

(1978) 10 MAD CK 0015
In the Madras High Court

Regional Director, ESIC

APPELLANT

Vs

M.M. Rubber Co. (P) Limited

RESPONDENT

Date of Decision : 06-10-1978

Acts Referred:

Employees State Insurance Act, 1948 — Section 2, 38, 75
Industrial Disputes Act, 1947 — Section 12

Citation : (1979) ILR (Mad) 93 : (1979) 2 LLJ 81

Hon'ble Judges : Sethuraman, J

Bench : Single Bench

Judgement

Sethuraman, J.—This is an appeal against the judgment in E.I.O.P. No. 14 of 1974, dated 26.11.1975 of the Employees' State Insurance

Court, Madras. The judgment came to be delivered on a petition u/s 75 of the Employees' State Insurance Act, praying for a declaration that the

production bonus paid to the employees in accordance with the provisions of a settlement dated 13.4.1970, was not wages as defined u/s 2(22) of

the Employees' State Insurance Act, 1948. The respondent is a factory in Madras where, foam rubber articles are manufactured with the help of

150 workmen. The employees are insured u/s 38 of the Act. Contributions as contemplated by the provisions of the Act were recovered from the

wages of all the insured persons and the amount so recovered along with the employer's contribution was remitted to the Corporation by the

respondent. On 13.4.1970, there was a memorandum of settlement u/s 12(3) of the Industrial Disputes Act, 1947. Under the said settlement,

production bonus became payable to the workers. The respondent was deducting the contribution even on the amount paid as production bonus

treating it as wages, and was also making its own contribution on that basis up

to July, 1973. On 17.8.1973 the respondent wrote to the

Employees" State Insurance Corporation stating that the bonus paid to the workmen would be excluded for the purpose of computing the

contribution payable under the Act. As the Corporation did not accept the interpretation and insisted upon the respondent paying the contribution

the petition was filed u/s 75 of the Act.

2. Before the Employees" State Insurance Court, the contention taken on behalf of the Regional Director, Employees" State Insurance

Corporation, was that the memorandum of settlement was only a revised bonus scheme which was already in force, that it was a bilateral act, on

the part of the employer and the employees and that the production bonus had, therefore, to be included in the ""wages"" as defined under the Act

for the purpose of computing the contribution payable by the employees. The Insurance Court went into the question whether the amount paid to

the employees as production bonus in accordance with the settlement dated 13.4.1970, fell within the term "" wages "" u/s 2(22) and whether the

Corporation was justified in demanding the contribution in respect of production bonus. After considering the respective contentions, the Court

below held that the production bonus had not to be taken into consideration in calculating the employees" contribution or the employer"s

contribution under the Act. The Regional Director has now filed the present appeal contending that the construction placed u/s 2(22) of the Act by

the Court below is wrong.

3. The only question that arises for consideration is whether the production bonus comes within the scope of Section 2(22) of the Act. Before

proceeding to consider the scope of the said provision, reference may now be made to a few of the terms of the memorandum of settlement

entered into u/s 12(3) of the Industrial Disputes Act, 1947, before the Labour Officer on 13.4.1970. The employees placed a charter of demands

by their letter dated 21.11.1968 addressed to the company. The charter of demand not having been met, the dispute was referred to the Labour

Officer II, Madras, and in the course of the said reference a settlement came to be entered into. Annexure I to the agreement deals with the

production bonus scheme. The bonus scheme is based on the total number of "cures" produced free of defects over the minimum ""cures"" fixed for

each box. The minimum "cure" fixed for each "box" would not earn any production bonus, but when the production exceeded the minimum cures, production bonus was payable. If production was less than the minimum prescribed for any reason whatsoever, no production bonus would be payable. Production scheduling was entirely at the discretion of the management. The production schedules, the number and the choice and the combination and the arrangement or moulds to be fed into the vulcanisers were all entirely at the discretion of the management. The question as to whether the amount paid under the above scheme can be called "wages" falling within the scope of Section 2(22) of the Employees' State Insurance Act has now to be gone into.

4. Section 2(22) of the Act which is the only relevant provision to be noticed runs as follows-

2. In this Act, unless there is anything repugnant in the subject or context- (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, 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; or

(d) any gratuity payable on discharge;

It may be seen that the main part of Section 2(22) of the Act forms into three parts : (i) all remuneration paid or payable in cash to the employee, if

the terms of the contract of employment, express or implied, were fulfilled; (ii) any payment to an employee in respect of any period of authorised

leave, lock-out, strike, which is not illegal or lay-off and (iii) other additional remuneration, if any, paid at the intervals not exceeding two months.

There are certain payments set out in (a) to (d) above which are excluded from the concept of wages. It is unnecessary to go into the provisions

relating to the exclusion, as in the present case it is not the contention of either

side that it falls within Clauses (a) to (d) of the provision. Even with reference to the main part of Section 2(22) of the Act, the present case does not fall within the scope of the second part of the provision. The question has thus to be considered in the light of the language that has been earlier described in items (i) and (iii).

5. The Supreme Court in *Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation*, had to deal with a somewhat

similar question. In that case, the workers were given what was called "inam". The payment of inam was dependent upon the employees exceeding

the target of output appropriately applicable to him. Though the right to receive the inam dependent on the efficient working of the employees,

there was a clause in the agreement which laid down that if the target were not exceeded due to lack of orders, lack of materials, break-down of

machinery, lack of labour, strike, etc., then no inam would be awarded. If the employer did not receive sufficient orders for the sale of the output

or there was shortage of raw materials or breakdown of machinery as a result of which it became impossible for the employee to reach the

minimum target fixed, there was no liability on the employer to pay inam. It was also made clear to the workmen in that scheme that the payment of

reward or inam were in no way connected with or part of wages. The Calcutta High Court in the appeal before it, held that the inam paid under the

scheme was covered by the word "remuneration" used in the definition of "wages" and before the Supreme Court the counsel appearing for the

company did not challenge the correctness of the view. The only contention that was urged was that the payment had not become a term of

contract of employment with the employees. It was held that the terms on which the inam was payable were inconsistent with the scheme having

become a part of the contract of employment. It was pointed out by the Supreme Court that the company had reserved the right to withdraw the

scheme altogether without assigning any reasons and that the payment of the inam was dependent on various other factors. With reference to the

terms of that agreement at p. 417 of AIR : at p. 368 of L.I.C it was pointed out-

In fact, in this case, there was no question of offer by the appellant (company) and acceptance by the employees as a condition of their service.

The employees were already working in accordance with the terms of their

contract of employment when the employer decided to make this extra payment if the employees did successfully what they were already expected to do under that contract. It cannot, therefore, be held that this payment of inam ever became even an implied term of the contract of employment of the employees of the appellant.

The scheme was considered to be "a onesided promise". Therefore, the decision of the High Court holding that the amount came within the scope of Section 2(22) was set aside. It is also clear from the judgment of the Supreme Court that it dealt with only the first part of the definition of the term ""wages"" as analysed above. The real test employed by the Supreme Court was whether the payment of inam was enforceable as one of the terms of the contract of employment, whether implied or express. As it was held that the payment of inam did not even become an implied term of the contract of employment, the payment in that case wholly fell outside the scope of Section 2(22). I do not find that this decision of the Supreme Court covers the facts here. That decision has to be understood in the light of the terms of the agreement.

6. My attention was drawn to the decision of the Calcutta High Court in *Bengal Potteries Ltd, v. E.S.I. Corporation* 47 F.J.R. 428 : (1973) L.I.C.

1328. In that case also, a provision for payment of incentive bonus came to be considered. In the scheme it was agreed to between the parties that

it was not paid as part of the terms of employment to any workman. Though such a provision may not be conclusive on the question whether the

payment forms part of the terms of the employment or not, it was certainly an indication which the Court was entitled to and did take into

consideration. With reference to the terms of this agreement it was held that it fell within the scope of the decision of the Supreme Court

considered above and that the amount did not form part of wages. Similarly in *Employees' State Insurance Corporation Bangalore v. Mysore*

Kirloskar Ltd. 47 F.J.R. 434 : (1974) L.I.C. 1083 , there was an incentive payment made voluntarily by an employer and he had a right to

withdraw or revise the scheme. It was held following the decision of the Supreme Court and also the Calcutta High Court considered the above

that it did not form part of the wages. It can be seen that these cases also depended on the nature of the contract between the employer and the

employees.

7. The Kerala High Court in *Carborandum Universal v. E.S.I. Corporation* 1976 1 L.L.J. 17, dealt with a similar problem. In that case also, there

was a settlement between the parties. The employer had no right to withdraw the scheme without the consent of the other party or without

reference to the proceedings warranted by law. The workmen would not earn the incentive bonus if the performance fell below the prescribed

form, but once their performance exceeded the norm, they got the remuneration as a matter of right. On these facts, it was held that the amount

paid fall within the term "wages" as defined in the Act. A Full Bench of the Andhra Pradesh High Court in *Employees' State Insurance*

Corporation, Hyderabad Vs. Andhra Pradesh Paper Mills Ltd., Rajahmundry, considered the includibility of an incentive bonus or production

bonus in the concept of wages. There were two decisions of the said High Court which apparently appeared to be inconsistent and hence the

reference to the Full Bench. In *Employees' State Insurance Corporation v. Vazir Sultan Tobacco Co. Ltd.* 1972 1 L.L.J. 602 : (1973) L.I.C. 523

, the employees were eligible for an annual bonus provided the maximum target of 10 hours was reached. Bonus was however paid in advance but

was finally adjusted. It was held that the bonus paid by the company to its employees did not fall within the scope of Section 2(22) of the Act. In

another decision of the same High Court in *Employees' State Insurance Corporation v. Hyderabad Asbestos Cement Products Ltd.* 49 F.J.R.

365 : (1977) L.I.C. 313, the management introduced a scheme to pay some incentives to the workmen. The bonus was payable every month if the

production exceeded a minimum target. There was no clause enabling the management to withdraw or modify the scheme at its discretion. It was

on these facts held that the amount paid came within the scope of "wages". After noticing these two decisions and several others, the Full Bench

held that the incentive bonus paid by the company constituted "wages" within the scope of the Act, The principle of the decision was set out as

follows at p. 29 of L.I.C.-

The result of the above discussion is that in order to fit into the definition of "wages" so far as the incentive bonus or productivity bonus scheme is

concerned, the terms of the scheme must be examined and it must be

ascertained whether the bonus paid under the scheme is part of the terms of the contract of employment as was the case in Hyderabad Asbestos Cement Products Ltd. case, (1976) 49 F.J.R. 365 : (1977) L.T.C. 313 , before Chinappa Reddy and Punayya, JJ. and before the Kerala High Court in Carborandum Universal Ltd., case (supra) and as is not the case before us, or, whether it is an additional remuneration within the meaning of the third part of Section 2(22) of the Act. If it does not fall either in the category of Part I or Part III, then only it can be said not to be wages and hence only the contribution will not be payable on the amount of bonus paid by the employer to the employees in such a scheme. If as happened in Braithwaite & Co.'s case 1968 I L.L.C. 550 : (1968) L.I.C. 364 or in The Regional Director, Employees' State Insurance Corporation Vs. The Vazir Sultan Tobacco Co. Ltd., ; (Andh Pra), the bonus is paid at the discretion of the employer and can be withdrawn at any time without implementing it, then it would not be wages within Section 2(22).

8. The real principle applicable can be set out as follows:

The question as to whether a particular amount paid constitutes "wages" or not has to be decided with reference to the particular facts of each case. In order to fall within the scope of the Part I of the definition, it must be remuneration payable to an employee under the terms of a contract of employment, express or implied. The amount payable must be capable of being demanded as a matter of right. The employer should not be in a position to withdraw from the agreement at his discretion. There is nothing preventing an agreement between the employer and the employee being traced to more than one document.

9. Even though the original contract employment between the parties did not provide for the payment of productivity or incentive bonus in the present case, the amount became payable as a result of a memorandum of settlement entered into before the Labour Officer. It has thus all the element of contract of employment between the employer and the employee. This is not a case where the employer can withdraw from the agreement at his will. Thus the payment falls within the first part of the provision. In this view, it is unnecessary to see whether the payment falls within the third part of the provision.

10. Mr. M.R. Narayanaswami, the learned Counsel for the respondent, drew my

attention to the fact that the production scheduling was entirely at the discretion of the management. He pointed out that if the production is so scheduled as not to make the labour eligible for the payment, then it would be a case of unilateral withdrawal of the payment of such a bonus. It is not possible to accept this submission. Even in the case of such rescheduling of production so long as the employee is in a position to earn the bonus, the amount will fall within the scope of Section 2(22) of the Act. If no bonus is paid, then there was no question of any contribution and therefore no need to consider any amount as falling within Section 2(22). He referred also to the fact that the production bonus was not payable where the shortfall in production was due to circumstances wholly traceable to the employer. Even such a provision does not have the effect of making it a unilateral offer of payment of incentive bonus which could be withdrawn at the discretion of the employer. So long as production has increased beyond the minimum fixed and so long as the employee has thus become entitled to the bonus in accordance with the terms of the agreement, then the amount paid by him will fall within the scope of Section 2(22) and would thus be "wages". The contention to the contrary is without force.

11. Two unreported decisions of N.S. Ramaswami, J. were brought to my notice. In C.M.A. No. 361 of 1974--Employees" State Insurance Corporation v. English Electric Co. of India Ltd., Pallavaram--a decision rendered on 7.7.1975 (Mad.) the question was whether good attendance bonus came within the scope of the definition of "wages" u/s 2(22). It was held that the bonus payable was part of the terms of the agreement between the management and the employees and it is not an ex gratia payment. This case supports the case of the appellant, In C.M.A. No. 288 of 1973--Regional Director of Employees" State Insurance Corporation v. Foundry and Engineering Service--a judgment dated 28.8.1975 (Mad.) the employer and the employee entered into an agreement under which an incentive bonus was to be paid to the employee under certain conditions. It was however specifically provided that it was open to the employer to withhold the said incentive bonus at his discretion without assigning any reasons. This case therefore fell within the scope of the case reported in Braithwaite Co. Ltd. v. Employees" State Insurance Corporation (supra). This decision is not of any assistance to the respondent as

this is a case of a right to unilaterally withdraw from the scheme at the instance of the employer. The result is the appeal is allowed. There will be no order as to costs.