ANDHRA PRADESH HIGH COURT

ESI Corporation

Vs

A P Paper Mills Ltd

(Madhava Reddy, J.)

24.02.1977

JUDGEMENT

Madhava Reddy, J.

(1.) THE question that arises for consideration in CM A. No. 94/75 is Whether incentive bonus paid by the Company constitutes 'Wages' within the meaning of S.2 (22) of the Employees State Insurance Act." In Regl. Director ESI.C.Vs. M/s. Vazir Sultari] Bench of this Court to which one of us was a party took the view that "remuneration takes in only all payments paid or payable every month as per the terms of the contract irrespective of the work done, such as wages, daily allowance, house rent allowance etc. But contingent payments like bonus for increase of production of profit bonus will not.....come within this definition". In this view the court held that the comprehensive annual bonus paid or payable to the employees as per the terms of Ex.

(2.) 2 which is a document of settlement relating to the terms and conditions of service for the year 1970 was not 'wages' within the meaning of S.2 (22) of the Act. The court purported to arrive at this conclusion having regard to the view expressed in Braithwaite &Co. V Employees State Insurance Corporation] In a later judgment dated 13-4-76 another Bench of this Court in CM A. 331/74 felt that the view expressed in Regl. Director E.S.I.C. Vs. Mis. Vazir Sultan] was directly opposed to what the Supreme Court laid down in Braithwaite & Co. Vs. Employees State Insurance Corporation and came to the conclusion that "incentive bonus" paid to the workmen as per the Memorandum of settlement arrived at between the employer and the workmen was 'wages' within the meaning of S 2 (22) of the Employees State Insurance Act. In view of this difference of opinion, we refer the matter to a Full Bench for consideration of the question whither 'incentive bonus' paid by the Company in pursuance of the settlement arrived at between the Employers and the workmen constitutes 'wages' within the meaning of Section 2 (22) of the Act. C.M.A. 229/74 involves the consideration of a question whether 'House Rent' paid by the Company to its workmen would constitute "Wages' within meaning of S, 2 (22) of the Act. This CM.A. was posted along with C.M,A. 94/75 for hearing and hence this is also referred to the Full Bench. As the decision of these questions would be sufficient to dispose of the Civil Miscellaneous Appeals, these appeals are referred to the Full Bench. Papers may be placed before the Hon'ble the Chief Justice for constitution of a Full Bench. Pursuant to the

aforesaid order of reference to a full Bench, these appeals coming on for hearing on Monday the 30th, Thursday the 31st day of August, 1976 and Wednesday the 15th day of September, 1976 before the full Bench consisting cfthe Hon'ble Mr. B.J. Divan, Chief Justice, the Hjn'ble Mr. Justice Righvir and the Hon'ble Mr.Justice Gangadhara Rao, and upon perusing the Memorandum in appeals, orders of the Lower Court and the material papers in the appeals and upon hearing the arguments of Mr. LA. Naidu, Advocate for the appellant in A.A.O. No. 229 of 1974 and of M/s. T. Dhanurbhanudu and LA. Naidu, advocates for the appellant in A.A.O. No 94 of 1975 and of M/s. K. Srinivasa Murtby, and S. R. James Advocate for the respondents in both the appeals and having stood over fjr consideration till this day, the Court made the following: ORDER These two matters have been referred by a Division Bench of this Court consisting of Madhava Reddy J., and A.V. Krishna Rao J. under the following circumstances: The view expressed by the Supreme Court in Braithwaile And Co. Vs. E S 1C (1) came to be considered by a Division Bench of this Court in Regional Director E.S I.C. V. M/s Vizir Tobacco Co. Ltd 2. (1) In & subsequent judgment in C.M.A. No. 331 of 1974 decided by a Division Bench consisting of Chinnappa Reddy and Punnayya JJ , on April 13, 1976 a different view was taken and the subsequent Division Bench of this Court felt that the v'ew expressed in the earlier decision in Regional Director ES I.C. Vs M/s Vazir Sultan Tobacco]. was directly opposed to what the Supreme Court laid down in Braithwaite & Co. V. E S 1C 1 , In view of this difference opinion the Division Bench consisting of Madhava Reddy and Krishna Rao, JJ , have referred A.A.O, 94 1975, which relates to incentive bouns to a larger Bench. The question arising for consideration in A A O. No- 229 of 1970 is regarding the house rent paid by the Company to its workmen. Originally directions were issued that A A.O. 229 of 1970 should be posted be along with A.A.O 94 of 1975 for h-aring and, hence, A.A O. 229 of 1974 also came to be referred to the Full Bench. The question which is referred in A.A.O. 94 of 1975 is whether incentive bonus paid by the Company i.e., employer, constitutes 'wages' within the meaning of section 2 (22) of the Employee' State Insurance Act. In order to appreciate the controversy and to understand the view taken by the Supreme Court in Braithwaite & Co] case, by the Division Bench of this court in Vazir Sultan Tobacco Co's]) case and by Chinnappa Reddy and Punnayya JJ., in the unreported case, it is necessary for us to refer some of the sections of the Employees' State Insurance Act, 1948. The long title to the Act points out that it is an Act for providing certain benefits to employees in case of sickness, and maternity and employment injury, and for certain other matters in relation thereto, and the preamable to the Act states that whereas it is expedient to provide for certain benefits to employees in case of sickness, maternity an1 employment injury, and to make provision for certain other matters in relation thereto the Act was enacted.Section 1 of the Act provides that it applies to all factories including factories belonging to the Government other than seasonal factories. Section 2 (12) defines 'factory' to mean any premises including the precints thereof whereon twenty or more persons are employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but does not include a mine'subject to the operation of the Mines Act, 1952 or a railway running shed. Section 2 (9) defines an 'employee' to mean any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and who is directlv employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of the factory or establishment whether such work is done by the employee in the factory or establishment or elsewhere, or who is employed bv or through an immediate employer on the

premises of the factory. We are not concerned with the rest of the definitions of employee'. Section 2 (4) defines 'contribution' to mean the sura of money payable to the Corportion by the principal employer in respect of an employee and includes any amount payable by on behalf of the employee in accordance with the provisions of this Act.

(3.) THE real controversy turns in this case, on the interpretation of the definition clause in section 2 (22), which defines 'wages'. That section is in these terms : "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, lockout, strike which is not illegal or lay-off and other additional remuneration if any, paid at intervals not exceeding two months, but does include (a) any contribution paid by the employer to any pension fund, or under this Act; (b) any travelling allowance or the value of any travellfng'concession, (c) any sum paid to the person employed to defray special expenses entalied on him by the nature of his employment ; or (d) any gratuity payable on discharge". THE question in A, A. O 94 of 1975 is regarding incentive bonus and the question that arise in that connection is whether incentive bonus paid by the employer comes within the definition of 'wages' so that if incentive bonus constitutes 'wages' within the meaning of section 2 (22) then the employer will have to pay contribution, not only his own contribution but also the employees' contribution to the Employees State Insurance Corporation (hereinafter called the Corporation). If it does not constitute 'wages' within the meaning of section 2 (22), the Contribution regarding that component of the remuneration which is represented by incentive bonus will not have to be paid by the employer to theCorporation. Sections 30 and 40 of the Act deal with contributions and they are occurring in Chapter IV relating to contribution. Under Section 38, subject to the provisions of the Act. all employees in factories or establishments to which the Act applies shall be insured in the manner provided by the Act. Under section 39 (1) the contribution payable under the Act in respect of an employee shall compromise contribution payable by the employer (hereinafter referred to as the employee's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) and shall be paid to the Corporation. Under sub-section (2) of section 39 the contributions have to be paid at the rates specified in the First Schedule, and in case where the provisions of the Act are made applicable to any employee or class of employees in any factory or establishment or class of factories or establishments in such manner that they are excluded from some of the benefits under this Act, at such rates as the Corporation may fix in this behalf. A week shall be the unit in respect of which all contributions shall be payable under the Act, according to sub-section (3) of section 39. Under sub-section (4) of Section 39, the contributions payable in respect of each week shall ordinarily fall due on the last day of the week, and where an employee is employed for part of the week, or is employed under two or more employers during the same week, the contributions shall fall due on such days as may be specified in the regulations. Under section 40 the principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate emplover, both the employer's contribution and the employee's contribution. Under sub-section (2) of section 40, notwithstanding anything contained in any other enactment but subject to the provisions of this Act and regulations, if any, made thereunder, the principal employer shall in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee the employee's contribution by deduction from his wages and not otherwise, provided that no such deduction shall be made from

any wages other than such as relate to the period or part of the period in respect of which the contribution is payable, or in excess of the sum representing the employee's contribution for the period. Under sub sec (3) or S. 40. notwithstanding any contract to the contrary, neither the principal employer nor the immediate employer shall be entitled to deduct the employer's contribution from any wages payable to an employee or otherwise to recover it from him. Under subsection (4) of section 40 any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted, and under sub-section (5) of section 40 the Principal employer shall bear the exepenses of remitting the contribution to the Corporation. In Braithwate & Co. Vs. E SIC] the question before the Supreme Court was whether the inam paid by the employer under a scheme dated December 28, 1955 was covered by the definition of wages as given in section 2 (22) of rhe Act. THE High Court held that it was covered by the definition of 'wages', though tha Employees' Insurance Court had held to the contrary. THE Supreme Court held that on a correct interpretation of the scheme, which was promulgated by the employer on December 28, 1955, the High Court had committed an error in holding that payment of inam under the scheme had become a term of the contract of employment of the employees. THE Supreme Court emphasised that the features of the scheme which indicated that the payment of the inam did not become a term of the contract of employment were the following (1) the payment of inam was not among the original terms of contract of employment, (2) the only offer under the scheme was to make an incentive payment, if certain specified conditions were fulfilled by the employees, (3) payment of inam was dependent upon the employee exceeding the target of output appropriately applicable to him, (4) if the targets were not achieved due to lack of orders, lack of materials, break-down of machinery, lack of labour, strikes lock-outs, go-slow or any other reason whatsoever, no inam was to be awarded. This was in consistent with the payment of inam having become an implied term of the contract of employment, and (5) it was also made clear in the scheme that the payment of inam, was in no was connected with wages. The High Court of Calcutta had in that case had held that in order to arrive at the correct conclusion Explanation to section 41 of the Act snould be looked at. But, the Supreme Court pointed out that Explanation lays down that for the purposes of Sections 40 and 41, wages shall be deemid to include payment to an employee in respect of any period of authorised leave, lockout or legal strike It appeared to the Supreme Court that the Hign Court committed an error in thus applying the legal fiction which was meant for sections 40 and 41 of the Act only. A legal fiction is adopted in law for a limited and definite purpose only and there is no justification for extending it beyond the purpose for which the legislature adopted it Similarly the Explanation to section 11 is not to be utilized for interpreting the definition of "wages" in section 2 (22) There was no express clause in the contract of employment of the employees of the appellant laying down the payment of inam, and the scheme, when brought into force, expressly excluded it from the contract of employment. The terms on which the inam was payable were also not consistent with the scheme having become a part of the contract of employment. ;