# Employees State Insurance Corporation Vs Hindustan Machine Tools Ltd., Pinjore

**Court:** High Court Of Punjab And Haryana At Chandigarh

**Date of Decision:** April 25, 2011

**Acts Referred:** Employees State Insurance Act, 1948 â€" Section 2, 2(9), 38, 39, 40

**Citation:** (2012) 134 FLR 538 : (2011) 2 ILR (P&H) 361 : (2012) 167 PLR 204 : (2013) 2 SLJ 91

**Hon'ble Judges:** Rajesh Bindal, J

**Bench:** Single Bench

**Advocate:** Vikas Suri, for the Appellant; R.K. Chibbar with Mr. Lalit Thakur, for the Respondent

**Final Decision:** Dismissed

## Judgement

Rajesh Bindal, J.
The judgment of the Employees Insurance Court, Ambala dated 10.4.1987 is impugned before this court in the present

appeal. Briefly, the facts are that the respondent-M/s Hindustan Machine Tools Limited, Pinjore (hereinafter described as "establishment"), is

covered under the provisions of the Employees" State Insurance Act, 1948 (for short, "the Act"). It filed a petition u/s 75 of the Act for quashing

orders dated 25.2.1984 and 16.5.1985 (Annexures P2 and P3 respectively), whereby the claim for refund of the contribution which, according to

the establishment, had been excess paid, was rejected. The learned court below having accepted the petition, the Corporation is before this court.

2. At the time of hearing, learned counsel for the appellant submitted that following two substantial questions of law would arise for determination

by this court in the present appeal:

(1) Whether contribution made in respect of certain employees, because of subsequent settlement getting wages exceeding the wage limit would

alter their past status of an employee u/s 2(9) of the Act?

(2) Whether contribution paid for the contribution period, which commenced prior to a wage settlement with retrospective effect can be said to

have been earlier made under an erroneous belief and falling within the ambit of Regulation 40 of the Employees" State Insurance (General)

Regulations, 1950 (for short, ""the Regulations"")?

3. Learned counsel for the appellant submitted that the judgment of the learned court below directing for refund of the amount which, according to

the establishment, had been excess paid is totally erroneous and suffers from patent illegality. Section 2(9) of the Act defines the term ""employee"".

Proviso thereto specifically provides that in case the wages of any employee covered under the Act exceeds at any time after the beginning of the

contribution period, he shall continue to be an employee until the end of that period. Regulation 4 of the Employees'' State Insurance (General)

Regulations, 1950 (for short, ""the Regulations""), as applicable at the relevant time, provided for different contribution and benefit periods for

different sets of employees. Regulation 5 of the Regulations provides for allocation of contribution and benefit periods to various employees. He

submitted that in the present case, it is not in dispute that the period for which the contributions were paid by the establishment, the employees

were covered under the Act. It was only on account of wage revision in terms of agreement executed on 1.12.1983 with retrospective effect from

1.1.1983 that some of the employees crossed the wage limit, which had taken them out of the definition of employee for being covered under the

Act, otherwise on the date when the contribution was made, they were very well eligible. On account of the aforesaid retrospective wage revision,

refund of the contribution already paid was sought for three different contribution periods, namely, June, 1983 to November, 1983; August, 1983

to January, 1984 and October, 1983 to March, 1984.

4. Regulation 40 of the Regulations, which provides for refund of contribution erroneously paid provides that the amount could be refunded if it has

been paid under erroneous belief or at a rate higher than at which it was payable. The case in hand does not fall within the scope of Regulation 40

of the Regulations, as it cannot be said to be contribution paid under erroneous belief or at a rate higher than applicable. It cannot be disputed that

on the date when the contribution was paid, it was correctly paid in terms of the provisions of the Act, considering the salary being paid to the

employees, they were covered under the provisions of the Act. In support of the contentions, reliance was placed upon a judgment of Bombay

High Court in Regional Director, ESIC, Bombay v. Century Spinning & Weaving Co. Ltd., Shahad, (1992) 1 Lab. Law Journal 660.

5. On the other hand, learned counsel for the respondent submitted that in terms of the provisions of Section 82(2) of the Act, an appeal lies to this

court only on a substantial question of law. The same having not been framed in the memo of appeal, it deserves dismissal. He further submitted

that the instructions issued by the Corporation, on which reliance was placed upon by the Corporation before the learned court below, should not

be given weight over and above the provisions of the statute, in terms of which the respondent has rightly been directed to refund the contribution

erroneously paid by it. Referring to the provisions of Regulation 40 of the Regulations, it was submitted that the establishment is entitled to refund

of the contributions erroneously paid to the Corporation.

6. Heard learned counsel for the parties and perused the paper book.

7. The relevant provisions of Regulation 40 of the Regulations, on which reliance is sought to be placed by learned counsel for the parties, are

extracted below;

40. Refund of contribution erroneously paid.- (1) Any contribution paid by a person under the erroneous belief that the contributions were payable

by that person under that Act may be refunded without interest by the Corporation to the person, if application to that effect is made in writing

before the commencement of the benefit period corresponding to the contribution period in which contribution was paid.

(2) Where any contribution has been paid by a person at a rate higher than that at which it was payable the excess of the amount so paid over the

amount payable may be refunded without interest by the Corporation to that person, if application to that effect is made before the commencement

of the benefit period corresponding to the contribution period in which such contribution was paid.

(3) In calculating the amount of any refund to be made under this regulation there may be deducted the amount, if any, paid to any person by way

of benefit on the basis of the contribution erroneously paid and for the refund of which the application is made.

(4) Where the whole or part of the amount of any contribution referred to in sub-regulations (1) and (2) was recovered from an immediate

employer or deducted from the wages of an employee by the principal employer, he shall, on getting the refund of the amount due from the

Corporation, be liable to pay back the amount so recovered or deducted to the person from whom the amount was so recovered or deducted.

(5) Applications for refund under this regulation shall be made in such form and in such manner and shall be supported by such documents as the

Director General may, from time to time, determine.

8. The undisputed facts are that the respondent-company deposited the amount of contribution pertaining to its employees at the relevant time. It

was only on account of an agreement executed by the company with its employees on 1.12.1983 that wages of some of the employees were

revised with retrospective effect from 1.1.1983, which resulted in increase in the emoluments, on account of which they were not covered in the

definition of ''employee'' to be liable to pay contribution under the Act. Otherwise at the relevant time before the retrospective pay revision, these

employees were covered under the provisions of the Act.

9. The issue involved in the present appeal is as to whether the contributions paid by the employer pertaining to the employees who were taken out

of the scope of the Act on account of retrospective pay revision from a back date is liable to be refunded to the employer.

10. In terms of Sections 39 and 40 of the Act, both the employer and the employee have to make contribution under the Act. However, it is the

primary duty of the employer to deposit the contribution with the Corporation at the first instance with a right to recover the employee''s

contribution from his wages. The payment of contribution by the respondent in the present case at the first instance cannot be termed to be under

any erroneous belief considering the fact that undisputedly on the date the contribution was made, the employees were covered under the Act and

it is only on account of retrospective pay revision that they came out of the purview of the Act. During the period contribution was paid, the

employee was fully entitled to avail of the facility or the benefits under the Act and possibly may have even availed of.

11. An issue identical in nature came up for hearing before Bombay High Court in Century Spinning & Weaving Co. Ltd.''s case (supra), wherein

it was opined that the relevant date for considering the liability to pay contribution under the Act is the date on which the wages are paid.

Subsequent settlement or a retrospective pay revision will not alter the status of an employee from a back date. Relevant paragraphs 9 to 12 are

extracted below:

9. Undisputedly during the period of contribution viz., January 1, 1981 till June 30, 1981, the recruits of the Company were complying with the

description of the term ''employee''. As per the term of the contract of employment as then in vogue, they have been paid wages as defined under

sub-section (22) of Section 2 of the Act. And such payment would be decisive for the term ''employee'' u/s 2(9) and also for the purposes of

Sections 38 and 39. The wages payable as envisaged u/s 38 and 39 are qua to a period when the employees and the employer are liable to make

contribution towards the scheme. Owing to subsequent settlement dated September 7, 1981, the wages have become payable with effect from

January 1, 1981. However, it did not in any manner alter the term ''wages payable'' during the period of contribution as per the contract of

employment as then in vogue.

10. The ''employee'' as defined u/s 2(9) for the purposes of Insurance Scheme is a status enjoyed by the recruits of the establishment whereby they

could secure the benefits under the Employees'' Insurance Scheme. Status as an employee is an aspect of definite significance. It is to be

ascertained as per the test qua the period of contribution. It cannot be permitted to dwindle either according to the negotiations in progress or

subsequent settlement. There could be prospective change in the status as a consequence of such settlement or agreement. However, such status

once conferred cannot be altered or abrogated with retrospective effect. As such the recruits of the Company between January 1, 1981 and June

30, 1981 who have enjoyed such status of an ''employee'', could not deem to be so i.e. ''employee'' during the said period as a result of revision of

pay scales increasing their wages on September 7, 1981 even if made effective from January 1, 1981.

11. The effect of the settlement is that the recruits would be entitled to a benefit as per the revision in pay scales with retrospective effect i.e.

January 1, 1981. However, the status as an employee conferred on them for the purposes of the benefits under the Insurance Scheme would

remain the same. The settlement in its result could not withdraw the status attached to the recruits for particular period.

12. The Insurance Court has completely mis-directed itself in placing reliance on Clause 40(1) of the Employees'' State Insurance (General)

Regulations, 1950. The Insurance Court lost sight that in recovering the contribution the Corporation has neither committed any mistake nor the

recovery was in any manner erroneous. As such resorting to the said provision by the Company was wholly misplaced. In view of this, the

impugned judgment of the Insurance Court suffers from patent illegality and the same is liable to be set aside.

12. Madhya Pradesh High Court in Employees'' State Insurance Corporation, Indore v. Swadesh Daily Newspaper, Gwalior, 1994(3) L.L.J.

(Suppl.) 643 considered the issue as to who has the locus standi to seek refund of the contributions as contemplated under Regulation 40 of the

Regulations and it was opined that right to seek refund as contemplated under Regulation 40 is primarily of the employee and the employer has

only contingent or consequential rights. Paragraph 13 of the judgment is extracted below:

13. Second question is, if the employer has any locus standi to raise the ''question'' of refund of the contribution already paid which is made up of

both, employee''s and employer''s contribution. That neither he, nor any other person, can directly raise that ""'dispute"" in E.I. Court. I have already

held. However, it is also to be noticed that according to Section 38, ''employee'' is the ''insured'' and even when any deduction is made by the

employer from the wages paid to the employee until that amount is paid by him to the Corporation, the employer holds that amount in ''trust'' for

the purpose of payment of that amount to the Corporation. The moment the trust is discharged by payment, he ceases to have any authority to act

in any manner in respect of that amount though he had deducted that amount from the wages paid to the employee. When the ''Insured'' or the

''employee'' does not raise any ''dispute'' in accordance with Regulations 40(1), the employer is impliedly debarred from raising the "question"

regarding refund in respect of which a ''dispute'' could have been, but has not been raised as per provisions of Regulation 40(1) by the employee

claiming refund in regard to deduction made from his wages under an ''erroneous belief in respect to any particular ''benefit period''. The employer

cannot unilaterally claim that he had paid any contribution, whether that was done under ''erroneous belief or not, because contribution is jointly

payable by him for the employee of latter''s shares along with his own contribution. Regulation 40 does not kill employee''s option to avail the

''benefit'' subsequent and pursuant to any ''contribution'' paid, rightly or wrongly. Right to refund contemplated under Regulation 40 is primarily his;

and employer''s is only contingent or consequential right.

13. In view of the authoritative enunciation of law by Bombay High Court in identical facts and also as is evident from the plain reading of

Regulation 40 of the Regulations under which refund has been sought, in my opinion, the judgment of ESI court is patently erroneous and deserves

to be set aside. It cannot possibly be opined that the date on which contributions were deposited there could be any erroneous belief.

14. The contentions raised by the learned counsel for the respondent, as noticed above, are merely to be rejected as nothing was addressed on

merits of the controversy. The questions of law could be framed even at the time of hearing of the appeal. Accordingly, the appeal is accepted. The

impugned judgment of the learned ESI Court is set aside. The questions posed are answered in favour of the appellant. The petition filed by the

respondent before the ESI Court is dismissed.