(2007) 09 KL CK 0070

High Court Of Kerala

Case No: MFA No. 544 of 2002

The Regional Director of E.S.I. Corporation		APPELLANT
	Vs	
Hotel Alukkas		RESPONDENT

Date of Decision: Sept. 26, 2007

Acts Referred:

- Employees State Insurance (General) Regulations, 1950 - Regulation 29, 31
- Employees State Insurance Act, 1948 - Section 2(13), 2(22), 40, 45A, 45G

Citation: (2008) 116 FLR 41 : (2008) 1 KLJ 296 : (2008) 1 LLJ 738

Hon'ble Judges: K.S. Radhakrishnan, J; A.K. Basheer, J

Bench: Division Bench

Advocate: P. Sankarankutty Nair, for the Appellant; A.V. Xavier, for the Respondent

Final Decision: Allowed

Judgement

K.S. Radhakrishnan, J.

This appeal is preferred by the Regional Director of E.S.I. Corporation aggrieved by the order of the Employees State Insurance Court in IC. No. 17 of 2000 holding that the incentive payment made by the applicant is in the nature of a gift and therefore cannot be treated as wages as defined in Section 2(22) of the E.S.I. Act and no contribution can be demanded on such payment.

2. Respondent herein filed application before the Insurance Court assailing Ext. A3 order dated 28-2-2000 issued u/s 45-A of the ESI Act by which contribution was assessed on alleged omitted wages coming under the heads repairs/maintenance and incentive. Hotel Alukkas is an establishment covered under the Employees State Insurance Act which was required to pay contribution in accordance with Section 40 of the Act read with Regulations 29 and 31 of the ESI (General) Regulations 1950. Since the employer had failed to pay contribution as required by law, a notice was issued to the employer by the Regional Office of the ESI Corporation vide their letter

dated 18-11-1999 to show cause why contributions as per statement enclosed therein should not be finally determined u/s 45-A of the Act and recovered u/s 45-G to 45-1 of the Act. Employer replied to the notice stating that the work undertaken by the employer for maintenance of air conditioner, fridge etc. would fall outside the provisions of the Act and the incentive paid would not fall within the meaning of wages under the Act since it was in the nature of a gift to employees. Objection filed by the employer was rejected by the Corporation and final order u/s 45-A dated 28-2-2000 was issued directing the employer to pay contribution totalling to Rs. 29,422/- for the period from April 1994 to March 1996 with interest.

3. The employer aggrieved by that order approached the Employees Insurance Court. With regard to the claim made under the head repairs/maintenance, Insurance Court took the view that repair of air conditioners, fridges, automobile, TV etc. were technical in nature and even if those technical works were carried out in the premises of the applicant it would not be possible either for the applicant or his hotel employees to supervise such highly skilled works and in the absence of any supervision, the applicant could not be treated as the principal employer in relation to the employees who were engaged by the third parties to carry out the above works. Insurance Court therefore held that there was no justification in demanding contribution on the amount paid for such works. We fully endorse the view taken by the Insurance Court that there is no justification in demanding contribution on the amount spent for repairs/maintenance etc. since those were skilled and technical works and the mere fact that those works were undertaken in the premises of the applicant it cannot be said that the applicant could be described as immediate, employer as provided u/s 2(13) of the E.S.I. Act.

4. We are now concerned with the question as to whether ESI court was justified in holding that incentive payment effected by the employer to the employees could be treated as a gift and therefore would not fall within the definition of wages u/s 2(22) of the ESI Act.

5. ESI Corporation had conducted inspection of the premises of the hotel and the tourist home. It was noticed that an amount of Rs. 3,23,585/- was paid as incentive to the employees of the hotel and Rs. 1,01,355/- was paid as incentive to the employees of the Tourist Home for the period 1994-96. It was noticed that a total amount of Rs. 4,24,940/ - was found omitted from payment of contribution. Applicant was therefore directed to pay contribution on the above omitted wages at the rate of 5.5% which works out to Rs. 23,372/-. On the basis of the above mentioned report the Corporation issued the order u/s 45-A of the Act which were challenged before the Insurance Court. Before the Insurance Court the applicant has stated that the incentive paid to the employees were in the nature of a gift and therefore cannot be treated as wages as defined u/s 2(22) of the ESI Act. Insurance Court, as we have already indicated, accept that plea. We find it difficult to accept the order passed by the Insurance Court that incentive amount paid to the

employees could be treated as a gift and therefore would not fall within the definition of wages ad defined u/s 2(22) of the Act.

6. We may in this connection refer to the definition of wages u/s 2(22) of the Act which is extracted hereunder for easy reference:

(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 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 of provident fund, or under the 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.

7. The definition clause would clearly indicate that 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. Expression "additional remuneration" has to be noted. Additional remuneration in the nature of incentive is paid to the employees for the service rendered by them. It cannot be said that those payments have got the character of gift. First of all there is nothing to show that it partakes the character of a gift and that the employer can always recover it from the employees. AW-1 deposed before the court that at any moment the employer could withdraw the said amount and that it would not be a remuneration under any settlement or part of service conditions. We find it difficult to accept that contention. It is difficult believe that an amount of nearly Rs. 4 lakhs paid to the employees by way of gift. On the other hand, it is the specific stand of the Corporation that incentive was paid to the employees in all the months at fixed rates. The said facts were not controverted by the employer.

7. We may in this connection refer to a decision of the Apex Court in Harihar Poly Fibres v. ESIC 1994 (2) LLJ 475. Apex Court examined the scope of Section 2(22) of the Act and held as follows:

The Employees'' State Insurance Act is a welfare legislation and the definition of "wages" is designedly wide. Any ambiguous expression is, of course, bound to receive a beneficent construction at our hands too. Now, under the definition, first, whatever remuneration is paid or payable to an employee under the terms of the

contract of the employment, express or implied is wages; thus if remuneration is paid in terms of the original contract of employment or in terms of a settlement arrived at between the employer and the employee which by necessary implication becomes part of the contract of employment it is wages; second, whatever payment is made to an employee is respect of any period of authorised leave, lock out, strike which is not illegal or lay-off is wages; and third, other additional remuneration, if any, paid at intervals not exceeding two months is also wages; this is unqualified by any requirement that it should be pursuant to any term of the contract of employment, express or implied.... Therefore wages as defined includes remuneration paid or payable under the terms of the contract of employment, express or implied but further extends to other additional remuneration, if any, paid at intervals riot exceeding two months, though outside the terms of employment. Thus remuneration paid under the terms of the contract of the employment (express or implied) or otherwise if paid at intervals not exceeding two months is wages. The interposition of the clause 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 between the first clause, all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, was fulfilled'' and the third clause, ''other additional remuneration, if any, paid at intervals not exceeding two months, makes it abundantly clear that while ''remuneration'' under the third clause need not be under the contract of employment but may be any ''additional remuneration'' outside the contract of employment. So, there appears to our mind ho reason to exclude ''House Rent Allowance'', ''Night Shift Allowance, ''Incentive Allowance'' and ''Heat, Gas and Dust Allowance'' from the definition of "wages".

8. If we apply the above principle to the facts of this case it is clear that the amount of Rs. 4,24,940/- paid by the employer to the employees during the period 1994-96 is to be treated as additional remuneration which would fall within the term "wages" ad defined u/s 2(22) of the Act and therefore contribution demanded by the Corporation under that head is perfectly legal and valid. Under such circumstance we are inclined to allow this appeal to the extent holding that the contribution demanded from the employer that the amount paid towards incentive is legal and valid and the order of the Insurance Court is set aside to that extent.

Appeal is allowed as above.