

(1988) 10 KL CK 0027
In the High Court Of Kerala

S.T. Reddiar and Sons

APPELLANT

Vs

Regional Director

RESPONDENT

Date of Decision : 11-10-1988

Acts Referred:

Employees State Insurance Act, 1948 — Section 2, 75

Citation : (1989) 1 KLJ 232 : (1989) 2 LLJ 289

Hon'ble Judges : V. Sivaraman Nair, J;Fathima Beevi, J

Bench : Division Bench

Judgement

1. The only question which arises for consideration in this appeal is whether the Employees Insurance Court was right in holding that ex gratia payments which the appellant-employer made to some of the employees on 31st December 1975 and 29th July 1976 for prompt completion of a specific item of work assigned to them were "wages" as defined in Section 2(22) of Employees State Insurance Act, 1948 (for short the Act.)

2. The short facts which are relevant are the following: The employer was conducting a printing press. It is a covered establishment and has been paying contributions in respect of the wages paid to its employees. It had entered into a contract with the Government for printing text books. That work was assigned to some temporary employees. They completed the work ahead of schedule in 1975 and again in 1976. On consolidated vouchers Exts. A1 and A2 dated 31st December 1975 and 29th July 1976 respectively, the employer paid Rs. 24,137.17 and Rs. 8,751.55 to the concerned employees as ex gratia. Such payments were called "Inam" in Exts. A1 and A2 vouchers. In letter dated 30th July 1978, the Director of Employees State Insurance Corporation required the employer to pay contribution on those amounts, claiming those amounts to be omitted wages. In the meantime, in Exts. D1 and D2 letters dated 2nd May 1978 and 18th July 1978, in reply to the demands of the Directorate, the employer had stated that the amounts were paid ex gratia. but he would pay contributions ad hoc. In Ext. D3 letter dated 13th October 1978 the employer disputed its

liability to pay contributions on the two amounts on the averment that those amounts were not "wages" which were paid or payable. Notwithstanding this, the demand was sought to be enforced. The employer filed Employees Insurance Case No.85 of 1982 before Employees Insurance Court u/s 75 of the Act. The main contention which it urged was that the amounts not being "wages" as defined in Section 2(22) of the Act, it had no obligation to pay contribution on those amounts. The employer relied on the decision of the Supreme Court in *Braithwaite & Co. v. E.S.I. Corporation* 1968-I-LLJ-550. The Insurance Court held against the employer for the reason that the documentary evidence adduced by the opposite party, viz. the Corporation, indicated that the amounts formed part of wages and therefore the decision of the Supreme Court did not apply. The employer appeals against that decision of the Employees Insurance Court.

2A. Wages is defined in Section 2(22) of the Act as meaning:

...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.

3. The question to be decided is whether the two amounts paid to the employees under Exts. A1 and A2 vouchers were remuneration paid or payable on fulfillment of the contract of employment, whether express or implied; or whether they were additional remuneration paid at intervals not exceeding two months. Those payments would constitute wages only in two contingencies (1) if they were remuneration paid or payable in cash on fulfillment of the contract of employment, express or implied, or (2) if they were additional remuneration paid at intervals not exceeding two months otherwise than on fulfillment of the contract of employment.

4. The Corporation which was demanding contribution on wages has, in a case where the eligibility of the contributions is disputed by the employer, to prove the existence of any one of the above factors, to make out that the contribution related to wages. It appears to us that the payment in cash has to be related to the terms of the contract of employment, express or implied, in the former case, whereas additional remuneration may even be unrelated to such terms in the latter. The only requirement of the latter is that the payments shall be at intervals not exceeding two months. In that case, recurring payments to be

made at intervals not exceeding two months even outside the terms of the contract may be wages. It has its justification that the recurring periodicity of payment of additional remuneration itself makes it an implied terms of the contract. We find that in the present case the Corporation has not succeeded-as a matter of fact, has not even attempted-to make out that these essential requirements have been satisfied in respect of payments effected under Exts. A1 and A2.

5. The respondent Corporation had no case before the Insurance Court that these payments were made in accordance with any express terms of the contract of employment. They should have, in the alternative, alleged and proved that the additional remuneration was paid pursuant to an implied term of the contract of employment. We are not impressed by the submission of counsel for the Corporation that once the Corporation demands contribution on the assumption that any particular amount is wages, it is then the obligation of the employer to prove it otherwise. His submission, in other words, is that the burden shifts to the employer to make out that such payments were not made on fulfillment of the terms of the contract of employment, express, or implied but otherwise than under such terms. We find it extremely difficult to accept this submission. It is true that in a case where a person claims exemption from a statutory provision, it is for him to prove that he is entitled to such exemption. But in a case where a demand which is made under a statute is challenged, that demand has to be justified by the authority which imposes, demands or collects the amount. The contribution is on the "wages" and the Corporation which demands contribution has to make out, in all cases where the employer disputes this liability, that such amounts were remuneration paid or payable on fulfillment of the contract of employment, whether express or implied.

6. The expression "remuneration payable naturally means remuneration which is due and the payment of which will be legally enforceable. It is the element of obligation which is important in a case where an amount in excess of the remuneration due is paid or is payable except under the terms of a contract of employment, whether express or implied-that excess amount will not be wages. This position is clear from the decision of this Court reported in Carborandum Universal Ltd. v E.S.I. Corporation 1976-I-LLJ-17 where it was stated that incentive payable pursuant to a contract of employment alone will be wages and not otherwise. The same proposition was laid down by the Supreme Court in Braithwaite Company's case (supra). The very question whether incentive payment made by an employer to its employees would be wages or not as defined in Section 2(22) of the Act was considered by a Division Bench of the Karnataka High Court in Regional Director, E.S.I. Corporation v. Mysore Kirloskar Ltd. (1973) 47 FJR 434. It was laid down in that decision on the basis of Braithwaite Company's case(supra) that wages are only such amounts as are paid or payable under the terms of the contract of employment, express or implied, but not voluntary payments made by the employer which can be varied at his will. It was also held that additional remuneration mentioned in the latter

part of the definition must be remuneration payable under the terms of employment, express or implied.

7. On the materials which were available before the Insurance Court, it is difficult to sustain its conclusion that the amounts paid voluntarily to a few employees as *ex gratia* or *Inam*" as mentioned in Exts. A1 and A2, formed part of the wages as defined in Section 2(22) of the Act. The Corporation could have summoned the contract employment before the Insurance Court to prove its point that the payments were effected on fulfillment of the contract of employment. The Corporation did not attempt to avail of this alternative. Therefore the Corporation is not entitled to succeed in its submission that the payments evidenced by Exts. A1 and A2 were wages. In the alternative it should have adduced evidence to show that the word in was only a camouflage for additional remuneration. If the Corporation had at least urged that the additional remuneration was paid with recurring regularity with intervals not exceeding two months, then also it may perhaps have been possible to contend that such payments were effected on the basis of the implied terms of the contract of employment. In that event it would also have been possible to sustain the demand, alternatively as "wages" falling within the latter part of the definition, quite irrespective of the terms of the contract of employment.

8. Counsel for the Corporation invited our attention to the decision reported in *Sharma v. E.S.I. Corporation* 1968-I-LLJ 441 where it was held that any reward paid to an employee would be wages. We do not find any discussion in that decision with reference to the terms of Section 2(22) defining the term "wages". In the light of the decision of the Supreme Court in *Braithwaite's case* (supra), as also the decision of this Court in *Carborundum Universal case* (supra) we are not persuaded to hold that any reward paid voluntarily by an employer as an incentive to its workmen or any other payment of a gratuitous nature otherwise than under the obligation - either statutory or contractual and unrelated to the contract of employment will be wages as defined in the Act. The only exception may perhaps be cases of additional remuneration paid at intervals not exceeding two months. This aspect was emphasised by a Full Bench of the Andhra Pradesh High Court in *E.S.I. Corporation v. A.P. Paper Mills* 1978-I-LLJ-469. The Full Bench differed from *Bengal Potteries* (1973) 47-FJR - 428 and *Mysore Kirloskar* (supra) and referred with approval the dictum laid down by this Court in *Carborandum Universal* (supra). The Full Bench decision in *A.P. Paper Mills case* (supra) was approved later by the Supreme Court in *Harihar Poly fibres v Regional Director, E.S.I. Corporation* 1984-II-LLJ-475. It is worthwhile extracting the following observations from *A.P. Paper Mills case*: (supra) 1978-I-LLJ-469 at 477:

The moment you get any additional remuneration other than the remuneration payable under the contract of employment and if this additional remuneration is paid at intervals not exceeding two months, it becomes wages by virtue of the third part of the definition of "wages."

In view of the fact that the above observations have now the approval of the Supreme Court in Harihar Poly fibres", case (supra) we have no hesitation in holding that only such additional remuneration as are paid beyond the terms of the contract and at intervals not exceeding two months, can be wages for ascertaining the quantum of contribution liable under the E.S.I. Act. In Harihar Poly fibres" case, (supra) the Supreme Court considered only payment of recurring additional remunerations called House rent allowance. Night allowance, Heat, Gas and Incentive allowances etc. as wages. The Supreme Court accepted the finding of the Full Bench of A.P. High Court in A.P. Paper Mills case (supra) as correct with specific reference to the last part of the definition of wages u/s 2(22) of the Act and that too with reference to additional monthly payments. In this view, additional remuneration even beyond the terms of the contract of employment can be treated as wages only if such remuneration is paid at intervals of not more than two months. Gratuitous payment effected once in an year cannot fall within the definition of wages u/s 2(22) of the Act. The contentions urged by the appellant Corporation cannot, therefore, be accepted.

9. In the result, the appeal is hereby allowed. The parties will suffer their respective costs.

10. Issue photo copies of this judgment to counsel on both sides on usual terms.