IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 08.10.2020

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THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A. No.1527 of 2020

The Employees State Insurance Corporation,
Sub Regional Office,
Coimbatore. ... Appellant/Respondent

-vs-

M/s.Texmo Industries,
rep. by its Managing Partner
Mrs.Damayanthi Ramchandran ... Respondent/Appellant

Prayer: Civil Miscellaneous Appeal filed under Section 82(2) of the ESI Act against the order of the Employees State Insurance Court, Coimbatore dated 31.07.2020 made in E.S.I.O.P. No.1/2016 to set aside the same.

For Appellant : Mr.G.Bharadwaj

JUDGMENT

This appeal has been filed against the order dated 31.07.2020 passed by the Employees State Insurance Court, Coimbatore in E.S.I.O.P. No.1 of 2016.

2.The appeal arises the following substantial questions of law:

'a)Whether without any averment in the petition and mere oral evidence of the respondent without any supporting documentary evidence can be relied upon by the ESI Court to decide that the employees are paid only travelling allowance as contemplated under C1(b) of Section 2(22) of the Act?

b)Whether the conveyance allowance paid by the respondent as part of wages are payments made to defray the travelling expenses incurred by them by reason of nature of their employment?

c)Whether contribution allowance paid to the employees as part of wages is excluded under the purview of the definition of "wages" under the ESI Act?

d)Whether the finding of the ESI Court is sustainable in merely relying upon the oral evidence of PW1 and referring one judgment of the High Court and arriving at a conclusion that conveyance allowance is excluded from the purview of “wages” as per cl(b) of Section 2 (22) of the ESI Act?

e)Whether the conveyance allowance paid by the respondent to its employees is a “wage” within the meaning of Section 2(22) of the Act to entitle the EWSI Corporation to demand contribution under the said Act?'

3.Learned counsel appearing for the ESI Corporation pleaded that the Social Security Officer has inspected the respondent Industries between 22.01.2015 and 23.01.2015 and drew an inspection report dated 23.01.2015. and on verification of records, it was observed that ESI contribution has not been paid on Conveyance Allowance which is part of monthly wage component. Therefore, the officer has found that during the period 2011-12, 2012-13, 2013-14 & 4/14 to 12/14, a total amount of Rs.1,45,92,566/- was paid on conveyance allowance to the ESI covered employees and that the contribution on the said amount is due and payable to the appellant. But, during the enquiry, the respondent requested the appellant to deduct a portion of amount in the contribution stating that the difference in wages claim is concerned, it was taken inclusive of leave salary, allowances and final settlement made to the staff including the exempted employees. Thereafter, the appellant has passed an order dated 20.05.2016 under Section 45-A of the ESI Act stating that the respondent has to pay a sum of Rs.10,29,670/- as a contribution in respect of wages and again the appellant passed a revised order dated 06.07.2016 directing the respondent to pay a sum of Rs.9,89,783/- as a contribution in respect of wages.

4.Learned counsel appearing for the appellant would further submit that the conveyance allowance including transport allowance should be treated as wages as it flows out of wage settlement and thereby, it has come within the first part of the definition of Wages under Section 2(22) of the ESI Act. But, when the respondent made payment, it varies according to the attendance of the particular employee and the same is construed as fixed Conveyance Allowance flowing out of Wage Settlement and therefore, the same is treated as wages and that the contribution is due on the part thereon. Therefore, the impugned order is liable to be set aside.

5.When there was a dispute with regard to non payment of ESI contribution on the conveyance allowance, an order was passed determining the payment payable by the respondent management in the case of Regional Director vs. The Management of Magus Customer Dialog Private Ltd. wherein it has been held that the conveyance allowance shall not form part of the wages for the purpose of ESI Act. Therefore, the argument made by the learned counsel for the appellant that the conveyance allowance including transport allowance should be treated as wages as it flows out of wage settlement and the same has come within the first part of the definition of Wages under Section 2(22) of the

ESI Act cannot be accepted. Moreover, when Section 2(22) of the ESI Act clearly defines that wages does not include any travelling allowance or the value of any travelling concession, the ESI Corporation cannot come to this Court raising the above substantial questions of law. It is relevant to extract Section 2(22) of the said Act as under:

> '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 authorised leave, lock-out, strike which is not illegal or layoff 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.

6.A perusal of Section 2(22) vividly makes it clear that paying conveyance allowance is only 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 to the place of work. Therefore, it is not fall within the definition of wages. Moreover, our High Court in the reported judgment in the case of Management of Oriental Hotels Ltd., Chennai vs. Employees State Insurance Corporation, Chennai has held in paragraphs 9 and 10 as under:

> '9.But, the decision of this Court reported in 2002 (1) LLJ 14 (Management of Oriental Hotels Ltd., Chennai v. Employees State Insurance Corporation, Chennai) gives a fitting answer to this issue. In the said judgment it has been held as follows:
>
> > "8.Insofar as the conveyance allowance 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 do hors 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 or the value of any travelling concession. The conveyance allowance paid is in the nature of travelling allowance 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 to the place of work. If instead of paying the conveyance allowance,

the employer had 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 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 Employees' State Insurance Act."

A reading of the above said judgment would show that paying conveyance allowance is only to enable the employee to reach his place of work from the place of his residence and therefore, it will not fall within the definition of 'wages'. Under such circumstances, I do not find any infirmity in the finding rendered by the Court below. There is no merit in the appeal and the same is liable to be dismissed.

10.In the result, the Civil Miscellaneous Appeal is dismissed. No costs.'

7.Therefore, in view of the settled legal position that the wage does not include the travelling allowance or the value of any travelling concession for the simple reason that paying conveyance allowance is in the nature of travelling allowance as the object of that payment is to enable the employee to reach his place of work which will not fall within the definition of wages, this Court, answering the substantial questions of law against the appellant, is inclined to dismiss the appeal. Accordingly, the appeal fails and the same is dismissed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

vga

To

1.The Employees State Insurance Court,
Coimbatore.

+1cc to Mr.G.Bharadwaj, Advocate, S.R.No. 33498

C.M.A. No.1527 of 2020

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