

(1992) 11 KL CK 0049

In the High Court Of Kerala

Case No : MFA No's. 530, 535 and 536 of 1886

Regional Director, E.S.I. Corporation

APPELLANT

Vs

Malabar Cashew Nut and Allied Products

RESPONDENT

Date of Decision : 19-11-1992

Acts Referred:

Constitution of India, 1950 — Article 141

Employees State Insurance Act, 1948 — Section 2(22), 40, 41, 73A

Factories Act, 1948 — Section 79, 80, 81

Kerala Industrial Establishments (National and Festival Holidays) Act, 1958 — Section 3, 3(2), 4A, 5, 5(1)

Citation : (1993) 1 LLJ 596

Hon'ble Judges : M. Jagannadha Rao, C.J; P. Krishnamoorthy, J; K.A. Nayar, J

Bench : Full Bench

Advocate : C.S. Rajan, for the Appellant; M.N. Sukumaran Nair and B. Raman Pillai, for the Respondent

Final Decision : Dismissed

Judgement

P. Krishnamoorthy, J.—The question involved in these three cases is as to whether the wages paid for certain holidays under the Kerala Industrial Establishments (National and Festivals Holidays) Act, 1958 (hereinafter referred to as the Holidays Act) will form part of wages as defined in Section 2(22) of the Employees' State Insurance Act, 1948 (hereinafter referred to as the "E.S.I. Act"). This point is directly covered by a Division Bench decision of this Court in E.S.I. Corporation v. Raj Cashew Company (1991 KLT 847). The facts of these cases on all material points are identical with the facts of the above case. But another Division Bench of this Court before which these cases came up for hearing felt that the ratio of the Division Bench decision referred to above is in 4 conflict with the ratio of the decision reported in Assistant Regional Director Vs. Model Mills Nagpur Ltd.,), which confirmed the decision of a Division Bench of the Bombay High Court in E.S.I. Corporation v. Model Mills 1975 Lab. I.C. 84.

2. The facts in brief are as follows: The Respondent-applicant before the E.S.I.

Court is engaged in cashew processing and is running factories at Chirakkara, Poovapally and Mukhathala in Quilon District. According to the Respondent, they erroneously and mistakenly paid contributions under the E.S.I. Act towards paid holidays under the Holidays Act (paid holidays of August 15th and Thiruvonam in 1981-82) According to them, they are not bound to pay any contribution towards paid holidays because on paid holidays employees are not rendering any service. Accordingly the Respondent filed applications before the E.S.I. Court seeking refund of the contributions so paid or in the alternative seeking a direction to the corporation to adjust the amount so paid towards future subscriptions. Respondent contended that holiday wages are not "wages" as defined in Section 2(22) of the E.S.I. Act and therefore contribution could not have been levied on such wages.

3. The E.S.I. Corporation took the stand that holiday wages are also wages as defined in the E.S.I. Act and contribution was lawfully levied.

4. The E.S.I. Court accepted the contention of the Respondent and held that holiday wages are not wages as defined in the E.S.I. Act and contribution could not have been levied on such wages and granted relief in regard to the contribution so paid for 1982 but denied relief for the year 1981 on the ground of limitation. Accordingly the E.S.I. Court granted the alternate prayer and directed the corporation to adjust the amount of contribution paid by the Respondent-applicant for the year 1982 towards future contribution to be paid by them. The above order is challenged by the E.S.I. Corporation in these appeals.

5. As stated earlier, the dispute in these cases relates to wages paid for certain holidays under the Holidays Act. The question to be decided is as to whether this will form part of wages as defined in Section 2(22) of the E.S.I. Act. In order to decide that question it will be worthwhile to quote Section 2(22) of the E.S.I. Act:

(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 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;

According to the definition as it originally stood before the 1966 amendment, "wages" meant all remuneration paid or payable in cash to an employee if the

terms of the contract of employment, express or implied, were fulfilled and included other additional remuneration, if any, paid at intervals not exceeding two months. But it did not include certain matters mentioned in Section 2(22). Explanation III to para 2 of schedule 1 to the E.S.I. Act as it originally stood provided that except as provided by regulations, wages, pay, salaries or allowances paid in respect of any period of leave or holidays other than the weekly holidays shall not be taken into account in calculating wages. Section 41 dealing with recovery of contribution from immediate employer originally contained an explanation stating that "for the purpose of Section 40 and 41 wages shall be deemed to include payment to an employee in respect of any period of authorised leave, lockout or legal strike".

6. On a reading of the definition of the term "wages" as contained in Section 2(22) of the E.S.I. Act, as it now stands, it is clear that it consists of four parts: The first part provides that "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. The second part contains an inclusive definition which includes any payment to an employee in respect of any period of authorised leave, lockout, strike which is not illegal or lay off. The third part deals with other additional remuneration, if any, paid at intervals not exceeding two months and this is also to be considered as wages. The last or the fourth part deals with the negative aspect and expressly states that items contained in Clauses (a) to (d) will not be included in the term "wages".

7. Counsel for the E.S.I. Corporation conceded that the holiday wages cannot admittedly come under para 2 and 3 (within the inclusive portion of the definition or as additional remuneration payable at intervals not exceeding two months) and rested his case solely on the basis that the holiday wages will form part of the wages as " defined in the first part of the definition, i.e., it is remuneration paid or payable in cash to an employee under the terms of the contract of employment, express or implied. Thus, we are concerned only with the question as to whether the holiday wages are wages coming within the first part of the definition contained in Section 2(22) of the E.S.I. Act.

8. From a reading of the first part of the definition of wages in Section 2(22), it is absolutely clear that three conditions must be satisfied before a payment can be said to be included therein. The three conditions to be satisfied are:

(i) that it must be a remuneration; (ii) that such remuneration must be paid or payable in cash to the employee; and (iii) that it must be paid or payable if the terms of the contract of employment, express or implied, were fulfilled.

There cannot be any dispute that the second condition is satisfied. The question is whether conditions 1 and 3 are satisfied in these cases.

9. Condition No. 1-The first question to be decided is as to whether the wages paid under the Holidays Act is remuneration paid or payable to an employee. In order to decide that question, it will be necessary to refer to the provisions of the

Holidays Act. Section 3 of the Holidays Act as it then stood provided that every employee shall be allowed in each calendar year holidays for 26th January, 15th August and 1st May and three other holidays to be so declared by the Inspector in consultation with both parties. Section 4A states that notwithstanding anything contained in Section 3, an employer may by notice in writing, require any employee to work on any holiday allowed under that section. Section 5 provides that every employee shall be paid wages for each of the holidays allowed to him u/s 3, Sub-section (2) requires that where an employee works on any holiday allowed u/s 3, he shall be entitled to twice the wages and to avail himself of a substituted holiday on any other day. The disputed wages in these cases relate to wages paid for holidays actually allowed to employees under Sub-section (1) of Section 5 and not wages paid under Sub-section (2). According to Counsel for the corporation, these wages will also form part of the remuneration, but Counsel for the Respondent contended that the Holidays Act confers only a benefit on the employee and the wages paid for those days cannot be treated as remuneration and it does not form part of the remuneration coming within Section 2(22) of the E.S.I. Act. As observed by the Supreme Court in *The Accountant General, Bihar and Another Vs. N. Bakshi*, : "The expression "remuneration" in its ordinary connotation means reward, recompense, pay, wages or salary for services rendered". The Division Bench decision in *E.S.I. Corporation v. Raj Cashew Company* 1991 (1) KLT 847, held that though wages are remuneration or recompense for services rendered, they need not necessarily be in every case for services rendered on the particular day. It was further held:

When an employee is under the terms of a valid statute entitled to be allowed a holiday and to be paid wages for that holiday, that provision in the statute becomes part of his conditions of service and it cannot be said that what he is paid is not wages since he has not rendered service on the particular day.... If the employee is entitled to a holiday and entitled to be paid wages for the holiday in fulfilment of the terms of contract, express or implied, wages so paid must be regarded as wages as defined in Section 2(22).

It is on the above reasoning that the Division Bench of this Court came to the conclusion that holiday wages are also part of the wages as defined in the E.S.I. Act. The question to be considered is as to whether it is in any way in conflict with the decision of the Supreme Court in *Assistant Regional Director Vs. Model Mills Nagpur Ltd.*,, , which confirmed the decision of the Bombay High Court in *E.S.I. Corporation v. Model Mills* 1975 Lab. I.C. 84.

10. The question that arose for consideration in the Bombay case was as to whether the amount paid to the employees towards the authorised leave period, which they enjoyed under the provisions of Section 79 and 80 of the Factories Act, 1948. has to be included in the total wage bill of the employer for the purpose of computing its share of special contribution u/s 73A of the Employees' State Insurance Act. Though the case arose before the amendment of the definition of wages in the E.S.I. Act in 1966 the first part of the definition as it

stood then and as it stands now is the same. Counsel for the E.S.I. Corporation limited his case to the first part of the definition. Thus, the provision to be interpreted by us and the provision which was considered by the Bombay High Court is the same.

11. u/s 79 of the Factories Act, every worker who has worked for a particular period in the previous year shall be allowed during the subsequent calendar year, leave with wages for a number of days calculated at the rate mentioned in the section. Section 80 relates to computation of wages during leave period and Section 81 makes a provision regarding payment in advance in certain cases. It lays down that a worker who is allowed leave for not less than four days, in the case of an adult, and five days, in the case of a child, shall, before his leave begins, be paid the wages due for the period of leave allowed. In the light of the above statutory provision, an employee in a factory is entitled to earned leave as laid down in those provisions and is also entitled to wages for such leave period. In considering as to whether the wages paid during the period of earned leave will be remuneration within the meaning of the definition of wages in Section 2(22) of the E.S.I. Act, the Bombay High Court observed as follows in E.S.I. Corporation v. Model Mills 1975 Lab. I.C. 84.

Now the dictionary meaning of the word "remuneration" is recompense or reward. It is payment by way of recompense for services rendered. In this connection, we may refer to the decision of the Supreme Court in Bala Subrahmanya Rajaram Vs. B.C. Patil and Others, wherein it is observed:

Remuneration is only a more formal version of "payment" and payment is a recompense for service rendered.

Admittedly, the employee is recompensated for the services rendered by him when he is paid the wages for the day or the month for which he has worked. But then the question arises whether the provisions incorporated in the Factories Act, which entitled the employee to earn certain quantum of leave because he has worked in the factory in the previous year, can be said to be recompensation for the services rendered by him. It cannot be seriously disputed the provisions relating to grant of leave with wages really provide for a benefit given to an employee for having worked for a particular number of days in the past.

(underlining is ours)

The Bombay High Court, in coming to the conclusion, followed the earlier decision in Bombay Gas Co. Ltd. v.R.N. Kulkarni AIR 1985 Bom 172. The question involved in that case was whether the workman was entitled to the benefit under the Industrial Disputes Act in respect of the amount to which he would be entitled for the privilege leave. In that case it was observed:

It is well-known that privilege leave is a sort of benefit granted to an employee so that he may recoup health after a long period of work and return to work refreshed. In short, it is a benefit which would have little meaning if its were not

to be actually enjoyed by the worker and instead the worker were to be given a monetary privilege. This is the fundamental basis for the grant of the benefit of privilege leave and hence it is implicit in the nature of such benefit and the purpose for which it is granted that it ought not to be allowed to be converted into money except perhaps when ultimately the worker retired with privilege leave to his credit. Normally privilege leave is, by its very nature and purpose, a benefit to be enjoyed and not to be encashed.

It was further held by the Bombay High Court in 1975 Lab. L.C. 84:

Even in the case governed by the provisions of Section 79 of the Factories Act, it seems to be clear that the employee is not entitled to convert his earned leave into a monetary benefit by working during the leave period. It appears to us that the employee earns the benefit of leave with wages by virtue of his working for a particular minimum number of days in the preceding year. Enjoyment of such a leave by the employee which has been earned by him would, in our opinion, be nothing but a benefit flowing from the statutory provisions of Sections 79 and 80 of the Factories Act.

In the light of the above findings, the Bombay High Court came to the conclusion that the concept of leave with wages as envisaged by the provisions of Section 79 cannot be included in remuneration, within the meaning of the term "wages" in Section 2(22) of the E.S.I. Act. On a reading of the provisions of the Holidays Act it is clear that u/s 3 every employee is entitled in each calendar year a holiday for one whole day on the 26th January, 15th August and 1st May and four other holidays for such festivals as the Inspector may, in consultation with the employer and the employee, specify in respect of any industrial establishment. u/s 5 of the Holidays Act, notwithstanding any contract to the contrary, every employee shall be entitled to the wages for each of the holidays allowed to him u/s 3. No doubt, there is a provision in Section 4A that an employer may, by notice in writing, require any employee to work on any holiday allowed under that section. But Section 5(2) provides that if an employee works on any holiday allowed u/s 3, he shall be entitled to twice the wages and to avail himself of a substituted holiday on any other day. It is thus clear from the provisions of the Holidays Act that no employee shall be compelled to work on a day which is declared a holiday under the Holidays Act. If in any contingency it is necessary that he should work, the employer can require him only by a notice in writing. Moreover, he is to be paid twice the wages and he must be granted another substituted holiday on any other day. From the scheme of the Holidays Act, it is clear that he is entitled to the holidays mentioned in the said Act as of right and he is entitled to be paid wages for the same even though he does not actually do any work on that day. No doubt, he gets that benefit by the fact that he is an employee or a worker, but it cannot be said that the wages paid for that day is a recompense for the work done. It is only a benefit granted to the employee and not remuneration for work done. In that view of the matter, we think that the principles laid down by the Division Bench of the Bombay High

Court apply on all force to the case on hand.

12. Counsel for the corporation tried to distinguish the Bombay decision on the ground that leave granted to an employee under the Factories Act can be availed of only at the option of the employee and that was one of the reasons for the Bombay High Court to come to the conclusion that it is not part of remuneration. But we do not think that that by itself is a ground to distinguish that decision from the facts of the case on hand, for from the provisions of the Holidays Act it is clear that it is nothing but a benefit conferred on the employee and the wages paid for those days cannot be treated as remuneration payable for work done.

13. The decision in Assistant Regional Director Vs. Model Mills Nagpur Ltd.,, was on an appeal from the decision in E.S.I. Corporation v. Model Mills 1975 Lab. I.C. 84. Confirming that decision the Supreme Court observed as follows:

Having heard learned Counsel for the Appellant, we are of the opinion that the view taken by the High Court with regard to the interpretation of the definition of the term "Wages" as it then stood as also of Sections 40 and 41 of the Act and the provisions contained in the I Schedule cannot be said to be in any manner erroneous. We agree with the view expressed by the High Court in the judgment under appeal with regard to the interpretation of the aforesaid provisions of the Act and find no merit in these appeals. Both the appeals are accordingly dismissed.

Though there is no independent discussion of the matter by the Supreme Court, their Lordships have approved the interpretation given to Section 2(22) of the E.S.I. Act by the Bombay High Court and we are bound by the same under Article 141 of the Constitution of India. Though the view taken in E.S.I. Corporation v. Raj Cashew Company 1991 (1) KLT 847 and in E.S.I. Corporation v. New Asarwa Mfg. Co. Ltd. 1984 F.J.R. 367 (Guj.), is also a plausible view, in the light of the aforesaid decision of the Supreme Court which this Court is bound to follow, it has to be held that the wages paid under the Holidays Act is not "remuneration paid or payable" and will not form part of the wages as defined in the E.S.I Act.

14. Counsel for the corporation relied on the decision of the Bombay High Court in Nutan Mills Vs. Employees State Insurance Corporation, , wherein the question was as to whether the lay off compensation will become part of the wages under the E.S.I. Act. No doubt, in considering the question as to whether any amount paid is wages or not, Chagla, C.J., observed as follows:

If he was prepared to render services it was no fault of his if his employer failed to give him work to do. The test was not that the employer should give work to the employee or that the employee actually should be rendering services, but the test was that the employee must be under an obligation to serve his master and consequently the employer must be under an obligation to pay wages.

Relying on Section 4A of the Holidays Act, Counsel for the corporation contended

that it is not as if the employee is not bound to work on a holiday under all circumstances, but if the employer by notice in writing require an employee to work on a holiday, he is bound to work and accordingly the wages paid for that day will become part of the wages. We find it difficult to agree with this contention. The observations by the Bombay High Court were made in an entirely different context. It is to be further noted that u/s 5 every employee shall be paid wages for each of the holidays allowed u/s 3. Even if a worker is asked to work on a holiday by virtue of Section 4A, Section 5(2) provides that he shall be entitled to twice the wages for that day and further that he must be granted another substituted holiday on any other day. These provisions in the Holidays Act make it different from a period under lay off with which the Bombay High Court was concerned. Under the provisions of the Holidays Act, every employee is entitled to a holiday as of right on the days declared under the Act and even in certain emergencies when he is made to work he is bound to be paid twice the wages as also a substituted holiday and as such the Bombay decision relied on by Counsel for the corporation cannot be of any assistance in coming to the conclusion that such wages are also wages under the E.S.I. Act. There is no obligation for the employee to work on holidays declared under the Holidays Act as is clear from Section 8 of the Act which provides for a penalty only on an employer contravening any of the provisions of Section 3 or Section 5. Moreover, in the same judgment, considering the very same section, i.e., Section 2(22) of the E.S.I. Act, it was observed:

But under this definition it is clear that if in fact no services are rendered and if in fact there is no obligation upon the employee to render services, then whatever else the payment by the employer may be, it would not be remuneration.

The above" passage also supports the view which we have taken.

15. Condition No. 3 - Counsel for the corporation contended that even a statutory liability to pay wages will form part of wages under the contract of employment. On the other hand, Counsel for the Respondent-applicant contended that the payment of wages for the holidays u/s 5 of the Act is notwithstanding anything to the contrary and accordingly it is outside and dehors the contract and can never be a payment under the terms of the contract of employment. In support of his contention Counsel for the corporation relied on the decision of the Supreme Court in , Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation, , Regional Director, Employees' State Insurance Corporation and Another Vs. Bata Shoe Company (P) Ltd., , and Birla Cotton Spinning and Weaving Mills v. E.S.I. Corporation, New Delhi 1979 Lab. I.C. 527. We have already taken the view that the wages in question is not remuneration and accordingly it is not necessary to decide as to whether the wages paid are payments made under the terms of the contract of employment and we leave open that question.

16. The decision in Harihar Polyfibres Vs. Regional Director, ESI Corporation, can have no application to the facts of these cases as it was a case" coming within

the third part of the definition, namely additional remuneration payable at intervals not exceeding two months. So also the decisions of the Karnataka High Court in *N.G.E.F. Ltd. v. Deputy Regional Director, E.S.I. Corporation, Bangalore* 1980 Lab. I.C. 431 and Andhra Pradesh High Court in *Employees' State Insurance Corporation, Hyderabad Vs. Andhra Pradesh Paper Mills Ltd., Rajahmundry*, were concerning the third part of the definition of "wages".

17. In view of what is stated above, in the light of the decision of the Supreme Court in *Assistant Regional Director, Nagpur v. Model Mills Nagpur Ltd.* AIR 1991 S.C. 237, we hold that the wages paid for holidays under the Holidays Act will not form part of wages as defined in Section 2(22) of the E.S.I. Act, 1948. We further hold that the decision in *E.S.I. Corporation v. Raj Cashew Company* 1991 (1) KLT 847 was not correctly decided and accordingly we overrule the same. These appeals are dismissed, but, in the circumstances, without any order as to costs.