

CASE NO.:
Appeal (civil) 1250 of 2001

PETITIONER:
M/s Quality Inn Southern Star

RESPONDENT:
The Regional Director, Employees State Insurance Corporation

DATE OF JUDGMENT: 03/12/2007

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
J U D G M E N T

CIVIL APPEAL No. 1250 OF 2001

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment of the learned Single Judge of the Karnataka High Court dismissing the appeal filed by the appellant. Challenge was to the order of the Employees' State Insurance Court (in short 'ESI Court') in ESI application No.123/89. The appeal was filed under Section 82(2) of the Employees' State Insurance Act, 1948 (in short the 'Act'). Order passed by the ESI Court was on the petition filed under Section 75 of the Act.

2. Background facts are as follows:

A show-cause notice was issued by the respondent on the report of the ESI Inspector on 9.1.1981 calling upon the appellant to contribute premium for the period November, 1986 to November, 1987 in respect of service charges collected by it. Not being satisfied with the explanation offered, order was passed under Section 45-A of the Act determining amount of contribution payable. The order was challenged by the appellant by an application under Section 75 of the Act. This application was contested by the respondent and the ESI Court on consideration of the evidence brought before it and it came to hold that the order under Section 45-A of the Act suffered from no infirmity.

3. According to the appellant, the basic question was whether the service charge collected by the hotel management from the customers and distributed amongst the employees amounted to "wages" within the meaning of Section 2(22) of the Act. According to the appellant this did not constitute wages. The respondent contended that the appellant runs a three-star hotel and the establishment is covered under the Act. Undisputedly, 10% of the total bill amount is compulsorily collected as services charges and is included in the bills. The service charges so collected are distributed amongst the employees of the appellant quarterly. The collection of service charges is essentially what is called as "tips" and paid at the option of customers. The ESI Court held that looking at the nature of the service charges, these are not directly paid by the customers to the employees but form part of the bills which the customers are obliged to pay without any option and this amount so collected is paid or distributed to the employees equally once in three months. According to the ESI Court the appellant had total control and power of distribution

of the amount and this is distinguishable from "tips". This was treated in any event covered by the expression "additional reimbursement". The High Court in appeal upheld the view.

4. Learned counsel for the appellant submitted that the payments were distributed equally amongst all the employees periodically, once in three months. It was submitted that by a circular it was clarified that service charges were outside the scope of wage as defined. Reference was made to a decision of this Court in *The Rambagh Palace Hotel, Jaipur v. The Rajasthan Hotel Workers' Union, Jaipur* (1976 (4) SCC 817). The High Court distinguished the same holding that it related to "tips" and there was no consideration of the aspect whether it was covered by the expression "reimbursement".

5. It was pointed out that the judgment of the High Court was delivered on 29.7.1999. Subsequently, the memorandum was issued by the Corporation bearing No.P-1/13/97-Ins.IV dated 6.11.2002 clearly stating that service charges of the nature involved in the present dispute do not form part of the wages. It is also pointed out that the Madras High Court in a decision in *Sathianathan N. & Sons Pvt. Ltd. and Ors. v. E.S.I. Corporation and Anr.* (2002-II LLJ 1002) on 6.2.2002 took a different view.

6. Learned counsel for the respondent on the other hand supported orders of the ESI Court and the High Court.

7. Section 2(22) defines wages as:

"Wages means all remuneration paid or payable, in cash to an employees 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 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 traveling allowance or the value of any traveling concession;

(c) any sum paid to the person employed to defray special expenses entailed on him by the nature employment; or

(d) any gratuity payable on discharge"

8. The circular referred to by the learned counsel for the appellant reads as follows:

"E Service charges cannot be included in "wages" for the following reasons-

(a) The Memorandum issued by the ESIC corporation number P11113/97-Ins.IV dated 6.11.2000 clearly states in paragraph 13 that:

"Service Charges are collected by management of the hotel on behalf of their employees in lieu of direct tips and the same is paid to their employees . at a later date.

Such amount collected as 'service charges' will not constitute wages under S 2(22) of the ESI Act. In the case of ESIC v M/s Rambagh Palace Hotel, Jaipur. The High Court of Jaipur has held that 'service charges' are not wages under Section 2(22) of the ESI Act. This verdict of the High Court of Jaipur was accepted in the ESIC and Hence no contribution is payable on 'service charges'. (Earlier instructions were issued vide letter No. P. 12/11/4/79 Ins. Desk I dtd.18.9.79)"

9. The introduction to the memorandum dated 6.11.2000 states that it has been issued because:

"it is necessary that the instructions issued by this office from time to time are not only consolidated but certain more items are included not only to clear the doubts of the what constitutes part of wage under Section 2(22) Some of the instructions were issued long back rather -as back as in 1967 and certain instructions are not even available in some of the regions and it is difficult to keep a track on the old instructions. Keeping in view the above aspects and consolidated instructions including some more items are as under:"

(b) In the present case, the amounts received by the employees were not in the nature of "wages", as they were not given to the employees under the terms of the contract of employment, either express or implied. The appointment letters expressly state that employees are not entitled to any other remuneration. Thus the distribution of service charges is expressly excluded from the wages."

10. In view of the above-said office memorandum and the view taken by the Madras High Court in Sathianathan's case (supra) the orders of the ESI Court and the High Court cannot be maintained and are accordingly set aside.

11. The appeal is allowed without any order as to costs.