The Indian Law Reports

LETTERS PATENT APPEAL

Before D. Falshaw, C.J., and S. B. Capoor, J.

THE BIRLA COTTON SPINNING AND WEAVING MILLS,—*Appellant.*

versus

SUMER CHAND,—*Respondent.*

L.P.A. No. 97-D of 1960.

1962

May, 16th.

Employees' State Insurance Act (XXXIV of 1948)—Ss. 39, 40 and 42—Employee on authorised leave without pay during certain weeks—Employer paying employer's and employee's contribution for those weeks—Whether entitled to recover the amount of employee's contribution from his wages for the months in which those weeks fall.

Held, that an employer, having rightly or wrongly paid to the authority his own and the employee's contributions in respect of the weeks during which he was on leave, is not entitled to recover the employee's contribution out of wages paid for work done in weeks other than those during which he was on leave. It is clearly provided in section 42(4) of the Employees' State Insurance Act that no contribution is payable in respect of any week in which no services are renedered by an employee and no wages are paid to him. Once a week is taken as the unit it is clear that no contribution can be deducted from the wages of an employee who in any particular week is on authorised leave without pay, and so neither does any work nor receives any wages.

Appeal under Clause 10 of the Letters Patent from the judgment, dated 18th August, 1960, passed by Hon'ble Mr. Justice Shamsher Bahadur in F.A.O. No. 38-D/1954.

D. K. KAPUR, ADVOCATE, for the Appellant.

Nemo, for the Respondent.

JUDGMENT

Falshaw, C. J.

FALSHAW, C. J.—This is an appeal under clause 10 of the Letters Patent against the order of Shamsher Bahadur, J., dismissing an appeal filed by the Birla Cotton Spinning and Weaving Mills, Delhi, against the order of the Senior Subordinate Judge, Delhi, acting as Judge of the Employees' State Insurance Court under the provisions of the Employees' State Insurance Act of 1948.

The matter is rather an old one since it arises from the fact that an employee of the appellant company named Banke Lal was on authorised leave without pay for the periods (i) from the 17th to the 30th of November, 1952, (ii) from the 1st to the 14th of December, 1952 and (iii) from the 22nd to the 28th of December, 1952. The Act provides for the payment by the employer in the first instance of both employer's and employee's contributions to the fund at the rates specified in the schedule to the Act, but authorises with certain limitations the recovery by the employer from the employee of the latter's contribution. In the present case the company duly paid over its own dues in respect of Banke Lal and also the dues of Banke Lal, and then proceeded to recover Banke Lal's share for the months of November and December, out of wages paid to him for the parts of those months during which he actually worked.

It appears that the trade union to which Banke Lal belongs took up his case and challenged the legality of the deduction from Banke Lal's wages of his contribution for the periods during which he was on authorised leave without pay. The deduction in respect of these periods was held to be illegal by the Employees' State Insurance Court as long ago as January, 1954, but it appears that the appeal which was filed by the employer under

the provisions of the Act in this Court was not decided until the 18th of August, 1960. This is said to be at least partly due to the fact that the learned counsel who originally filed the appeal in 1954 later became a Judge of this Court as also did the learned counsel to whom brief was entrusted after his appointment. Be that as it may, the learned Single Judge upheld the decision of the Employees' State Insurance Court.

Chapter IV of the Act deals with contributions and sub-sections (1) and (2) of section 39 provide that the contribution in respect of an employee is to consist partly of the contribution paid by the employee and partly of the contribution paid by the employer and that the contributions shall be calculated according to the rates specified in the first schedule. Sub-section (3) reads—

> "A week shall be the unit in respect of which all contributions shall be payable under this Act."

The relevant portions of section 40 read—

> "(1) The principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.
>
> (2) Notwithstanding anything contained in any other enactment, but subject to the provisions of this Act and the regulations, if any, made thereunder, the principal employer shall, in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee

The Birla Cotton Spinning and Weaving Mills
v.
Sumer Chand

Falshaw, C. J.

the employee's contribution by deduction from his wages and not otherwise:

Provided that no such deduction shall be made from any wages other than such as relate to the period or part of the period in respect of which the contribution is payable, or in excess of the sum representing the employee's contribution for the period."

Section 42 deals with general provisions as to payment of contributions and reads—

"(1) No employee's contribution shall be payable by or on behalf of an employee whose average daily wages are below Re. 1.

Explanation.—The average daily wages of an employee shall be calculated in the manner specified in the first schedule.

(2) Contribution (both the employer's contribution and the employee's contribution) shall be payable by the principal employer for each week during the whole or part of which an employee is employed.

(3) Where wages are payable to an employee for a portion of the week, the employer shall be liable to pay both the employer's contribution and the employee's contribution for the week in full, but shall be entitled to recover from the employee the employee's contribution.

(4) No contribution shall be payable in respect of an employee for any week during

the whole of which no services are rendered by an employee and in respect of which no wages are payable to him.

(5) Notwithstanding the provisions of sub-section (4), contribution shall be payable, in respect of any week during which no services are rendered and no wages are paid to an employee, at the rate at which contribution was last paid, where the failure to render such services is due to the employee being on auhorised leave, or is due to a lock-out or a legal strike, if in respect of the period covered by such legal strike the employee receives wages in full or in part."

The question depends on the interpretation to be given to the word 'period' in the proviso in sub-section (2) of section 40 to the effect that "no such deduction (i.e., employee's contribution) shall be made from any wages other than such as relate to the period or part of the period in respect of which the contribution is payable." It is contended on behalf of the appellant that since admittedly wages are paid by the appellant on a monthly basis the period must mean a full month, and therefore, even if an employee only works for part of the month, the employer, having paid both the employer's and the employee's contributions in respect of the whole month, would be entitled to recover the employee's subscription from the wages paid for his services for part of the month. On the other hand the learned Senior Subordinate Judge and the learned Single Judge have both taken the view that whatever may be the system of payment of wages by the appellant company the week is clearly made the unit in respect of which all contributions shall be payable under the Act [section 39(3)], week

The Birla Cotton Spinning and Weaving Mills
v.
Sumer Chand

Falshaw, C. J.

being defined in the Act in section 2(23) as a period of seven days commencing at midnight of Saturday night, and each of the periods spent on leave by the employee in this case consists of whole week, the first two periods being of a fortnight and the last one a week. Moreover, it is clearly provided in section 42(4) that no contribution is payable in respect of any week in which no services are rendered by an employee and no wages are paid to him. Once a week is taken as the unit it is clear that no contribution can be deducted from the wages of an employee, who in any particular week is on authorised leave without pay, and so neither does any work nor receives any wages. There seems to be ample justification for the view taken by the learned Single Judge that the period in the proviso in sub-section (2) of section 40 must be taken to be a week.

It may be that actually according to section 42(4) no contribution is payable even by the employer in respect of any week in which the employee neither performs any services nor receives any wages, but this aspect of the matter has not been considered, and it does not even arise in the sense that the narrow point for determination is whether the employer, having rightly or wrongly paid to the authority his own and the employee's contributions in respect of the weeks during which he was on leave, is entitled to recover the employee's contribution out of wages paid for work done in weeks other than those during which he was on leave, which appears to be clearly barred by the proviso in section 42. In the circumstances I see no reason to interfere and would dismiss the appeal, but make no order as to costs since the Union has not appeared.

S. B. CAPOOR, J.—I agree.

B.R.T.