2023:BHC-AUG:15214

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 651 OF 2003

Paramount Agencies Pvt. Ltd.
a Private Limited Company registered
under Companies Act, 12956 and
having it's Registered Office situated
at 5-9-164 Chapel Road, Begum
Hyderabad and having it's one of
the Brach situated at Station Road,
Aurangabad — Appellant

Versus

1. The Deputy Regional Director
E.S.I. Corporation, 'PANCHDEEP'
Bhavan, Ganeshpeth,
Nagpur

2. Assistant Regional Director
E.S.I. Corporation, 'PANCHDEEP'
Bhavan, Ganeshpeth,
Nagpur — Respondents

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Mr. S.V. Dankh, Advocate for the appellant.
Mr. V.D. Sonawane, Advocate for the respondent.

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CORAM : **SANDIPKUMAR C. MORE, J.**

Judgment Reserved on : 11.07.2023.
Judgment pronounced on : 20.07.2023.

Judgment :

1. Feeling aggrieved and dissatisfied with the judgment and order dated 30.11.1994 passed by the learned Judge, Employees' State Insurance Court, Member, Industrial Court, Aurangabad (hereinafter referred to as "the learned

trial Court") in Application (E.S.I.) No. 4/1991, the appellant Company, who is the original applicant in the aforesaid Application, has preferred this appeal challenging rejection of it's application.

2. The background facts are as under :

. The appellant Company is covered under the Employees' State Insurance Act, 1948 (for short, "the ESI Act"). Non applicant No.2, on the basis of inspection dated 06.12.1989, issued one letter dated 31.01.1991 to the appellant Company claiming an amount of Rs. 11,584/- towards contribution on the amount of conveyance shown by the appellant for the period from July 19856 to September 1990. The appellant Company had replied the same vide its reply dated 25.02.1991 and contended that it was not liable to pay such contribution since the conveyance allowance was exempted from the definition of 'wages' under Section 2 (22) (b) of the ESI Act. The appellant also claimed opportunity of being heard. However, again on 15.04.1991, the respondents issued one more notice to deposit the aforesaid amount within 15 days, failing which 12% interest per annum would be accrued upon it. As such, the appellant Company was constrained to file the aforesaid application.

3. The respondents resisted the claim before learned trial Court and thereafter the learned trial Court on the basis of material produced before it, rejected the prayer of the appellant Company that the respondents were not entitled to recover the aforesaid amount under show-cause notice dated 15.04.1991. Hence, this appeal

4. Learned Counsel for the appellant Company during his argument submitted that the appellant Company has challenged the impugned judgment and order mainly on two grounds viz; (1) that the Corporation did not give any opportunity to the appellant Company of personal hearing and (2) that the conveyance allowance against which the respondents had sought contribution is not part of wages. According to him, the Corporation did not give any opportunity of personal hearing to the appellant Company. He also pointed out that the learned trial Court has definitely erred in holding that conveyance allowance was part of wages since it was different from travelling allowance as contemplated in the E.S.I. Act. In support of his submission, he relied on the following judgments.

(i) Employees State Insurance Corporation vs M/s Texmo Industries [Special Leave Petition (C.) No.811/2021).

(ii) Talema Electronic India Pvt.Ltd. Vs Regional Director, ESI Corporation and anr, Civil Appeal No.3175 of 2022

(iii) Rajrani Exports Ltd. vs Employees' State Insurance Corporation & ors, 2002 (1) L.L.N. 236

(iv) Garage Kamat vs Regional Director, Employees' State Insurance Court, Bombay & anr, 1998 (3) L.L.N. 665.

5. On the contrary, the learned Counsel for the respondents Corporation strongly opposed the submissions made on behalf of the appellant Company. He claimed that the Inspection Report on record had clearly indicated as to how the said conveyance allowance was part of wages, which the appellant Company, to avoid the contribution, showed it separately than the wages.

6. Heard rival submissions. Perused the entire impugned judgment and order alongwith record and proceeding of the original application. Also considered the judgments relied by learned Counsel for the appellant Company in the light of rival submissions.

7. It is significant to note that the learned trial Court has refused the contention of the appellant Company that personal hearing was required to be given before claiming contribution amount of Rs. 11,584/- towards conveyance allowance in absence of any provision. The trial Court has

also disallowed the claim of appellant Company that the conveyance allowance was excluded from the wages as per the provisions of the ESI Act. Thus, two main questions under consideration in this appeal, are as under :

(a) Whether the Corporation is under obligation to give an opportunity of personal hearing to the appellant Company before determination of contribution amount to the extent of Rs.11,584/-?

(b) Whether the conveyance allowance in respect of which contribution has been demanded, is the part of wages?

8. So far as giving opportunity of personal hearing is concerned, the learned trial Court in the judgment itself has observed that the appellant Company in response to demand letter dated 31.01.1991 had raised legal ground that the conveyance allowance was not part of wages, and therefore, no personal hearing was required. The learned trial Court has specifically observed that the order under Section 45-A of the ESI Act does not contemplate any hearing and such hearing is contemplated under Section 94-A before imposing the damages. For quick reference, I would like to reproduce Section 45-A of the ESI Act herein below :

> *"[45-A. Determination of contributions in certain cases. — (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any [Social Security Officer] or other official of the*

> *Corporation referred to in sub-section (2) of section 45 is [prevented in any manner] by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment.]*
>
> *[Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.]*
>
> *[Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.]*
>
> *(2).....*

9. On plain reading of the said Section 45-A, it is clearly evident that the Corporation must give reasonable opportunity of being heard to the person against whom the order under this Section is to be passed. Further, this Court in the case of ***Garage Kamat vs Regional Director, Employees' State Insurance Court*** (supra) has clearly observed as under :

> *"Turning to the first point sought to be raised by the appellant which relates to the power of the Corporation to determine the contribution, it is seen that section 45A of the said Act clearly provides that the Corporation may, on the basis of the information available to it, determine the contribution payable in respect of employees of a factory or establishment. Undoubtedly as is held by this Court in the matter of Employee's State Insurance Corporation v. Asian Paints India Ltd. (supra) before determining the liability under section 45A of the said Act, it is necessary to give reasonable opportunity of being heard to the employer".*

Further, Calcutta High Court in the case of ***Rajrani Exports Ltd vs Employees' State Insurance Corporation*** (supra) has made similar following observations :

> *"Thus, it appears that absence of giving hearing is a glaring infraction of statutory provisions or violation of the established principles of law as enshrined in the statute. In any event, the right of hearing or the principle of 'audi alteram partem' is a principle implicit in many of the provisions where a civil right of the person is determined. In such a case, one can not be punished unheard of or penalised unheard or visited with civil consequences unheard. Even without the proviso it could have been said that such right is implicit in the provision itself. Section 45A, as it stood prior to the adding of the proviso, was interpreted in Asian Paints (India) Ltd. v. ESIC 1981 Lab 1C 514 (Bombay), wherein it was held that opportunity is required to be given before determination under Section 45A is made".*

10. Admittedly, the learned trial Court had not given any opportunity of hearing to the appellant Company to establish the fact that the conveyance allowance was not part of wages. It is extremely important to note that under reply dated 25.02.1991 the appellant Company had in fact called upon the respondent Corporation to give personal hearing to satisfy how the amount of contribution in respect of conveyance charges, was not recoverable from it. Thus, the finding of learned trial Court that no opportunity of hearing was permissible under Section 45-A of the ESI Act, is apparently illegal, and therefore, the learned trial Court has definitely erred in this regard.

11. So far as the second question i.e. whether the conveyance allowance is exempted from the definition of 'wages' is concerned, I would like to reproduce Section 2 (22) (b) of the ESI Act herein below :

> *"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*
> *(a) .....*
> *(b) any travelling allowance or the value of any travelling concession ;*

It is the case of the appellant Company that the conveyance allowance is the same as that of travelling allowance as contemplated in clause (b) of Section 2 (22) of the ESI Act. However, on going through the impugned judgment, it appears that the learned trial Court has refused to accept the aforesaid claim of the appellant Company by holding that travelling allowance and conveyance allowance are two different things, and therefore, travelling allowance may not be the part of wages, but the conveyance allowance is so.

12. The Hon'ble Apex Court in the case of ***Employees State Insurance Corporation vs M/s Texmo Industries*** (supra), has clarified this position and made the following

observations.

> *"11. The short question involved in this Special Leave Petition is whether 'wages', as defined in Section 2(22) of the ESI Act, would include Conveyance Allowance paid by the Respondent Company to its employees.*
>
> *13. A reading of Section 2(22) of the ESI Act, makes it amply clear that 'wages' means all remuneration paid or payable in cash to an employee, under a contract of employment, express or implied, as consideration for discharging his duties and obligations under such contract of employment, including 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. The definition of 'wages', however, expressly excludes any contribution paid by the employer to any pension fund or provident fund or under the ESI Act, any travelling allowance or the value of any travelling concession, any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment or any gratuity payable on discharge.*
>
> *14. From the definition of wages in Section 2(22) of the ESI Act, it is amply clear that wages includes remunerative payments, but does not include compensatory payments. Travelling allowance including the value of travelling concession has expressly been excluded from the definition of wages, as also any payment made to an employee to reimburse or compensate for special expenses that an employee might incur by reason of the nature of his employment.*
> *15. The Employees' State Insurance Court held, and in our view, rightly, that Conveyance Allowance is in the nature of travelling allowance, the object of which is to enable the employee to reach his place of work and to defray costs incurred on travel from his place of residence to his place of work. If instead of paying the Conveyance Allowance, the employer provided free transport to the employee, the monetary value of that benefit of travel from his residence, to his place of work would also not be regarded as forming part of his wages.*
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> *16. In Management of Oriental Hotels Ltd., Chennai v. Employees' State Insurance Corporation, Chennai reported in 2002 (1) LLJ 14, a Division Bench of Madras*

High Court held:-

> *"8. In so far 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 de 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."*

17. In Regional Director, ESI Corporation v. Sundaram Clayton Ltd. Reported in 2004 (II) LLJ 30 another Division Bench of the Madras High Court reiterated that, payment towards Conveyance Allowance for the travel of employees from their place of residence to their place of work would have to be construed as Travelling Allowance and excluded from 'wages' in view of clause (b), sub-section (22) of Section 2 of the ESI Act.

18. We affirm the view taken by Madras High Court in Oriental Hotels Limited, Chennai (supra) and Sundaram Clayton (supra). InRegional Director, ESI Corporation, Thrissur v. Royal Plastics Industries, Aluva reported in 2015 (2) KLT 64, a Single Bench of

Kerala High Court referred to the judgment of the Madras High Court in Oriental Hotels' case (supra) and held that, clauses (a) to (d) of sub-section (22) of Section 2 of the ESI Act are in the nature of exception to the main part of the sub-section. Any Travelling Allowance or the value of any travelling concession would be outside the purview of the term 'wages', and that it would make no difference whether the Travelling Allowance was paid as part of the contract of employment, or whether it was paid in lump sum or whether it was paid at regular intervals. It would not cease to be Travelling Allowance only because it was a fixed sum paid along with the wages, as per the terms of the contract of employment. We agree with the view taken by the Single Bench of Kerala High Court in Royal Plastics Industries (supra).

20. We are of the view that, the reasoning that Conveyance Allowance cannot be excluded from the definition of 'wages' as it is paid every month to every employee, like House Rent Allowance, in terms of the contract of employment, so as to meet to and fro conveyance expenses, is is based on an erroneous construction of Section 2(22) of the said Act".

13. Thus, based on the aforesaid observations of the Hon'ble Apex Court it is amply made clear that the conveyance allowance cannot be treated differently from the travelling allowance as contemplated in the definition clause. Further, the Hon'ble Apex Court in its subsequent judgment in the case of ***Talema Electronic India Pvt.Ltd. Vs Regional Director, ESI Corporation*** (supra) has reiterated the aforesaid observations and held that conveyance allowance is equivalent to the travelling allowance, and therefore, any conveyance allowance / travelling allowance is excluded from the definition of 'wages' in the aforesaid definition clause.

Therefore, in the light of these observations the finding of the learned trial Court treating the conveyance allowance and travelling allowance on different footings, is definitely erroneous.

14. Learned Counsel for the respondents relied upon the observation of the Hon'ble Apex Court in para 25 of the judgment in the case of ***Employee State Insurance Corporation vs M/s Texmo Industries*** (supra) which is as under :

> *"25. Conveyance Allowance, on the other hand, compensates expenses that might be incurred by an employee for reporting to his usual place of work or to any other place of work, where he may have to report. If an employer were to provide the employee with accommodation within walking distance from his place of work and that employee were not required to go to any other place in connection with his duties under his contract of employment, the employee may not have to incur any expenditure in connection with his employment. In such a case, Conveyance Allowance would be redundant and might be construed as part of allowance consisting wages. In this case, it is not the case of the Corporation that the employees concerned did not need to avail any conveyance expenditure to report for duty to their place of work, or otherwise in connection with their duties under their contracts of employment. Nor is there any such finding. We see no reason why Conveyance Allowance should not be excluded from the definition of wages".*

By relying upon the aforesaid observation, the learned Counsel for the respondents submitted that the appellant Company intentionally shown the wages of their employee in disguise of conveyance allowance only to avoid

the liability of contribution. In short, he tried to argue that the conveyance allowance which was shown to be paid, was not at all required as nothing was produced that the employees of the appellant Company were required such conveyance allowance for attending their day-to-day duties. However, the aforesaid submission of the respondent Corporation appears to be an afterthought since it did not raise such point in the letter dated 31.01.1991. Nothing is mentioned in the said letter that the appellant Company intentionally or falsely shown conveyance allowance to avoid the contribution. On the contrary, it seems that the respondent Corporation had in fact mentioned the word "conveyance allowance" without raising any objection as aforesaid. Thus, I find no force in the submission of the learned Counsel for the respondent Corporation to that effect.

15. Thus, in the light of the above discussion, it has been found that the respondent Corporation did not give any opportunity to the appellant Company as contemplated in Section 45-A of the ESI Act while determining the amount of contribution in respect of conveyance allowance. Further, it has also established in the light of the observations of the Hon'ble Apex Court in the judgment supra that the

conveyance allowance as shown by the Corporation in the letter dated 31.01.1991 was not part of wages as contemplated in Section 2 (22) (b) of the ESI Act. Therefore, the Corporation could not have issued notice dated 15.04.1991 to recover contribution of Rs. 11,584/- as part of wages. Thus, rejection of the application of the appellant Company to that effect under the impugned judgment is definitely erroneous and liable to be set aside. Hence, I pass the following order.

ORDER

(i) The appeal is hereby allowed.

(ii) The impugned judgment and order dated 30.11.1994 passed by the learned trial Court in Application (E.S.I.) No.4/1991 is hereby quashed and set aside and Application (E.S.I.) No. 4/1991 stands allowed by declaring that the respondents are not entitled to recover an amount of Rs. 11,584-40 paise from the appellant Company on account of contribution towards conveyance allowance.

(iii) The appeal is accordingly disposed of. Parties to bear their own costs.

(SANDIPKUMAR C. MORE, J.)

VD_Dhirde