

IN HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	24.09.2019
Pronounced On	18.10.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.M.A.No.2799 of 2011

The Employees' State Insurance Corporation
Having its Sub-Regional Office (Coimbatore)
at A.P. Office Complex, IV Floor, 333,
Cross Cut Road, Coimbatore - 641 012,
rep by its Deputy Regional Director,
Coimbatore - 641 012. ...Appellant/Respondent

vs

Datafield India Private Ltd,
A Company incorporated under the Indian
Companies Act, having its Factory at
119/1B, Mudalipalayam Road,
Arasur Post, Coimbatore - 641 407
Rep. by its Managing Director
Mr.M.K.Kannan ...Respondent/Petitioner

Prayer: Civil Miscellaneous Appeal filed under Section 82 of
the Employees Insurance Act, 1948, to set aside the order of
the Labour Court, Coimbatore (Employees State Insurance Court
constituted under ESI Act) dated 31.03.2010 made in ESIOP No.
55 of 2004.

For appellant : M/s.G.Narmadha for
G.Bharadwaj

For Respondent : Mr.I.Haroon-A- Rasheed for
M/s.T.S.Gopalan & Co

J U D G M E N T

The present Civil Miscellaneous Appeal has been filed
under Section 82 of the Employees Insurance Act, 1948, against
the order of the Labour Court, Coimbatore (Employees State
Insurance Court constituted under ESI Act) dated 31.03.2010
and made in E.S.I.O.P.No.55 of 2004.

2.By the impugned order, the Labour Court had allowed the
petition filed by the respondent under Section 75 of the ESI
Act, 1948. In the said petition the respondent had challenged
the order dated 28.06.2004 passed by the appellant under

Section 45A of the Employee's State Insurance Act, 1948 directing the respondent to pay a sum of Rs.49,886/-as contribution.

3.Earlier, the respondent was issued with a show cause notice dated 01.03.2004 to show cause as to why a sum of Rs.49,886/-should not be levied as contribution on the amount of Rs.7,67,462.58/- paid by the respondent to its employees/workers towards travelling allowance during the period between 01.04.2001 and 31.03.2003. The respondent submitted its reply and attended a personal hearing before the appellant herein.

4.Thereafter, the appellant herein passed an order dated 28.06.2004 under Section 45A of the Employee's State Insurance Act, 1948. In the said order, the appellant confirmed the proposal made in the above mentioned show cause notice and directed the respondent to pay the aforesaid amount within 15 days from the date of receipt of the order. The appellant also initiated recovery proceedings vide letter dated 11.10.2004.

5.The operative portion of the said order reads as under:-

From the wages slips for 3/04 and 4/04 I have found that the travelling allowances were paid proportionately on the basis of wages and as per the rank and designation status of the workers and staff and not as per the distance or actual expenditures involved for the performance of journey from their home and work place. The allowances were paid along with and form part of the wages/salary every month, depending upon the number days present. The amounts are paid as part of the wages/salary. Hence, I determine that the amounts of allowances constitutes wages under the Act and paid to the employees and contributions are payable.

6.Aggrrieved by the same, the respondent filed a petition under Section 75 of the ESI Act, 1948 before the Labour Court. The Labour Court vide the impugned order dated 31.03.2010 in E.S.I.O.P.No.55 of 2004 allowed the petition filed by the respondent under Section 75 of the ESI Act, 1948 and thus set aside order dated 28.06.2004 passed by the appellant which had directed the respondent to a sum of Rs.49,886/- as contribution under the ESI Act.

7.The Labour Court relied on the decisions of this court rendered in the following cases:

- i. Management of Oriental Hotel Ltd vs ESIC
Chennai, 2002 1 LLJ 14;

ii.Regional Director, ESI Corporation vs Sundaram Clayton Ltd., 2004 (1) LLN 630.

8.In paragraph 8 of Management of Oriental Hotel Ltd vs ESIC Chennai, 2002 1 LLJ 14 the court observed as under:-

"8 .Insofar as the conveyance is concerned, even though it forms part of the wages being the amount payable in terms of the contract of employment, having regard to the settlement and even de horse the settlement, the payment of the amount would fall within the ambit of "additional remuneration". Nevertheless, that amount will have to be excluded having regard to the specific exclusion provided in the definition itself for travelling allowance of the value of any travelling concession. The conveyance allowance paid is in the nature of travelling allowances as the object of that payment is to enable the employee to reach his place of work and to defray a part of the cost incurred on the travel from his place of residence the place of work. If instead of paying the conveyance allowance, the employer provided free transport to the employees, the monetary value of that benefit of free travel from his residence to the place of work would not have been capable of being regarded as forming part of the wages. The conveyance allowance paid in cash for the purpose of being utilised on the travel from the place of residence to the place of work, is of the same character and there is no reason why it should not be regarded as travelling allowance for the purpose of section 2 (22) (b) of the Employee' s State Insurance Act.

9.In Regional Director, ESI Corporation vs Sundaram Clayton Ltd., 2004 (1) LLN 630, the above decision in Management of Oriental Hotel Ltd vs ESIC Chennai, 2002 1 LLJ 14 was approved.

10.In the impugned order, the Labour Court has referred to the definition of "wages" in Section 2 (22) of the ESI Act, 1948 to exclude travelling allowance or the value of any travelling concession from its purview and thus allowed the petition filed by the respondent.

11.Aggrieved by the order of the Labour Court, the appellant Employees State Insurance Corporation represented by

its Deputy Regional Director, Coimbatore has preferred this appeal under Section 82 of the Employees' State Insurance Act, 1948.

12. In the present appeal, the appellant seeks to assail the impugned order of the labour Court which had set aside the order passed by the appellant Deputy Regional Director of ESIC on 28.06.2004 under Section 45(A) of the ESI Act pursuant to the Show Cause Notice dated 01.03.2004 seeking to include travelling/conveyance allowance into the wages for the purpose of contributions under the Act.

13. The learned counsel for the appellant relies on the decision of the Karnataka High Court rendered in Rajashree Cement and others vs The Deputy Director (I) and others, 2004 SCC OnLine Kar 220, wherein it was held as follows:

" The payment of conveyance allowance in the present cases is made either under the contract of employment or in terms of a settlement arrived at between the Management on the one hand and the employees on the other. That payments made by the Management under a settlement with the employees would constitute payments made under the contract of employment is fairly well settled by the decisions of the Supreme Court in Wellman (India) Pvt. Ltd. v. Employees' State Insurance Corporation, and Modella Woollens Ltd. v. Employees' State Insurance Corporation. To the same effect is the decision of this Court in Escorts Limited v. The Regional Director, ESI Corporation. If that be so, as it indeed is the payment of conveyance allowance made in terms of the contract of employment or the settlement would be a wage under Section 2(22) of the Act especially when such payment is made to all the employees and regardless whether they are using any conveyance and if they are the type of conveyance which they are using. The Corporation has in our opinion rightly come to the conclusion after review of the facts and a proper appreciation of the pronouncements of the Supreme Court and those of this Court that conveyance allowance is different from travelling allowance or travelling concession referred to in clause (b) of Section 2(22) of the Act. Travelling allowance referred to in clause (b) is a

payment meant to defray specific expenses incurred by the employees by reason of the nature of his employment and may include any allowance paid or reimburse to any employee for specific duty related journey. It may also include reimbursement of actual cost of journey subject to proof of actual expenditure. Payment of conveyance allowance on a uniform basis regardless whether the employee concerned has or has not incurred any expenditure on his journey to a place of his work is not however synonymous to travelling allowance as is envisaged under Clause (b) of Section 2(22). The ESI Courts were in that view of the matter perfectly justified in holding that the payment of conveyance allowance to the employees was a part of the wage payable to the employee and would therefore be relevant for purposes of determining the liability of the Management to pay contribution. The appeals filed by the Management to that extent do not make out a case for interference with the orders passed by the ESI Court, except in M.F.A. No. 1879/1999 where the Court has taken a contrary view which shall stand reversed in the light of the synopsis filed by the learned Counsel for the Corporation and in the light of what we have said herein above."

14. The learned counsel for the appellant also drew my attention to another decision of this Court rendered in Magus Customer Dialog Private Limited vs The Deputy Director, Chennai, 2011 SCC OnLine Mad 2867, wherein a learned Single Judge of this Court has distinguished the decision of the Court in Regional Director Employees' State Insurance Corporation, Madras vs Sundaram Clayton Ltd. Moppet Division, Madras, 2004 (1) L.L.N.630 with the following observations:-

"15. In the present case, the stand of the ESI Corporation was that the conveyance allowance paid was more than 60% of the Basic pay of an individual and therefore, it was unbelievable. But the petitioner in their original reply dated February 14, 2008 have claimed that the value was less than 25% of the basic salary. It cannot also be said that the amounts were paid pursuant to any settlement between the Management and the Union. There is a vast difference between the stand of the petitioner and the ESI Corporation. The petitioner claims

it was less than 25% whereas, ESI claims it was 65% of the wages. As held in Regional Director, ESIC, Madras v. Sundaram Clayton, Ltd., Moppet Division, Madras, (supra) case, unless it is proved that the amount was paid only in lieu of travelling allowance or the petitioner is paying the actuals of the expenditure incurred by the employees and in the absence of these ingredients, there cannot be any automatic presumption in favour of the petitioner's company and that a direction to the respondent must be issued to desist from passing final orders."

15. The learned counsel for the appellant sought to lay stress/ on the recent decision of the Honourable Supreme Court in a batch case rendered on 28.02.2019 by the Honourable Supreme Court reported in RPF (Regional Provident Fund) vs Vivekananda Vidya Mandir and others and other cases. The said decision was rendered in the context of Employee's Provident Fund and Miscellaneous Provisions Act, 1952.

16. Issue before the Honourable Supreme Court was whether special allowance paid by an establishment to its employees would fall within the expression "basic wages" under Section 2 (b) (ii) read with Section 6 of the Employee's Provident Fund and Miscellaneous Provisions Act, 1952 for computation of deduction towards provident fund.

17. There in some of the cases the management was paying basic wage + variable dearness allowance + travel allowance + lunch incentive. This was not included in the "basic wages" by the management for the purpose of deduction for provident fund. Similarly, some of the other managements were not deducting amounts towards provident fund contribution on house rent allowance, special allowance, management allowance and conveyance allowance by excluding it from basic wage. The High Court had rejected the case of the employer and thereby held that some of these amounts were to be included in the "basic wages" for the purpose of contribution under the Employee's Provident Fund and Miscellaneous Provisions Act, 1952. The Hon'ble Supreme Court rejected the plea of the Management and upheld the contention of the Regional Provident Commissioners. Operative portion of the decision in the above case reads as under:-

14. Applying the aforesaid tests to the facts of the present appeals, no material has been placed by the establishments to demonstrate

that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. There is no data available on record to show what were the norms of work prescribed for those workmen during the relevant period. It is therefore not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen. The wage structure and the components of salary have been examined on facts, both by the authority and the appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. There is no occasion for us to interfere with the concurrent conclusions of facts. The appeals by the establishments therefore merit no interference. Conversely, for the same reason the appeal preferred by the Regional Provident Fund Commissioner deserves to be allowed.

18. The decision of the Honourable Supreme Court rendered in Bridge and Roof Company (India) Limited vs Union of India, 1963 (3) SCR 978 was referred. In Bridge and Roof Company (India) Limited vs Union of India, 1963 (3) SCR 978, the Honourable Supreme Court observed that the crucial test in paragraph 8 of the said decision. Relevant portion of the paragraph 8 is reproduced below:

"Therefore, house-rent allowance which may not be payable to all employees of a concern and which is certainly not paid by all concern is taken out of the definition of "basic wages", even though the basis of payment of house-rent allowance where it is paid is the contract of

employment. Similarly, overtime allowance though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment; but because it may not be earned by all employees of a concern it is excluded from "basic wages". Similarly, commission or any other similar allowance is excluded from the definition of "basic wages" for commission and other allowances are not necessarily to be found in all concerns; nor are they necessarily earned by all employees of the same concern, though where they exist they are earned in accordance with the terms of the contract of employment. It seems therefore that the basis for the exclusion in the clause (ii) of the exceptions in S.2(b) is that all that is not earned in all concerns or by all employees of concern is excluded from basic wages. To this the exclusion of dearness allowance in clause (ii) is an exception. But that exception has been corrected by including dearness allowance in clause (ii) is an exception. But that exception has been corrected by including dearness allowance in S.6 for the purpose of contribution. Dearness allowance which is an exception in the definition of "basic wages", is included for the propose of contribution by S.6 and the real exceptions therefore in clause (ii) are the other exceptions beside dearness allowance, which has been included through S.6."

19.The decision of the Supreme Court in Muir Mills Company Ltd., vs Its Workmen, AIR 1960 SC 985 was also referred. Relevant portion of the said decision also is reproduced below:-

"11. Thus understood "basic wage" never includes the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production. The quantum of earning in such bonuses varies from individual to individual according to their efficiency and diligence; it will vary some times from season to season with the variations of working conditions in the factory or other place where the work is done; it will vary also with variations in the rate of supplies of raw material or in the

assistance obtainable from machinery. This very element of variation, excludes this part of workmen's emoluments from the connotation of "basic wages"..."

20. Decision of the Honourable Supreme Court in Manipal Academy of Higher Education vs Provident Fund Commissioner, 2008 (5) SCC 428, was also quoted wherein in paragraph 10 the law was summarised as follows:-

"10. The basic principles as laid down in Bridge Roof's case (supra) on a combined reading of Sections 2(b) and 6 are as follows:

(a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.

(b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages. By way of example it was held that overtime allowance, though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment but because it may not be earned by all employees of a concern, it is excluded from basic wages.

(c) Conversely, any payment by way of a special incentive or work is not basic wages."

21. The learned counsel for the respondent management (private limited) submits that the impugned order of the labour court is well reasoned and requires no interference. The learned counsel for the respondent referred to the following decisions of this Court rendered specifically in the context for ESI Act.

- i. Management of Oriental Hotels vs Employees' State Insurance, 2002 (1) LLJ 14.
- ii. Regional Director, Employees' State Insurance Corporation, Madras vs Sundaram Clayton Ltd., Moppet Division (Registered Office), Madras, 2004 (1) L.L.N.630.
- iii. Deputy Regional Director, The Employees State Insurance Corporation vs Management of the Lakshmi Mills Company Ltd., 2018 SCC Online 9334.

22.The learned counsel also submits that the decision in RPF (Regional Provident Fund) vs Vivekananda Vidya Mandir and others and other cases was rendered in the context of Employee' s Provident Fund and Miscellaneous Provisions Act, 1952. the context of Employee's Provident Fund and Miscellaneous Provisions Act, 1952 and therefore cannot be relied for the purpose of determination of wages under the Employees' Insurance Act,1948.

23.It was submitted that all allowances form part of "additional remuneration" attracting the contribution under Section 2 (22) of the ESI Act, 1948 and therefore the order of the labour Court which has been sought to be assailed in the present appeal cannot be permitted.

24.The learned counsel for the respondent management states that the order of the labour Court is well reasoned and requires no interference and therefore prayed for dismissal of the appeal.

25.I have considered the arguments advanced on behalf of the appellants and the respondent.

26.In present cases, the travelling allowances were paid proportionately on the basis of wages and as per the rank and designation/status of the workers and staffs. It was not as per the distance or actual expenditures involved for the performance of journey from their home and work place. The allowances were paid along with the wages/salary every month to employees, depending upon the number days present. According to the appellants, the amounts paid towards travel allowances were paid as part of the wages/salary.

27.The definition of wages under Section 2(22) of the ESI Act, 1948 and basic wages in Section 2 (b) of the Employee' s Provident Fund And Miscellaneous Provisions Act, 1952 read as under:

Employee' s State Insurance Act, 1948	Employee' s Provident Fund And Miscellaneous Provisions Act, 1952
Section 2(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, lockout, 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."	Section 2(b):- "Basic Wages" means all emoluments which are earned by an employee while on duty or (on leave or on holidays with wages in either case) in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include- (i)The cash value of any food concession; (ii)Any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment. (iii)Any presents made by the employer;

28.Both the definitions are worded differently. Both exclude certain categories of allowances and payments made by an employer. Sub Clause (a) to Section 2(22) of Employee' s State Insurance Act, 1948 of the excludes contribution paid by an employer to any pension fund or provident fund. Sub Clause (b) specifically excludes provisions of the value of any travelling concession or any travelling allowance. Sub Clause (C) excludes any sum same paid to the person employed to defray special expenses entailed on him by the nature of his employment.

29. The definition of "basic wages" in Section 2(b)(ii) of the Employee's Provident Fund and Miscellaneous Provisions Act, 1952 also carves out certain exceptions in the definition. Cash value of food concession, dearness allowance, house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment and any other presents made by the employer are excluded.

30. Though Dearness Allowance is excluded from the definition of "basic wages" in Section 2(b) of the Employee's Provident Fund and Miscellaneous Provisions Act, 1952, yet for the purpose of contribution under Section 6 of the said Act, "Dearness Allowances" is included as well. Section 6 of the said Act reads as under:-

Section 6: Contributions And Matters Which May Be Provided For In Schemes. - The contribution which shall be paid by the employer to the Fund shall be ten percent of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employees whether employed by him directly or by or through a contractor, and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding ten percent of his basic wages, dearness allowance and retaining allowance if any, subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section:

Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words "ten percent", at both the places where they occur, the words "12 percent" shall be substituted:

Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for rounding off of such fraction to the nearest rupee, half of a rupee, or quarter of a rupee.

Explanation I - For the purposes of this section

dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

Explanation II. - For the purposes of this section, "retaining allowance" means allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services."

31. In RPF (Regional Provident Fund) vs Vivekananda Vidya Mandir and others and other cases, it was held that for an amount to go beyond the scope of the definition of "basic wages", it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in following the decision of the Hon'ble Supreme Court in Bridge and Roof Company (India) Limited Vs Union of India, 1963 (3) SCR 978 wherein it was observed that the basis for the exclusion in the clause (ii) of the exceptions in Section 2(b) is that all that is not earned in all concerns or by all employees of concern is excluded from basic wages. In other words, any amount earned by an employee otherwise than his normal wages was to be excluded. The Hon'ble Supreme Court upheld the contention of the various Regional Provident Fund in RPF (Regional Provident Fund) vs Vivekananda Vidya Mandir and others and other cases. However, this test cannot be imported for the purpose of determination of "wages" in Section 2 (22) of the Employees' State Insurance Act, 1948 particularly in the light of the specific exclusion in sub Clause B.

32. The definition of "wages" in Section 2 (22) of the Employees' State Insurance Act, 1948 specifically excludes any travelling elements or the value of any travelling concession. The definition does not stipulate that the amount should be equal to the actual amount incurred towards travel from the factory to the residence/place of stay to and fro.

33. Therefore, any amount that is paid towards travelling allowance is not includible in the definition of "wages" in Section 2 (22) of the Employees' State Insurance Act, 1948. In fact it is not expected that the employer should maintain a separate log book for reimbursing such expenses on actual basis. In my view, the authorities acting under the Act have to consider legitimate business consideration and expediency of the men of commerce in allowing such expenses particularly in the light of the exclusions contained in the definition in

Section 2 (22) of the Act. In this connection, the decision of the Honourable Supreme Court in Philips India Ltd vs Collector of Central Excise, 1997 (6) SCC 31 is invited. There, the Honourable Supreme Court observed as follows:-

7. We think that in adjudicating matters such as this, the Excise authorities would do well to keep in mind legitimate business considerations.

34. Though rendered in the context of deduction under the Central Excise Act, 1944, the above observation is applicable to give facts of the present case. It is not expected for large business organisations to restrict the travel allowance to actual as it would not only involve unnecessary paperwork but also waste of time and men and man hours. Therefore, employers are perfectly within their right to work out a equalised method for allowing travel allowance to their employees.

35. It is for the concerned employee to use the travel allowance. The travel element are intended to ensure that the employee/worker is present at the place of work in time and reaches his home/place of residence after working hours. As long as the amounts that are given as travel allowance are not unreasonable and disproportionate, deductions cannot be denied. There are no facts forthcoming from the records to draw such inference that travel allowance was camouflaged. Merely because these amounts are paid at the time of disbursement of salary/wages to the employees/workers, it cannot ipso facto be construed that it has to be included as part of the "wages" in violence to the expression in exclusion in the definition.

36. The appellant has not produced any decision of the Honourable Supreme Court rendered in the context of Employee's State Insurance Act, 1948 contrary to the three decisions of this court cited by the learned counsel for the respondent. The decision of the Karnataka High Court which was cited by the learned counsel for the appellant is to be distinguished on facts in the light of the observations contained herein. Further, there the payments were made either under the contract of employment or in terms of a settlement arrived between the management on the one hand and the employees on the other hand.

37. I am therefore of the view that the impugned order passed by the Labour Court's requires no interference. Accordingly, the present Civil Miscellaneous Appeal filed by

the Deputy Regional Director of the Employee's State Insurance Corporation is liable to be dismissed.

38. Accordingly, the present Civil Miscellaneous Appeal is dismissed. No cost.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

jen

To

1. The Labour Court, (Employees State Insurance Court constituted under ESI Act)
Coimbatore.
2. The Deputy Regional Director,
Employees' State Insurance Corporation
Having its Sub-Regional Office (Coimbatore)
A.P. Office Complex, IV Floor, 333,
Cross Cut Road, Coimbatore - 641 012,
3. The Section Officer,
V.R. Section. High Court,
Madras.

+1cc to M/s. T.S. Gopalan & Co, Advocate SR.87503

+1cc to Mr. G. Bharadwaj, Advocate SR.87424

Pre-Delivery Judgment
in

C.M.A.No.2799 of 2011

SJ(CO)

CB(21/11/2019)

CB(09/01/2020)

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