
(1990) 10 MAD CK 0009
In the Madras High Court
Case No : C.M.A. No. 345 of 1982

Simpson and Company Ltd.	Vs	APPELLANT
Employees State Insurance Corporation		RESPONDENT

Date of Decision : 24-10-1990

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(22), 75, 77

Citation : (1990) 10 MAD CK 0009

Hon'ble Judges : Thanikkachalam, J

Bench : Single Bench

Advocate : S. Ramasubramaniam, for the Appellant; S.M. Ali Mohammed, for the Respondent

Judgement

Thanikkachalam, J.—This civil miscellaneous appeal is directed against the order passed by the Additional City Civil Judge, Madras in

E.I.O.P. No. 15 of 1979 dated 2.5.1980. The petitioner is the appellant herein. A petition was filed u/s 75 of the Act 34 of 1948 (hereinafter referred to as the Act)

In the petition it was stated as under:

The petitioner/company introduced an incentive scheme in June, 1961 in order to maintain good industrial relation between the employees and the management. The payment under the incentive schemes is payable only

(a) If the targeted production is fixed by the management for the month beyond the norm level.

(b) If the workmen effectively reach end-product at the level as fixed by the management over and above norm level.

Therefore, there is no guarantee that irrespective of the production level, the workmen will be paid incentive under the group incentive scheme and

the payment is directly linked to the level of the output reached by the workmen under the incentive scheme. The payment of incentive under the group incentive scheme is not a condition of service and such payment is directly linked to productive effort of the workmen. Both the parties to the scheme have understood that the scheme may be continued or withdrawn at the sole direction of the management without the consent of the workmen concerned.

The incentive payment under the scheme will not attract the definition of "wages" u/s 2 (22) of the Act. The incentive amount paid to their workmen is not "wages". However, by way of abundant caution and without prejudice to the management's contention the incentive is not wages, the petitioners/company has been treating the incentive as "wages" under protest from October, 1976, and contribution both employees" and employer"s is being made.

2. The incentive bonus paid to the petitioner"s employees would not be wages within the meaning of Section 2(22) of the E.S.I. Act and the petitioner cannot be compelled to pay contribution on the same. Under the incentive scheme, incentive was earned at the extra work done as and by way of reward and as no worker who did less than the stipulated workload was entitled to the incentive, the same paid under the scheme cannot be said to be wages as defined u/s 2(22) of the Employees State Insurance Act. Since the payment is entirely at the discretion of the management, it would not constitute "wages" within the meaning of the Act. Incentive bonus is not a regular or invariable part of the remuneration claimed by the employee and therefore it would not constitute "wages". It was therefore pleaded that a declaration may be given to the effect that the incentive bonus payable by the petitioner to its employees would not amount to wages as contemplated u/s 2(22) of the Employees State Insurance Act.

3. In the counter statement filed by the respondent it was submitted as under:-

The petition as framed is not maintainable since the cause of action for filing the petition was not stated in the petition for the purpose of determining the limitation u/s 77 of the Employees State Insurance Act, and the statement of cause of action is necessary. Further, when the petitioner/company pays the demanded contributions either under protest or otherwise it is deemed

to have (sic) waived the raising the dispute u/s 75 of the Act.

4. The petitioner has to prove by records the contract of employment. All the employees are covered under the Act. The question is whether the

incentive payments paid along with salary includes wages or not so as to attract the contributions payable on these incentive payments. It is not said

that the contributions should be fixed. The weekly contributions payable in a contribution period has to be worked out as laid down in schedule I

of the E.S.I. Act 1948. Therefore the abovesaid provisions of Schedule I would go show that the weekly contributions in respect of each

contribution period may vary depending upon the average daily wages in respect of the first wage period ending in that contribution period and has

to be worked out for each employee for each contribution period separately. In such circumstances the distinction drawn between the workmen

and administrative management employees are not well founded. Since the incentive payments are made permanently and regularly, it attracts the

coverage under para III of the Section 2(22).

5. It is not correct to say that the management has got full right to decide about incentive payments and as it is seen when the level of production

exceeds the target the payment is automatic and compulsory. The payment therefore becomes a condition of service. The contributions can be

worked out easily as per the schedule I of the Act. The payments made are wages and as such, the statutory obligation cannot be waived by the

union or its representatives. At no time, the scheme is altogether withdrawn. The scheme is not working under the unilateral act but it is a binding

contract under the Industrial Disputes Act by the management and union and bilateral and it has got the periods of permanency.

6. The demand for contributions are perfectly legal. When the incentive payments (Paid) are made at intervals not exceeding two months than it

falls squarely under the definition wages. It was therefore prayed that the petition may be dismissed.

7. The petitioner examined the Assistant Industrial Relation Officer as a witness. Reliance was placed on the decisions reported in Regional

Director, ESIC Vs. M.M. Rubber Co. (P) Limited, Considering the facts arising in this case and after hearing both sides, the lower court came to

the conclusion that the incentive bonus payable to the employees is part of

wages as defined in Section 2(22) of Act 34 of 1948, and therefore, the petitioner is liable to pay the demand made by the respondent. Accordingly, the lower court dismissed the petition with costs.

8. It is against this order, the present Civil Miscellaneous Appeal has been preferred before this court.

9. The learned counsel appearing for the appellant submitted that the incentive bonus payable by the appellant to its employees is not wages as

contemplated u/s 2(22) of the Act, 34 of 1948. The learned counsel submitted that in the scheme Exhibit P-10 there is no clause compelling the

petitioner to get concurrence from the employees to withdraw any part or whole of the scheme. The words occurring in clause 2 of part III of

Exhibit P-10 viz., in consultation with the union does not mean that the scheme is amenable to modification only with the concurrence of the union.

The scheme is silent with regard to the withdrawal. There is also no clause in the scheme to denote that it is a bilateral agreement in the matter of

withdrawing the scheme. In the absence of any such averments in the scheme for withdrawal, the intention of the parties assumes importance in the

matter of interpreting the true meaning of the clauses contained in the scheme. It was submitted that in the year 1968 the Government itself took the

stand in the communication addressed to the petitioner incentive payment is not wages and all of a sudden in the year 1976 the Government came

forward stating that the incentive payment is wages. It was submitted that the lower court has not considered the various documents filed showing

that the respondent itself accepted the interpretation that the incentive payment is not wages. According to the learned counsel for the appellant

each case depends upon its own facts and the prior conduct of the respondent herein would clearly establish that the incentive payment cannot

come under the purview of wages as contemplated u/s 2(22) of the Act, 34 of 1948. The learned counsel further pointed out that it is not correct

on the part of the respondent herein to allege that there is collusion between the management and the union and any finding contra to this would be

against the facts appearing in this case. The learned counsel for the appellant placed reliance upon various letters written by the respondent in order

to support his case that incentive payment is not wages.

10. On the other hand, the learned counsel appearing for the respondent

submitted that in view of clause 12 of part III of Exhibit P-10 wherein it is stated that the modification of the scheme can be made in consultation with the union would clearly show that the scheme cannot be withdrawn or modified without the concurrence of the Union and hence the scheme is a bilateral agreement and it is not unilateral as alleged. The learned counsel for the respondent further submitted that in order to understand clause 12 of Exhibit P-10 we need not depend upon the various correspondences passed between the parties and the interpretation given by them. In order to support his contention, the learned counsel appearing for the respondent placed reliance on the decisions reported in Harihar Polyfibres Vs. Regional Director, ESI Corporation, and in Regional Director ESIC, Madras v. M.M. Rubber Company and (P) Ltd. 1979 II LJ 81. In view of what is stated above, the learned counsel for the respondent, submitted that the employer cannot withdraw the scheme unilaterally without the concurrence of the union and therefore the incentive payment would come within the definition of Section 2(22) of the Act, 34 of 1948. Accordingly, the learned counsel for the respondent submitted that no interference with regard to the order passed by the lower court is called for.

11. I have heard the learned counsel appearing on both sides. The question that arises for consideration in this appeal is whether the incentive

bonus payable by the petitioner company to its employees under the Scheme Ex. P-10 is wages as contemplated u/s 2(22) of Act 34 of 1948.

Clause 12 of Part III of Ex.P-10 reads that ""the company reserves the right in any given circumstances to suitably modify the scheme in

consultation with the union."" So also in clause 7, it is stated that the target figure may also be adjusted by the management in consultation with the

union"". On a plain reading of clause 12 and clause 7 of the scheme would go to show that so far as the modifications are concerned, they can be

effected by the management in consultation with the union only and not unilaterally. It remains to be seen that so far as the question of withdrawal

or abandonment of scheme is concerned, in Ex. P-10 there is no such clause whatever entitling the management to do so unilaterally. This was

accepted by P.W.1 when he was in the witness box. The scheme itself laid down that unless the targeted production is exceeded above the

prescribed production level, no incentive bonus would be payable. There is no

evidence on record to show that the petitioner ever attempted to withdraw the scheme altogether without reference to the employees or their union. The appellant's case is that the understanding between the management and the union was that the scheme is always liable to be withdrawn by the management unilaterally without reference to the union. In the absence of any clause in the scheme, in the matter of withdrawal of the scheme either unilaterally or bilaterally, I am unable to understand the submissions made by the appellant on this aspect. We cannot also read something which is not stated in the scheme itself.

12. The learned counsel appearing for the appellant heavily relied upon the prior conduct of the respondent in order to support his case. In this

respect, he drew my attention to various letters passed between the parties. One such letter is dated 25.3.1971 from the Manager to the Minister

for Labour, Government of Tamil Nadu, wherein it is stated as under:

The Regional Director, Employees' State Insurance Corporation, Madras by his letter dated 11.2.1971 addressed to M/s. Simpson & Company

Limited, Madras (copy enclosed) has advised the Management to deduct the E.S.I. Contribution from out of the incentive bonus payable to the

workers, as, in their, opinion, wages as defined u/s 2(22) of the E.S.I. Act, covers such incentive scheme.

On a prior occasion, viz., on the 31st of July 1968 on a reference made by the Employer, the Regional Director advised the Management that the

incentive earnings under the incentive scheme operated by the Management will not form part of wages u/s 2(22) of the Act and therefore no

contributions are payable in respect of them. It is, therefore, not known as to what made the E.S.I corporation to change their decision now and

call upon the Employers and the employees to pay the contributions to E.S.I on the earnings based upon the incentive scheme.

Therefore a request was made to the Minister to intervene and see that the employer does not deduct E.S.I. contribution from out of the incentive

payment payable to the workers and thus come forward to avert an impending strike. There is another letter written by the Employees State

Insurance Corporation dated 17.4.1971 to the Industrial Relations Officer of the Petitioner-company, wherein it is stated as under:

Kindly refer to the various correspondences exchanged by Simpson & Company

and this office on treating the incentive bonus paid to the employees as "wages" and the discussions you had with me and Regional Director when you contended that Clause VI provides that the management has the right to withdraw or modify to suit their trade requirements. I have to request you to let this office know whether the incentive bonus provided by the Company can be withdrawn by the employer unilaterally without consulting the Unions concerned and without assigning any reason. If it is so, you may kindly forward an unequivocal clarification to that effect to enable us to consider your plea further that your incentive scheme is analogous to the one with M/s. Braithwait & Co., Calcutta which was a matter of judicial decision by the Supreme Court.

There is also another letter written by the union dated 20.4.1971 to the management. In the said letter it is stated as under:

I am in receipt of your letter D.O. No. 51-3142-74 ESC dated 17th April, 1971. I wish to state that the Employer reserves the right to revise,

modify or withdraw the incentive scheme at his discretion at any time without consulting our Union and without assigning any reason therefor. In the

circumstances, I am of the opinion that the Incentive scheme operated by the Simpson Group of Companies cannot within the meaning of "wages"

under the E.S.I. Act for the purpose of contributions.

The Joint Secretary to the Government also wrote a letter dated 4.9.1971 to the petitioner/company as under:

I am directed to state that the Government are advised that the term "wages" as defined u/s 2(22) of the Employees State Insurance Act, 1948,

does not include "incentive wages" paid to workers.

However, on 20.8.1976 on behalf of the Deputy Regional Director a letter was addressed to the petitioner/company stating as under:

With reference to the above I have to inform you that Incentive Bonus paid to the Employees are treated as wages u/s 2(22) of the Act.

Employees who draw more than Rs. 1000/- p.m. inclusive of Incentive Bonus should not be registered. If registered, refund will not arise.

These are all the letters relied on by the learned counsel for the appellant in order to show that the parties herein always understood that the

incentive bonus is not wages. The learned counsel further submitted that the schedule Exhibit P-10 should be read along with these letters in order

to understand the intention of the parties.

13. It remains to be seen that whatever might have been the understanding between the parties, in this case a duty is cast upon the court to decide

the issue in accordance with law whether the incentive payment is wages as contemplated u/s 2(22) of the E.S.I. Act, 1948. The incentive payment

is being made under the scheme Exhibit P-10. As already pointed out that there is no clause in the scheme to withdraw the same unilaterally. In so

far as the modifications are concerned, as can be seen from the scheme, that such modifications can be done by the management in consultation

with the union only and not unilaterally. So also, it cannot be said that employees are not entitled to demand incentive bonus once if they complied

with the condition stated in the scheme. Since the incentive payments are made permanently and regularly and there is no clause for withdrawal of

the scheme unilaterally by the management, the incentive payments would come under the purview of para III of the Section 2(22) of the E.S.I.

Act, 1948.

14. While considering Section 2(22) of the Act, this Court in the case of Regional Director, ESIC, Madras v. M.M. Rubber Co.(P) Ltd., 1979 II

LJ 81 set out the real principle applicable in a matter like this as under:

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.

15. Yet another decision brought to my notice was that reported in Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance

Corporation, According to the facts appearing in that case, the company reserved the right to withdraw the scheme altogether without assigning

any reason or to revise its conditions at its sole discretion. 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. On these facts, the

Supreme Court held as under:

...The payment of Inam, though remuneration, could not be said to have become a term of the contract of employment within the meaning of the definition of "wages" as given in section 2(22).

16. Thus the facts appearing in the foregoing case is different from the facts appearing in the present case. Therefore, this decision will not render

any assistance to the appellant herein to put forward their case. Thus considering the facts arising in the instant case, in the light of the judicial

pronouncements cited supra, I hold that there is no infirmity in the order rendered by the lower court in the present case in holding that incentive

payment would come under the purview of wages as contemplated u/s 2(22) of the Employees State Insurance Act, 1948. In the result, the order

passed by the lower court is confirmed and the appeal is dismissed with costs.