

Handloom House, Ernakulam

Vs

Regional Director, ESI

Civil Appeal No. 2521 of 1999

(S. Saghir Ahmed, K.T. Thomas JJ)

29.04.1999

JUDGMENT

K.T. Thomas, J

1. Leave granted.

2. Handloom House is a Co-operative Society engaged in manufacturing and selling handloom fabrics. It disburses to its employees, besides the normal wages, special amounts under two counts. One is "incentive bonus" and the other is "sales commission". Thereupon, the Employee State Insurance Corporation (for short 'the Corporation') demanded from the Handloom House additional contribution towards insurance fund on the premise that such extra benefits given to the employees fall within the ambit of "wages" under the Employees State Insurance Act, 1948 (for short 'the Act'). When the Handloom House challenged the said demand before the Employees Insurance Court it was held that such benefits do not form part of wages and hence the demand is unsustainable. The Corporation filed statutory appeal before the High Court of Kerala and a Division Bench thereof quashed the judgment of the Insurance Court and permitted the Corporation to proceed with the demand.

3. The Handloom House, having lost even a motion for review of the said judgment, has filed this appeal by special leave.

4. It was first thought that appellant cannot re-cavass against settled position since this court had held on earlier occasions that "wages" as defined in Section 2(22) of the Act would include, among others, incentive allowances and production bonus paid to the employees (*Harihar Polyfibres v. Regional Director, ESIC, 1984(4) SCC 324; Regional Director, ESIC v. Enfield India Ltd., 1997(11) SCC 752*).

5. Sri T.L. Viswanatha Iyer, learned Senior Counsel made an endeavour to distinguish the said decisions from the instant case on the premise that incentive bonus and sale commission paid to the employees of the appellant society are paid at intervals "exceeding two months" and, therefore, they cannot form part of their wages as defined in the clause.

6. In *Modella Woollens Ltd. v. ESIC, 1994 Suppl.(3) SCC 219* a two judge bench of this Court considered whether production bonus paid to the workmen would fall within "wages" as defined in the Act. The employer in that case projected a particular term in the agreement (between workmen and the employer, which provides for payment of such bonus) that bonus is to be paid at the end of each quarter, and contended on its strength that it would not be wages. However, this court

highlighted another term of the same agreement which stated that an employees can claim advances against such bonus and also the fact that the employees were availing themselves of such advances. On the basis of such clauses in the agreement learned Judges observed thus :

"The mere term in the agreement that the payment of bonus would be made at the end of the quarter, therefore, does not make the bonus, a payment other than remuneration for the labour put in during the said quarter. Hence the stipulation in the agreement that the payment of the bonus would be made at the end of the quarter is not material for deciding the question whether the payments would be covered by the first part of the definition or not."

7. The definition of "wages" in section 2(22) of the Act reads thus :-

"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 person fund or provident fund, or under this Act;

(1) any travelling allowances 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."

8. The main body of the definition encompasses within its fold three kinds of payments made to the employees. First is, all remuneration paid or payable in cash on fulfilment of the terms of employment. The second is any payment made to an employee in respect of any period of authorised leave etc. The third is other additional remuneration paid at intervals "not exceeding two months".

9. It is contended that if incentive bonus and sales commission would fall within the scope of the first category mentioned above it is immaterial that the payment is made at intervals or in a lump. But that aspect is no more *res integra* in the light of the decision in *Harihar Polyfibres v. Regional Director, ESIC, 1984(4) SCC 484*. In that case a two judge bench (Chinnappa Reddy and AN Sen, JJ.) dealt with the decision of a Full Bench of the High Court of Andhra Pradesh which held thus :

"The word `other' appearing at the commencement of the third part of the definition of wages under Section 2(22) indicates that it must be remuneration or additional remuneration other than the remuneration which is referred to in the earlier part of the definition viz., all remuneration paid or payable, in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and incentive bonus in the present scheme is certainly additional remuneration. It must be emphasised at this stage that under the third part of the definition of "wages" it is actual factum of payment which counts because the word used is `paid' as distinguished from `paid' or payable. 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".

10. This Court approved the said statement of law as correct by observing that "we express our respectful agreement with what has been said by the High Court of Andhra Pradesh in the above extracted passage."

11. So the only question to be determined in this case is whether incentive bonus and sales commission would fall within the ambit of the aforesaid third category of remuneration or not. It is clear that any additional remuneration paid at intervals exceeding two months has been excluded by specific terms, from the purview of the definition. What is the rationale for excluding such remuneration paid at intervals exceeding two months from the scope of "wages" ? Though we did not get any clue from the Statement of Objects and Reasons for the Bill (which became Employees State Insurance (Amendment) Act 1951), the rationale could be discerned as inter-linked with the definition clause "*wage period*" in Section 2(23). It reads thus :

"*wage period*" in relation to an employee means the period in respect of which wages are ordinarily payable to him whether in terms of the contract of employment, express or implied or otherwise."

12. Section 40 of the Act casts liability on the Principal Employer to pay the contribution to the Corporation, whether it is of employer's or of employee's contribution. Of course the Principal Employer is allowed to recover that part of "employer's contribution" by making deduction from his wages. Section 39(4) of the Act states :

"The contributions payable in respect of each *wage period* shall ordinarily fall due on the last day of the *wage period*, and where an employee is employed for part of the *wage period* or is employed under two or more employers during the same *wage period*, the contributions shall fall due on such days as may be specified in the regulations."

13. No employer shall have the permission to dodge the payment of contribution on the premise that annual payments have to be worked out. Normally, the wage period is one month, but the Parliament would have thought that such "wage period" may be extended a little more, but no employer shall make it longer than two months. This could be the reasons for fixing a period of two months as the maximum period for counting additional remuneration as to make it part of "wages" under the Act.

14. It is a question of fact in each case whether sales commission and incentive bonus are payable at intervals not exceeding two months. The Insurance Court has, in this case, found that such payments were not made within a period of two months and are, therefore, not includible as wages. But the High Court did not say anything about that factual position. The question whether incentive bonus and sales commission would fall within the aforesaid third category of "wages" as defined in Section 2(22) of Act has to be considered by the High Court afresh in the light of the observations made above and after deciding the preliminary question whether the finding made by the Insurance Court on that aspect can be upheld or not.

15. So the course open to us is to remit the case to the High Court for disposal of the writ petition afresh in the light of the observations made above. We do so, and for that purpose we set aside the impugned judgment. Appeal is thus allowed. Appeal allowed.