N.K.S.

Before G. C. Mital, J.

EMPLOYEES STATE INSURANCE CORPORATION,—*Appellant.*

versus

GEDORE TOOLS INDIA (P.) LTD.,—*Respondent.*

First Appeal from Order No. 57 of 1980.

December 3, 1981.

Employees State Insurance Act (XXXIV of 1948)—Section 2(22)—Wages—Sectional Reward Scheme unilaterally introduced by the employer by way of incentive—Such scheme could be modified or rescinded by the employer at his own will—Payments made under the Scheme—Whether 'wages'—Tea and milk allowance also given under unilateral scheme—Such allowance—Whether covered by the expression 'wages'.

Held, that the sectional reward scheme as also the concession of milk and tea allowance being a voluntary and unilateral act of the management not forming part of the contract of service, the payments made to the employees thereunder would not fall within the first part of the definition of wages. These would also not fall in the second part of the definition. However, since the payments made were the unilateral act of the management which could be withdrawn or changed by it at any time to the detriment of the employees, these would not come even under the third part of the definition, of wages as given in section 2(22) of the Employees State Insurance Act, 1948. (Paras 5 and 6).

First Appeal from order of the court of Shri S. D. Anand Employees Insurance Court, Gurgaon Camp, Ballabgarh, dated 19th October, 1979 quashing the impugned demand notices for sum of Rs. 2,11,034,33 P. as the contribution on the milk/tea allowance and sectional reward scheme and Rs. 13,11,18 as interest thereon. It is held that no contribution under the E.S.I. Act is payable on the amount spent on tea and milk allowance and the sectional reward scheme in question and leaving the parties to bear their own costs.

K. L. Kapoor, Advocate, *for the Appellant.*

A. S. Chada & R. N. Narula & Lakhinder Singh, Advocates, *for the Respondent.*

JUDGMENT

Gokal Chand Mital, J.—

1. The following substantial questions of law arise for determination in this appeal :—

(i) Whether payments made to employees under a unilateral reward scheme, which cannot be enforced by the employees but can be altered or rescinded to the detriment of the employees by a unilateral act of the employer, can be termed as 'wages' as defined in section 2(22) of the Employees State Insurance Act, 1948 (hereinafter referred to as the Act)? and

(ii) Whether 'milk and tea allowance' paid to the employees would be covered by the definition of 'wages' as given in section 2(22) of the Act or would be excluded therefrom under any of the exceptions thereto ?

2. The respondent industrial concern was called upon by the Regional Director of the Employees State Insurance Corporation (hereinafter called the Corporation) to pay contribution on the reward payments made by the former to its employees, as also in respect of the 'milk and tea allowance' payments made to them, because, according to the Corporation, the reward as well as 'milk and tea allowance' payments formed part of 'wages' as defined in section 2(22) of the Act. The demand was challlenged by the respondent-company by filing a petition under section 75 of the Act. The employees Insurance Court by a well-reasoned order, dated 19th October, 1979, came to the conclusion that the benefit of the reward scheme and the milk and tea allowance was extended by the management unilaterally to its employees which could be modified or withdrawn by it at any time to the disadvantage of the employees and, therefore, did not fall within the definition of 'wages' as contained in section 2(22) of the Act and, as such, no contribution was payable thereon. In para 49 of the judgment, the learned court also concluded that the Regional Director, who issued the demand notices, was not the competent authority to do so. In

view of the aforesaid two findings, the application filed by the management was allowed and the demands were held to be illegal. Against the aforesaid judgment, the Corporation has come up in this appeal.

3. Section 2(22) of the Act which falls for consideration is as follows :—

> "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 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."

A plain reading of the aforesaid definition does go to show that the term 'wages' means and includes the following three kinds of payments :—

(i) remuneration paid or payable in cash to an employee under the terms of contract of employment,

(ii) payments made or payable in respect of any period of authorised leave, lock-out, strike, which is not illegal; or lay-off, and

(iii) other additional remuneration, if any, paid at intervals not exceeding two months.

Before the legal position is discussed in greater detail, the facts of the case must be borne in mind. The court below has found that the management had evolved a sectional reward scheme providing for incentive to its employees so that they put in more work and show better production and whichever section of the industry showed better results was to be paid unilaterally reward over and above the emoluments payable under the terms of contract of service. The scheme is Ex. A5, a reading of which clearly shows that it was a unilateral act of the management and the scheme could be modified or rescinded by the management at any time to the detriment of the employees. The finding of the court below to this effect is fully borne out from the evidence on record. Accordingly, I shall proceed to decide this aspect of the matter with these facts in view.

4. As regards the 'milk and tea allowance', the factual position on the record is that while tea was being served to all the employees on duty, milk used to be provided to the employees working in forging, grinding heat-treatment and electro-plating sections only as the employees in those sections had to work under special atmospheric conditions of heat, dust, fume, etc.. and, thus, it was done in order to take better care of their health. While the tea was provided in a mug, half a litre of milk per day was given to each employee actually on duty in the aforesaid sections. The resultant effect was that the employees, actually on duty could get milk and tea whereas those off duty could not get this facility. It has also come in evidence that once a problem arose between the employees and the canteen-man about the quality and the quantity of milk and tea to be given to the employees. In order to avoid the controversy, the management framed a unilateral policy,—*vide* Ex. A4 called the food concession under which it decided to pay tea allowance at the rate of Rs. 3 per month and milk allowance at the rate of Rs. 13.50 per month. The policy also provided that whenever an employee would be absent from duty or would be on leave of any kind, proportionate deduction would be made from the allowance payable. This was also a voluntary scheme which could be unilaterally modified or rescinded by the management at any time to the detriment of the employees and the court below accordingly concluded that it was also unilateral scheme not making the allowance a part of contract of service. This finding of the court below is also

based on evidence and has not been shown to be wrong. Accordingly, this aspect of the matter will also be tested on the aforesaid premises, namely, that milk and tea allowance was payable to the employees on the basis of a unilateral policy framed by the management which could be withdrawn or modified by the management at any time on their own sweet-will.

5. The facts of the case being clear that the sectional reward scheme as also the concession of milk and tea allowance being a voluntary and unilateral act of the management, not forming part of the contract of service, the matter will not fall within the first part of the definition of 'wages'. Neither of the parties to this case disputes this proposition. It is also not disputed that this matter will not fall in the second part of the definition. Therefore, the dispute centres around the third part of the definition. While according to Mr. Kapur appearing for the Corporation, this would fall in the expression, "other additional remuneration" and hence would form part of the 'wages', according to Mr. Chadha, counsel for the management, the expression "other additional remuneration" includes only such other remuneration paid under any scheme, policy, settlement or additional terms of employment, which may be enforceable at law, and does not include any payment made under a unilateral act of the employer subject to withdrawal or modification at the instance of the employer at any time, without creating a right in the employee and hence such payment shall not mean remuneration and consequently, will not form part of the expression "other additional remuneration". Mr. Kapur, counsel for the Corporation, has placed reliance on the following decisions :—

(i) *Employees' State Insurance Corporation, Hyderabad* vs. *Andhra Pradesh Paper Mills Ltd., Rajahmundry* (1).

(ii) *M. G. Works P. Ltd.* vs. *ESI Corpn.* (2).

(iii) *Sharma (R. L.)* vs. *Employees' State Insurance Corporation* (3).

(1) AIR 1978 A.P. 18 (F.B.)
(2) 32 Fac L.R. 436 : (1976 Lah I.C. 515) Bombay.
(3) (1968) 1 L.L.J. 441 Punjab.

On the other hand, Mr. Chadha, counsel for the management, has placed reliance on the following decisions :—

(i) (4).

(ii) *Regional Director of Employees' State Insurance Corporation* vs. *Management of Mysore Kirloskar Ltd.* (5).

(iii) *Bengal Potteries Ltd.* v. *Regional Director, W. Bengal Region, Employees' State Insurance Corporation and others* (6).

(iv) *Regional Director, W.B. Region, ESIC and others v. Bengal Potteries Ltd.* (7).

(v) *Corborundum Universal Ltd.* v. *ESI Corpn., Trichur* (8).

(vi) *M/s. Braithwaite and Co. (India) Ltd.* v. *The Employees' State Insurance Corporation* (9).

Besides, he placed reliance on the Full Bench judgment of the Andhra Pradesh High Court cited by Mr. Kapur.

6. After going through all the aforesaid cases, I find that wherever the payments were made on the basis of settlement made before the Conciliation Officer or under any scheme by which both the sides were bound, it was held that such payments were covered by the definition of "wages" as the same were enforceable at law as well. Wherever the payments were made either as bonus or under a unilateral scheme to induce the employees to put in more work, which could be changed or withdrawn by the management at any time unilaterally, it was held that such payments could not be termed as remuneration or "other additional remuneration" and, therefore did not come under the third part of the definition

(4) (1972) 2 M.L.J. 607.
(5) (1974) 2 LL.J. 396 (Ker).
(6) (1973) Lah. I.C. 1328, Calcutta.
(7) 1978 Lah. I.C. 793 Calcutta.
(8) (1976) 1 L.L.J. 17 Kerala.
(9) AIR 1968 S.C. 413.

of 'wages' as contained in section 2(22). The matter would have been concluded by the Supreme Court decision in *M/s. Braithwaite and Co. (India) Ltd. case* (supra) but a reading of that judgment shows that the unilateral reward scheme in that case was considered only under the first part of the definition of 'wages' and not under the third part thereof. That is why, in the various cases cited by Mr. Chadha, the third part of the definition had to be interpreted to find out whether unilateral payments made by the employer to the employees would be covered by that part or not. All the decisions, barring the Bombay High Court decision, are unanimous to support the proposition that if payments are made on the basis of a unilateral scheme, which can be withdrawn or altered by the employer at any time according to his sweet-will, such payments would not mean "other additional remuneration" falling under third part of the definition of 'wages'. The Full Bench of the *Andhra* Pradesh High Court in the *Andhra Pradesh Paper Mills Ltd.*, case (supra) answered the question as follows :—

> ".....in order to fit into the definition of 'wages' so far as the incentive bonus or productivity bonus scheme is concerned, the terms of the scheme must be examined and it must be ascertained whether the bonus paid under the scheme is part of the terms of the contract of employment, as was the case in *Hyderabad Asbestos Cement Products Ltd.'s* (10), before Chinnappa Reddy and Punnayya, JJ., and before the Kerala High Court in *Corbonundum Universal's case* (11) and as is not the case before us or, whether it is an additional remuneration within the meaning of the third part of S. 2(22) of the Act. If it does not fall either in the category of Part I or Part III, then only it can be said not to be wages and hence only then contribution will not be payable on the amount of bonus paid by the employer to the employees in such a scheme. If as happened in *Braithwaite & Co.'s case*, (12) or in *Vazir Sultan Tobacco Co.'s case*, (13) the bonus is paid at the discretion of the employer and

(10) 1977 Lah. I.C. 313 An. Pra.
(11) 1976 I. Lah. L.J., 17.
(12) A.I.R. 1968 S.C. 413.
(13) 1973 Lah. I.C. 523, An. Pra.

can be withdrawn at any time without implementing it, then it would not be wages within S. 2(22)."

A reading of the above judgment clearly shows that any payment made at the discretion of the employer cannot be termed as 'wages' either under the first part or under the third part of the definition of 'wages'. Therefore, the aforesaid view clearly supports the contention of the counsel for the management. Only the Bombay High Court in *M.G. Works P. Ltd.'s case* (supra) has gone on to include all additional payments made by the employer to the employee would fall within the third part of the definition of 'wages' and that judgment does support the contention of the counsel for the Corporation, but a reading of the facts of that case would show that there the payments were made on the basis of a settlement arrived at between the management and the employees which was binding on them and could be enforced at law. In that view of the matter, that cannot be considered to be a direct decision on the point and the observations made therein would be more in the nature of *obiter dicta.* On the other hand, before the Madras, Karnataka and Calcutta High Courts, the cases were directly on the facts in hand, namely, whether payments in question were made on the basis of a unilateral policy or scheme framed by the management which could be withdrawn at any time by it, and it was held in those cases that such payments were not part of 'wages'. The Full Bench of the Andhra Pradesh High Court has considered the Bombay view as well and on consideration of all the decisions, including the Supreme Court decision in *M/s Braithwaite & Co. (India)* Ltd.'s case (supra), has taken the view in favour of the management and against the Corporation. I am inclined to follow the same. While doing so, the only inescapable conclusion on the facts of the present case would be "that the payments made under the sectional reward scheme or under the milk and tea allowance policy were the unilateral act of the management which can be withdrawn or changed by it at any time to the detriment of the employees and, therefore, would not come under third part of the definition of 'wages' and, thus, not amenable to the Act."

7. The matter of payment of milk allowance in this case can be considered yet from an additional angle. The finding recorded by

the court below, as also the unrebutted evidence on record, clearly go to show that the employees working in the four sections referred to above were subjected to such hazards that in order to take care of their health, special expenses for providing them milk had to be entailed by the management. While for some time milk was provided to the employees working in those sections, later it was considered proper to pay them cash allowance to defray those special expenses for the purchase of milk and, therefore, the payment of such allowance clearly fell within exception (c) to the definition of 'wages'. On this basis also, the milk allowance could not be included in the wages for levying contributions under the Act.

8. Before parting, one more point deserves to be noticed, namely, whether the Regional Director was competent to issue notices making demand from the management or not and whether the court below was right in deciding this point in favour of the management and against the Corporation. Counsel for the Corporation has invited my attention to notification dated 11th January, 1968, a reading of which clearly shows that the Regional Director was duly authorised to demand the contributions. Mr. Chadha, appearing for the management, was unable to controvert the aforesaid argument or to show that the said notification either did not apply to the facts of the present case or it did not authorise the Regional Director to demand contributions and issue notice in that behalf. Accordingly, the decision to the contrary recorded by the court below in this regard is set aside and it is held that the Regional Director was competent to issue notices demanding contributions under the Act.

(9) For the reasons recorded, the appeal is allowed in part as indicated above and the order of the court below to the effect that the Regional Director had no jurisdiction to issue notice demanding contributions is set aside. In all other respects, the appeal fails and is dismissed being without any merit. The parties shall bear their own costs.

S.C.K.