KARNATAKA HIGH COURT

Hind Art Press

Vs.

E.S.I. Corporation

M.F.A. Nos. 486 and 331 of 1982

(M. Rama Jois and S. Rajendra Babu, JJ.)

03.06.1989

ORDER

M. Rama Jois, J.

1. In these two appeals, presented under sub-section (2) of Section 82 of the Employees' State Insurance Act, 1948 ("the Act" for short), the following substantial questions of law arise for consideration :

> "(1) Whether on the facts and circumstances of the case, the respondent-Employees' State Insurance Corporation, was justified in imposing damages of fifty per cent., sixty per cent., and hundred per cent, of the amount of contribution required to be remitted by the appellant to the Corporation, in respect of which there was some delay by the appellant in remitting the same to the Corporation ?
> (2) Whether the first respondent-Employees' State Insurance Corporation, was justified in treating the special allowance, midday meal allowance and overtime wages as part of 'wages' for the purpose of computing the contribution payable under the provisions of the act and the Scheme framed there under ?"

2. The facts of the case, in brief, are as follows : By an order dated 12th September, 1979, the Corporation levied damages on the appellant for delayed payment of contribution. According to the appellant, the delay in the payment of contribution was small and did no merit the levy of damages and a valid explanation for the small delay had been furnished in reply to the show - cause notice issued by the Corporation, but rejecting the explanation, the Corporation proceeded to levy damages up to an extent of 50 per cent, and 60 per cent. respectively for two periods and to the maximum extent of hundred per cent, for two subsequent periods. Aggrieved by the order, the appellant presented an application under Section 75 of the Act before the Employees' Insurance Court, which was numbered as employees' State Insurance Application No. 12 of

1979. In another proceeding initiated against the appellant, the question for consideration was, whether contribution was payable in respect of ex gratia payment of special allowance, midday meal allowance and overtime wages, paid by the appellant to its workmen. The explanation of the appellant was that these payments did not constitute "wages" as defined under section 2(22) of the Act and therefore could not be taken into account for computing the contribution payable under the Act and the Scheme framed there under. This contention of the appellant was also negatived by an order dated 15th September, 1979. The appellant presented an application under Section 75 of the Act before the Employees' state Insurance Application No. 16 of 1979. Both the applications were disposed of by a common order dated 11th December, 1981. Aggrieved by the same, the appellant has preferred these two appeals.

3. With reference to the first question regarding the levy of damages arising out of Employee State Insurance Application No. 12 of 1979, the extent of delay on four occasions and the quantum of damages levied are as specified below :

Sl. No.	Period	Extent of delay	Quantum of damages	Amount of damages levied
1.	7-1-1978 to 3-2-1978	27 days	50%	₹ 698-77
2.	8-7-1978 to 7-9-1978	61 days	60%	₹ 748-38
3.	11-11-1978 to 27-1-1979	77 days	100%	₹ 975-00
4.	6-1-1979 to 27-1-1979	21 days	100%	₹ 1372-00

4., Learned counsel submitted that the explanation furnished by the appellant was that the delay was bonafide in that there was no trained employee who had to prepare the contribution card in time and that was the reason for the delay in remitting the contribution, and this explanation was brushed aside and heavy damages were levied.
5. Section 85-B of the Act, which confers on the Corporation the power to recover damages, reads :

> "85-B. Power to recover damages :- (1) Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover from the employer such damages not exceeding the amount of arrears as it may think fit to impose :
> Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard.

(2) Any damages recoverable under sub-section (1) may be recovered as an arrear of land revenue."

The above section, in our opinion, is both compensatory as well as penal in nature and is intended to enforce discipline on the management of establishments covered by the Act and is similar to Section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 the scope of the power under which has been expounded by the Supreme Court in *Organo Chemical Industries v. Union of India*[1], Therefore, unless it is shown that the quantum of damages levied in a given case is arbitrary, it cannot be said to be unjustified.

[1](1979-II-LLJ-416)

6. Learned counsel for the appellant submitted that Section 68 of the Act provided for taking action in cases where there has been default in paying contribution. Section 68 of the Act reads :

"68. Corporation's rights where a principal employer fails or neglects to pay any contribution. - (1) If any principal employer fails or neglects to pay contribution which under this Act he is liable to pay in respect of any employee and by reason thereof such person becomes disentitled to any benefit or entitled to a benefit on a lower scale, the Corporation may, on being satisfied that the contribution should have been paid by the principal employer, pay to the person the benefit at the rate to which he would have been entitled if the failure or neglect had not occurred and the Corporation shall be entitled to recover from the principal employer either

(i) the difference between the amount of benefit which is paid by the Corporation to the said person and the amount of the benefit which would have been payable on the basis of the contributions which were in fact paid by the employer; or

(ii) twice the amount of the contribution which the employer failed or neglected to pay, whichever is greater.

(2) The amount recoverable under this section may be recovered as if it were an arrear of land revenue."

Learned counsel pointed out that as the Corporation is entitled to recover twice the amount of contribution which the employer had failed or neglected to pay, once it is found that the amount was paid by the employer, there was no justification to levy damages under Section 85B of the Act.

7. Sri Papanna, learned counsel for the Corporation, however, submitted that the two provisions, namely, Sections 68 and 85B of the Act, covered entirely different circumstances. He submitted that having regard to the language of Section 68 of the Act, it is clear that it could be invoked in a case where a principal employer had failed or neglected to pay contribution in respect of any individual employee, whereas Section 85B of the Act related to the non-payment of contribution payable under the scheme of the Act in respect of the whole establishment and therefore the former has nothing to do with the latter. Having regard to the clear wordings of Sections 68 and

85B of the Act, it appears that learned counsel for the Corporation is right that the scope of the two sections is entirely different and the provisions of Section 68 of the Act have no bearing on the provisions of Section 85B of the Act regarding recovery of damages for non-payment of contribution or delayed payment of contribution by an employer.

8. Now, coming to the facts of this case, having regard to the extent of delay in respect of the first two periods, we do not consider that the levy of damages at the rate of 50% and 60% was unjustified. The levy of damages at the said rate cannot be said to be an instance of arbitrary exercise of power under Section 85B of the Act. However, regarding the levy of damages at the maximum rate of hundred percent, for the two subsequent periods, we are of the view that the damages levied is excessive. The contention of the appellant that the levy of damages at hundred percent, was excessive was rejected by the court below, stating thus :

> "11. .. In the first instance two cases covered under exhibit A-1 the 1st respondent has proposed damages at the rate of 50%, 60% considering the delay of one month and two months respectively. If in spite of it the applicant had not improved and had committed further delays for the subsequent months as is clear from exhibit A-3, higher damages by way of 100% cannot be said to be disproportionate or unconscionable," (Underlining by us).

9. The court below justified the levy of 100% damages on the ground that the Corporation had proposed the levy of damages at the rate of 50% and 60% for the first two periods and in spite of this there was no improvement on the part of the appellant and, therefore, the levy of hundred per cent, damages for the two subsequent periods was justified. It is not disputed by learned counsel for the Corporation that the show-cause notices were issued in respect of all the four periods on the same date and the final order was also passed on the same date, that is, 12th September, 1979, and, therefore, it is clear that the court was not correct in stating that in spite of the proposal to levy damages at the rate of 50% and 60% the appellant did not show any improvement. If the proposal to levy 50% or 60% of the damages for the first two periods or an order levying damages at the rate of 50% or 60% was made earlier and even thereafter the appellant had delayed in remitting the contribution, the court below would have been justified in holding that the appellant did not improve in spite of levy of damages at the rate of 50% and 60% and, therefore, the levy of 100% was justified. In the circumstances, it appears to us that the levy of damages for the two subsequent periods at the rate of hundred per cent. is excessive and, therefore, the appeal of the appellant has to be partly allowed reducing the damages to 60%.

10. Now, coming to the second question, we shall proceed to consider as to whether the special allowance and midday meal allowance, could be treated as part of wages for the purpose of computing the contribution payable under the Act. The undisputed facts relating to these allowances are : A special allowance of ₹ 15.00 per month was being paid to each of the employees in terms of the settlement dated 6th June, 1973. This was linked to the regularity of

attendance of the workman. The appellant was also making a payment of ₹ 10.00 to each of the employees under the settlement to defray part of the midday meal expenditure which the employee had to incur and in order to avoid the necessity of the employees going to their residence for food during lunch hour, which would have caused considerable hardship to the employees concerned. Contention of the appellant before the court below was that both these payments did not fall within the definition of the word "wages" as defined in Section 2(22) of the Act. The said definition reads :

> "2. Definitions ....
> (22) '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 authorized 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."

There is no dispute that these two payments do not fall within any of the exceptions specified at (a), (b), (c) or (d) in the definition. The definition would disclose that it covers three kinds of payments as falling within the definition of word "wages". They are : (1) any remuneration payable in cash if the terms of the contract of employment, express or implied, were fulfilled; (2) any payment to an employee in respect of any period of authorized leave, lock-out, strike which is not illegal or lay-off; and (3) other additional remuneration, if any, paid at intervals not exceeding two months. The contention of the appellant is that the two payments do not fall within any of the three categories of payments specified in the definition. We are unable to agree. There is no dispute that the special allowance as well as the midday meal allowance are paid in cash, namely, ₹ 15.00 and ₹ 10.00 respectively per month. It is also paid in terms of the settlement entered into between the management and the workmen. Therefore, it is an amount paid in terms of the contract of employment. The said payment would also come under "other additional remuneration" specified in Section 2(22) of the act. The matter, in our opinion, is also covered by the decision of the Supreme Court in *Harihar Polyfibres v. E. S. I. Corporation*[2]. In the said decision, the Supreme court held that house rent allowance, night shift allowance, incentive allowance and heat, gas and dust allowance, come within the definition of the word "wages" as defined under Section 2(22) of the act. The special allowance as well as midday meal allowance, which the appellant has been paying to the employee, are also of the same nature and are in the nature of incentive allowance and they being payments made in terms of the settlement

entered into between the workmen and the appellant, they constitute wages and fall within the first part of the definition under Section 2(22) of the Act.

11. Learned counsel for the appellant, however, submitted that there was a specific condition in the settlement itself to the effect that these allowances shall not be considered as "wages" for the purpose of contribution under the Act and, therefore, they do not fall within the first part of the definition of wages under Section 2(22) of the Act. In support of this, the learned counsel relied on the Full Bench judgment of the Andhra Pradesh High Court in *E. S. I. Corporation v. Andhra Pradesh Paper Mills Limited*[3]. It is true that in the said case, the Full Bench of the Andhra Pradesh High Court held that if in respect of payment of any special allowance there was an agreement between the parties to the effect that the said allowance shall not be taken as part of "wages" for the purposes of contribution under the act, the same would not be wages within the first part of the definition of the word "wages" under Section 2(22) of the act, on the ground that there was no prohibition under the Act for entering into such a contract. However, as could be seen from paragraph 19 of the judgment, the Full Bench accepted the alternative contention of the Corporation that such allowance would be "wages" as defined under Section 2(22) of the act falling within the third part of the definition, namely." Other additional remuneration". This decision of the Full Bench of the Andhra Pradesh High Court has been approved by the Supreme Court in the case of Harihar Polyfibres (supra),

[2](1984-II-LLJ-475)

[3](1978-I-LLJ-469)

at paragraph 4 of the said judgment. It is unnecessary for us to express any opinion on the question, whether the view taken by the Full Bench at paragraph 19 is correct or not, for the reason that once it is held that a special allowance falls within the definition of the word "wages" as defined under Section 2(22) of the Act, the question as to whether it falls within the first, second or the third part is immaterial. The Full Bench of the Andhra Pradesh High Court held that a special allowance in respect of which there was an agreement to the effect that it would not be treated as "wages" for the purpose of contribution under the Act, though it does not fall within the first part of the definition, falls within the third part of the definition and the said decision has been approved by the Supreme Court. The matter stands concluded and, therefore, we hold that these two allowances fall within the definition of the word "wages" as defined under Section 2(22) of the act and, therefore, the authority as well as the court below are right in holding that these allowances form part of wages for the purpose of computing contribution under the Act.

12. Now, coming to the overtime wages, the contention of the appellant is that it does not fall within the definition of wages under Section 2(22) of the act. In support of his contention, learned counsel for the appellant relied on the decision of the Calcutta High Court in *Hindustan Motors Ltd. v. E. S. I. Corporation*[4]. As against this, learned counsel for the Corporation relied on the decision of the Bombay High Court in *Shivraj Fine Art Litho Works v. Regional Director*[5], of the Delhi High Court in *Birla Cotton Spinning and Weaving Co. v. E. S. I. Corporation*[6], and the

decision of the Andhra Pradesh High Court in *Hyderabad Allwyn Metal Works v. E. S. I. Corporation*[7], There is thus divergence of opinion on the point. In order to appreciate the point, it is necessary to refer to the relevant provisions of the Factories Act.

13. Section 51 of the Factories Act provides that no adult worker shall be required or allowed to work in a factory for more than forty-eight hours in any week and subject to this provision Section 54 of the Act provides that no adult workman shall be required or allowed to work for more than nine hours a day and this limit could be exceeded only to facilitate change of shifts and with the previous approval of the chief Inspector. There is no compulsion under the terms and conditions of service of the workmen that they should work overtime for any specific number of days in any month. It is only under the circumstances when management is permitted to engage the services of a workman overtime in terms of the provisions of the factories act and a workman offers to work overtime that the management may allow him to work overtime on payment of double the rate for the period of overtime work as prescribed under Section 59 of the factories Act. It is not obligatory for any workman to work overtime and the management has also no right to compel a workman to work overtime and further even if the workman agrees, he cannot be engaged to work over time regularly as it is controlled by the aforesaid provision of the factories Act. Therefore, it is clear that overtime work cannot be regarded as either an express or implied term of the contract of employment. It is also significant that Section 2(9) of the Act which defines the word "employee" as a person employed in a factory or establishment whose remuneration does not exceed ₹ 1,600, expressly excludes the remuneration for overtime work. Therefore, in the nature of things, they are not

[4](1979) 1 Lab IC 852
[5](1974) 1 Lab IC 329
[6](1979) Lab IC 527
[7](1981) Lab IC.456

payments to be made regularly every month or at least regularly at the end of a period not exceeding two months. In the case of Hindustan Motors (supra), the Calcutta High Court, on a thorough consideration of various aspects relating to wages for overtime work, held that remuneration paid for overtime work does not fall within the word "wages" as defined under Section 2(22) of the Act. We respectfully agree with the said view and we are not persuaded to agree to the contrary view taken by the Andhra Pradesh, Bombay and Delhi High Courts. In this behalf, the ratio of the decision of the supreme court in the case of *E. S. I. Corporation v. Bata Shoe Company*[8], is also apposite. In the said case the court held that any payments made at intervals of not exceeding two months alone would fall within the definition of the word "wages" under section 2(22) of the act and the bonus payable one month after the end of each quarter could not be treated as wages. It is not the case of the corporation that overtime wages were wages payable regularly at the end of any specified period not exceeding the period of two months. In fact, the payment of overtime wages, in the nature of things, cannot have any such regular periodicity. It solely depends upon the exigencies of the administration of the factory or establishment and the willingness of any employee to work overtime. Therefore, we accept the contention of the appellant that overtime wages could not be treated as "wages" for the purpose of contribution under the Act and, therefore, the appeal of the appellant to that extent has to be

allowed.

14. In the result, we make the following order :

I. In M.F.A. No. 486 of 1982 :

(i) The appeal is allowed in part.
(ii) The inclusion of overtime wages in computing the contribution payable under the Act is set aside.
(iii) The rest of the order of the court below shall remain undisturbed.
(iv) The corporation shall be at liberty to redo the order, in the light of this order.

II. In M.F.A. No. 331 of 1982 :

(i) The appeal is allowed in part.
(ii) The levy of damages at hundred per cent for the periods in question is set aside and the same is reduced to 60 per cent.
(III) There shall be no order as to costs.

Appeal partly allowed.
[8](1986-I-LLJ-138)