will obviously arise. The term "Wages" has been defined in Section 2(22) of the Act. It runs as follows:

" ''Wages'' means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off 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;

(d) Any gratuity payable on discharge."

Thus, the definition is of inclusive nature. All remunerations paid or payable in cash to the employee made in accordance with terms of contract of employment, whether express or implied, fall within the term "Wages". The definition further states that the remunerations paid to the employee including any payment in respect of any period of authorised leave etc and, all other additional remunerations at intervals not exceeding two months will also fall within the term "Wages" (underlined to give emphasis). It is further clarified that remuneration or payment made under clauses (a), (b), (c) and (d) above is excluded from the meaning of the term "Wages". We are not concerned with the aspect. The argument of the learned Counsel for the appellant is that the incentive paid by the respondent to the employee has been made under the implicit contract between the employer and the employee. There is absolutely no material to show that there is any implicit contract. The learned Counsel was obviously trying to fall on implicit contract because admittedly there is no explicit contract. It is argued that the very fact that payment under the head "incentive" has been made on more than one occasion and fairly regularly in the period in question, would raise the inference that there was some sort of agreement between the employer and the employees. The contention is unsound. The evidence, which remains undisturbed, clearly shows that the payment has been made to some of the employees and not to all the employees. There is no specific criteria for making the payment. The evidence shows that the payment has been made at the discretion of the employer. The appellant is unable to show any rationale behind payment of such amount to a particular employee who has received the incentive. It will thus be seen that no implicit contract can be inferred in such circumstances. Counsel brings to my notice a decision of Supreme Court in Civil Appeal No. 2777 of 1980 between Indian Drugs And Pharmaceuticals Limited v. Employees State Insurance Corporation. The question in that case was whether the payment made to the employees for the overtime work done by them falls within the meaning of the term "Wages" under the Act. The Supreme Court, after analysing the provisions of the Act, found that the said payment did not fall within the exclusionary clause of Section 2(22) of the Act. The Supreme Court further found that whatever remuneration was paid or payable for overtime work by particular employee formed "Wages" because the payment was obviously made under the implied term of contract. The Court found that the object in payment was to clear more work by the employee and it was for doing such more work, which was implicit in the contract of employment, that the workers were paid in addition to their usual wages. It was therefore an implied contract spelt out from the facts of the case. The employer is enjoined to pay the contribution in respect of such overtime payment made to the employee. The Court found that such remuneration is normally in terms of the settlement between the employer and employees. The expression "Wages" embraces all payments which have been made under any implicit contract of employment. The Court observed:

"... There emerges concluded implied contract between ihe employer and the employee... It becomes integral part of the original or revised contract of employment from time to time. The employer is obligated to pay Wages when the employee does work. This will be in addition to the payment of the Wages he receives for normal work."

It will be seen from the above observations of the Supreme Court that unless the remuneration paid can be construed as one arising out of a contract, express or implied, the said payment cannot fall under the definition "Wages". I am afraid this decision is of no help to the appellant. The payment made to some of the employees in the present case was not for any particular work done. It is not for any specific purpose and therefore it is impossible to infer any contract, express or implied. It cannot be said that any particular worker under the respondent could claim as of right, such incentive as there was no specific formula for claiming the same and no right was vested in the employee.

7. The learned Counsel next contended that the second limb of the definition'' ''Wages" would cover the payment of incentives in the instant case. I do not think that this contention can stand. The inclusive part of the definition is that

any payment to the employee, which is additional remuneration if paid at intervals not exceeding two months, constitutes "Wages". In the instant case, the payments, which have been made, are not at intervals which are less than two months. The dates referred above will clearly show that the first payment was made on 7-6-1990 followed by next payment on 11-8-1990, not necessarily to the same employees. The payment was made after two months and four days. Therefore, the interval exceeded two months. The third payment was on 20-10-1990. Again this was not necessarily to the same employees and was made after two months and 9 days from the previous payment, The next payment was on 3-l-1991 which "was after two months and 14 days from the immediate last payment and, the fifth payment on 18-3-1991 was after two months and 15 days from the previous payment. It will thus be seen that no payment was made within an interval of two months as required in the term "Wages" u/s 2(22) of the Act. The learned Counsel, however, says that by making payments beyond two months, the object of the respondent was to overcome the liability. It is argued that there was pattern of regularity in making these payments. The payments have been made at intervals exceeding two months but by a few days only. By and large the payments were between two months and few days and two months and 15 days. No doubt, the payments have been made at the intervals between two to three months. But, I fail to understand as to how this would bring the payment of incentive under the definition as it exists. If the law permits that the payments after the interval of two months will not fell under the inclusive definition, nothing prohibits the employer from making such payment. Such payments would be legitimately out of the purview of the term "Wages" and we cannot add something to what is existing in the statute. The learned Counsel very seriously contended that the provisions of the Act are meant for benefit of the workers and it is a beneficial social legislation and should not be allowed to be bypassed by employers by some device. He relied on certain observations made in Employees State Insurance Corporation Vs. M/s. Hotel Kalpaka International, . I am not able to find any support in this case for the proposition that even though the action of the employer does not fall within the four comers of the provisions of the Act, he should be made liable for the acts done by him. In the case relied upon by the learned Counsel, it was entirely due to the fault of the Officers of the appellant-Corporation that the respondent in that case did not make the contribution which the employer was bound to make. The establishment of the employer in that case was closed down on 31st March, 1988 and the employer has not made the contribution as required by the Act in respect of remuneration of the workers which was payable to the workers prior to 31st March, 1988. The Wages of the workers were paid subsequently by the employer, but the contribution was not made. The Supreme Court observed that whenever the employer paid the wages to the workers which were due to them, it was the liability of the employer to contribute as per the requirements of the Act. It was in such circumstances that the Court reiterated that the beneficial piece of social security legislation which is in the interest of labour, has to be construed with a view to promote the scheme and avoid the mischief. The Court refused to accept the argument that the employer had made the payment towards Wages in terms of settlement much after the closure and had not deducted the contribution of the employees while making payment of wages and therefore, could not made liable for not contributing. This argument was rejected. I do not think that the said case can give any support to the contention of the appellant in the present case.

8. I am of the view that the conclusions reached by the learned Tribunal are perfectly valid and correct. The payment made in the instant case towards incentive does not fall, in the facts and circumstances of the case, under the term "Wages" as defined under the Act. The appeal is thus meritless and has to be dismissed. The appeal is accordingly dismissed. No order as to costs.

