
(2002) 08 KL CK 0033
In the High Court Of Kerala
Case No : M.F.A. No. 709 of 1995

Regl. Director, E.S.I. Corpn.

APPELLANT

Vs

The Aluminium Industries Ltd.

RESPONDENT

Date of Decision : 02-08-2002

Acts Referred:

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

Citation : (2003) 96 FLR 512 : (2003) 1 LLJ 84

Hon'ble Judges : P.R. Raman, J

Bench : Single Bench

Advocate : P. Sankarankutty Nair, for the Appellant; Antony Dominic, for the Respondent

Final Decision : Partly Allowed

Judgement

P.R. Raman, J.—This appeal is filed by the Employees' State Insurance Corporation challenging the order passed by the E.I. Court, Kollam, in I.C. No. 52 of 1992 dated 17.1.1995.

2. The respondent is a covered establishment under the ESI Act. In this appeal, the question that arises for consideration is as to whether overtime allowance paid to the workers, omitted wages and the amount paid towards canteen allowances are wages within the meaning of the ESI Act?

Omitted Wages

3. The Court below found that as per Ext. B1 inspection report no details of the amount regarding "omitted wages" is given. DW1 was examined in this case to prove Ext. B1 report. Though he has verified the register he has not recorded any details of this item and he has not taken any extract of the record verified by him. In such circumstances, the court below found that it is not known as to how this amount was arrived at and what are the items for which the amount was spent. According to the respondent, they have paid contribution on wages admittedly payable by them. Hence the question arises for consideration is as to

whether what is claimed to be "omitted wages" really partake the character of wages, for which details should be furnished as to how this amount is spent and under what head without which it cannot be determined as to whether it represent wages at all. In the absence of any answer on this question, the claim of the Corporation cannot be found sustainable. I cannot take a different view in this matter in the absence of any evidence and the finding is only to be confirmed.

Overtime allowance

4. The court below found that overtime payment depends upon the exigencies of the administration as well as the willingness of the employee to work overtime. After referring to some of the decisions of the other High Courts, the Tribunal found that overtime allowance paid to the workmen is not a term of the contract and the same need not be included for determining contribution due. At the same time, the tribunal also took notice of some of the divergent views expressed by other High Courts. But according to the Tribunal, in the light of the law laid down by the Apex Court and majority of the High Courts, the decision of the Andhra Pradesh High Court in *Hyderabad Allwyn Metal Works Ltd. v. E.S.I. Corpn.* 1981 Lab IC 457 is no longer a good law and in that view, it held that overtime allowance is not wages attracting contribution. It is the correctness of this decision which is challenged in this appeal.

5. While disposing of this item, the Tribunal has referred to a decision rendered by the Supreme Court in *Branthate & Co. India Ltd. v. E.S.I. Corpn.* 68 II LLJ 550 and that is the only decision of the Apex Court referred to in the judgment while dealing with the question. Therefore, the view taken by the tribunal that the Apex Court has taken a view different from that of the Andhra Pradesh decision must necessarily be based on its reference to this decision of the Apex Court. But in *M/s. Branthate & Co.* "s case 68 (II) LLJ 550 the question that arose for consideration was whether under the scheme initiated by the management to pay certain incentives if production target exceeded would come within the definition of wages u/s 2(22) of the Act. The Apex Court found that it will not come within the ambit of Section 2(22) of the Act. The incentive payable to a workman on higher production cannot be compared with wages paid for overtime work. In *Rajakamal Transport and Another Vs. Employees" State Insurance Corporation, Hyderabad*, it was held that when a workman is called upon to do work overtime and if he does so, he has to be paid overtime wages for the additional work done by him over and above the normal hours. A Division Bench of this Court in *Vijayamohini Mills v. E.S.I. Corpn.* (1998 (1) KLT SN 89 considered the question as to whether overtime wages would be wages within the meaning of Section 2(22) of the Act. This Court referred to a decision of the Apex Court in *C.A. 2777/1980* wherein it was held that overtime wages would be wages within the meaning of Section 2(22) of the Act. Thus, whatever difference of opinion existed was resolved by the Apex Court decision referred to above. Following the said decision, a Division Bench of this Court held that overtime

wages would be wages u/s 2(22) of the ESI Act. Therefore, it cannot now be contended that overtime wages is not wages within the meaning of Section 2(22) of the Act so as to attract contribution. Accordingly the decision of the Court below holding that overtime wages will not attract contribution has to be set aside and I declare that overtime wages is "wages" on which contribution is payable by the employer.

Payment made towards loading and unloading charges

6. The Court below found that an amount of Rs. 1,240/- was disbursed as per Ext. A2 under the head "loading and unloading charges" for the period 3/90 to 3/91. But details were not furnished in Ext. B1 report regarding the employees who had done such work. The case of the respondent was that normally loading and unloading work is done by the regular workers and occasionally they used to engage workers from the locality for loading panels once in two months. According to the Tribunal, it has come out in evidence that such workers are deputed by local trade unions and the payments are effected to the Convenor of those unions. However, the Tribunal considered that this cannot be compared with a case of payment made to "attimari" employees and therefore the decision of this Court in ESI Corpn. v. Premier Timber Supplies 1991 (2) KLT 554 has no application. But in the absence of any details, the Corporation was given liberty to proceed further in the matter to collect necessary details as to who are the persons for whom wages are paid and for want of details it was held that the liability to pay contribution cannot be decided now. Thus no decision is rendered as to whether the amount paid under the head "loading and unloading charges" would be wages within the meaning of the Act.

7. Learned counsel for the appellant however relied on the decision reported in Rajakamal Transport and Another Vs. Employees' State Insurance Corporation, Hyderabad, to contend that even casual employees engaged for loading and unloading work and amounts paid to them would be wages within the meaning of the Act. The appellants in that case were engaged in the business of transportation of goods entrusted to them as carriers and loading and unloading work was part of the appellants' establishment. This loading and unloading work was done through the hamalis under the control of the appellant. It was held that what is important is that the hamalis work in connection with the work of the establishment and the loading and unloading of the work is done at the appellants' directions and they control the activities of loading and unloading. Therefore, the relevant test for determination is to find out whether the work was in connection with the work of the establishment and the mode of payment made have no relevance.

8. In this case, there is no dispute that loading and unloading was part of the establishment. The respondent contended that normally, the work was being done by their own regular employees and occasionally, they were engaging casual employees from outside. Therefore, whatever loading and unloading charges paid must be either to this regular employees or to outsiders who are

thus employed for the work of loading and unloading. Since the work was done inside the establishment and incidental to the work of the appellant, following the decision of the Supreme Court and the High Court, wages paid towards loading and unloading will be wages within the meaning of the Act attracting contribution.

Canteen allowance

9. According to the appellant, the amount is paid directly in cash to the employees and hence it forms wages as defined u/s 2(22) of the Act. It was found that admittedly there is no canteen in the establishment and so in lieu of the canteen facility the applicant had agreed to pay Rs. 100/- to each workman as canteen subsidy. It is not disputed that as per the agreement the applicant is at liberty to withdraw this facility when canteen facility is provided. Since it was not established by the Corporation that canteen subsidy is a payment in fulfilment of the contract of employment, it was held that canteen allowance do not form part of wages as defined in the Act. Reference is also made to the decision reported in *Malabar Food Products Ltd. v. ESI Corpn.* 1991 (2) KLT 434 wherein the question considered was whether meals allowance paid to the employees is one that falls under Clause (c) of Section 2(22) of the Act.

10. The relevant question that arises for consideration in this case is as to whether amounts are paid to workmen as per the terms of the contract i.e., by virtue of the agreement between the employer and the employees and such payment falls within the term "wages"? So long as any amount is paid under the terms of the contract it cannot be contended that it will not fall under the main definition of the term "wages" of the Act. There is an excluded category and the question is whether the amount paid is for defraying any special expenditure entailed on the employee having due regard to the work? In this case, it is not disputed that there is no canteen facility made available though the employer is bound to maintain a canteen as per the provisions of the Factories Act. Even if there was a canteen there is no contention that employees should be given free food from the canteen. But the argument is that employees will be given food on a subsidised rate. Therefore, whoever runs the canteen whether it is by a society or an independent contractor, will be paid a lumpsum amount by way of subsidy so as to enable him to give food at subsidised rate. Therefore, what is denied to the employee by not running the canteen is the non supply of food items at subsidised rate. In order to make good the loss a fixed amount is paid to the employees when admittedly there is no canteen facility. Therefore, what is paid is not really an allowance towards meals but only a distribution of the subsidy which the employer is bound to give as per the contract and it is divided and a notional amount is fixed so that the employee may get food from outside but the benefit of getting it at a subsidised rate is met by paying this subsidy. In such circumstances, and going by the decision of this Court, it cannot be said that it partakes the character of wages. Accordingly, I find that contribution is not leviable on the amount paid to the employees by way of canteen subsidy and admittedly, there is no canteen facility available. In such circumstances, the

finding of the court below on this ground is only to be sustained.

In the result, the appeal is allowed in part. In the circumstances, there will be no order as to costs.