months from the date of receipt of a copy of this judgment, failing which the same will be released along with interest at the rate of 12 per cent per annum. There will be no order as to costs.

J.S.T.

Before : G. R. Majithia, J.

EMPLOYEES STATE INSURANCE CORPORATION, CHANDIGARH,—*Appellant.*

versus

M/S NIRBHAI ROADWAYS PVT. LTD., LUDHIANA,—*Respondent.*

First Appeal From the Order No. 276 of 1988.

28th May, 1991.

Employees' State Insurance Act, 1948—*Ss.* 2(22), 44 & 45—*Commission paid to drivers and conductors when they take buses out of station—Such commission, held, is in the form of incentive and falls within the definition of 'wages'—Management, therefore, liable to make payment of employer's contribution*—Ad hoc *assessment made by Corporation—No evidence shown as to employer not maintaining records—In the circumstances, Corporation directed to make* de novo *assessment of contributions payable to employee.*

Held, that the employer in the instant case adopted a novel method to come out of the rigour of the Act by labelling D.A./T.A. as commission payable on the actual booking when the drivers and conductors take the buses outside Ludhiana. The commission is nothing else but an incentive to the drivers and conductors when they take the buses outside Ludhiana. It is an additional remuneration paid to the employees as laid down under S. 2(22) of the Act. There is no escape from the conclusion that the commission allegedly paid by the Management to the employees falls within the definition of 'wages' and the Management is liable to make payment of the employer's contribution.

(Para 6)

Held further, that there is no allegation by the Corporation that any Inspector or other official of the Corporation was obstructed by the management in exercising his functions or discharging his duties so as to attract the second part of S. 45-A of the Act. So far as the first part is concerned, there is not even an iota of evidence on the record to show that the employer is not maintaining the record in accordance with the provisions of S. 44 of the Act. The employer has disputed the liability to pay the contributions

demanded by the Corporation. The assessment made at the back of the employer cannot be sustained. In the circumstances of the instant case, the assessment made by the Corporation is quashed and it is directed that the Corporation will make *de novo* assessment of the contributions payable by the employer.

(Para 7)

First Appeal from the order of the Court of Shri O. P. Goel PCS Judge Employees Insurance Court. Ludhiana dated 19th December, 1987 succeeding the application and quashing the impugned assessment and demand of Rs. 21,973 from the applicant is quashed and restraining the respondents from enforcing the recovery and clearing that the respondent shall be at liberty to make fresh assessment of E.S.I. contribution if any, due from the applicant under the rules and to recover the same from the applicant.

Claim : Application U/s 75(i)(g) of Employees State Insurance Act, 1948 as amended up-to-date.

Claim in Appeal : For reversal of the order of the Lower Appellate Court.

K. L. Kapur, Advocate, *for the Petitioner.*

V. G. Dogra, Advocate, *for the Respondent.*

JUDGMENT

G. R. Majithia, J.

This judgment disposes of F.A.O. Nos. 275 and 276 of 1988 and F.A.O. Nos. 500 and 501 of 1990 since common questions of law and facts are involved therein. F.A.O. Nos. 500 and 501 of 1990 are directed against the order of the Employees State Insurance Court dismissing the petition filed by the employer under Section 75 of the Employees State Insurance Act, 1948 (for short, the Act). F.A.O. Nos. 275 and 276 of 1988 are directed against the order of the Employees State Insurance Court allowing the application under Section 75(1)(g) of the Act filed by the employer.

(2) Reference to the relevant facts has been made from F.A.O. No. 276 of 1988.

(3) The Employees State Insurance Corporation (for short, the Corporation) through its Regional Director,—*vide* letter dated November 2, 1983, called upon M/s Nirbhai Roadways Pvt. Ltd., Ludhiana (for short, the Management) to deposit Rs. 21,973 as contribution in respect of travelling allowance paid to the conductors.

The Management challenged the order before the Employees Insurance Court, Ludhiana in a petition under section 75(1)(g) of the Act. The demand was assailed principally on the ground that the Management does not pay any travelling allowance to the drivers and the conductors; it pays the amount to the conductors under a scheme to defray special expenses when they take the buses outside Ludhiana. The decision to pay special allowance can be rescinded or modified unilaterally at any time without notice to the employees, who could not claim the same as a matter of right. The scheme was oral and no contributions were chargeable on this amount. The *ad hoc* assessment was not envisaged under the provisions of Section 45-A of the Act.

(4) The Employees Insurance Court framed the following issues :—

1. Whether the claim of contribution made by the E.S.I. is illegal and *ultra vires* ? OPA

2. Relief.

It found that the Management pays commission to the drivers and conductors when they take the buses outside Ludhiana and that the Commission cannot be treated as wages under section 2(22) of the Act. It also held that the *ad hoc* assessment is contrary to the provisions of Section 45-A of the Act. The Corporation could not make *ad hoc* assessment since the relevant information required from the Management was duly supplied by it to the Corporation. On these premises, the assessment was quashed. Contrary view on identical facts was taken by the Employees Insurance Court. It dismissed the petition under Section 47 of the Act. The Corporation aggrieved against the decision of the Employees Insurance Court has come up in appeal to this Court.

(5) Section 2(22) of the Act defines the term "wages" as under:—

"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 allowances or the value of any travelling concession;

(c) any sum paid to the person employed to defray special expenses entailed on him by the gratuity payable on discharge;"

The incentives under the scheme of settlement between the Management and its workmen is wages within the meaning of Section 2(22) of the Act. The commission at the rate of 1½ per cent on the actual booking is alleged to be paid to the drivers and conductors when the buses are taken outside Ludhiana. The commission is in the form of incentive. It is either in lieu of D.A. or T.A. and in fact D.A./T.A. have been given the nomenclature of commission to avoid employer's contribution under the Act. In *M/s. Harihar Polyfibres* v. *The Regional Director, E.S.I. Corporation* (1), question arose whether the expression 'wages' as defined Section 2(22) of the Act, includes House Rent Allowance, Night Shift Allowance paid to those employees who are obliged to work in the night shift and the 'Heat, Gas and Dust Allowance' and 'Incentive Allowance' paid by an employer to his employees. In that case, O. Chinnappa Reddy, J., after examining the definition, held thus :—

"So, there appears to our mind no reason to exclude 'House Rent Allowance', 'Night Shift Allowance', 'Incentive Allowance' and 'Heat, Gas and Dust Allowance' from the definition of 'wages'."

Amarendra Nath Sen, J. concurring with the judgment rendered by O. Chinnappa Reddy, J. observed as under :—

"I entirely agree with my learned brother that on a proper interpretation of the term 'wages' the legislative intent is made manifestly clear that the term 'wages' as used in the Act will include House Rent Allowance, Night Shift

(1) A.I.R. 1984 S.C. 1680

Allowance, Heat, Gas and Dust Allowance and Incentive Allowance. The definition, to my mind, on its plain reading is clear and unambiguous. Even if any ambiguity could have been suggested, the expression must be given a liberal interpretation beneficial to the interests of the employees for whose benefit the Employees' State Insurance Act has been passed."

The Apex Court observed that the expression 'wages' should be given liberal interpretation beneficial to the interests of the employees.

(6) The employer in the instant case adopted a noval method to come out of the rigour of the Act by labelling D.A./T.A. as commission payable on the actual booking when the drivers and conductors take the buses outside Ludhiana. The commission is nothing else but an incentive to the drivers and conductors when they take the buses outside Ludhiana. It is an additional remuneration paid to the employees as laid down under Section 2(22) of the Act. There is no escape from the conclusion that the commission allegedly paid by the Management to the employees falls within the definition of 'wages' and the Management is liable to make payment of the employer's contribution.

(7) The Employees Insurance Court came to the conclusion that the *ad hoc* assessment was not warranted by Section 45-A of the Act. This section reads thus :—

"*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 Inspector or other official of the Corporation referred to in sub-section (2) of section 45 is obstructed 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.

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation

under Section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45B."

A plain reading of sub-section (1) of Section 45-A would show that an assessment thereunder can be resorted to only in the following situations :—

(a) 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

(b) Any inspector or other official of the Corporation referred to in sub-section (2) of Section 45 is obstructed by the principal or immediate employer or any other person in exercising his functions or discharging his duties under section 45.

In the instant case, there is no allegation by the Corporation that any inspector or other official of the Corporation was obstructed by the management in exercising his functions or discharging his duties so as to attract the second part of Section 45-A of the Act. So far as the first part is concerned, there is not even an iota of evidence on the record to show that the employer is not maintaining the record in accordance with the provisions of Section 44 of the Act. The employer has disputed the liability to pay the contributions demanded by the Corporation. I have held in the earlier part of this judgment that the employer is liable to pay the contributions under the Act. The assessment made at the back of the employer cannot be sustained. In the circumstances of the instant case, the assessment made by the Corporation is quashed and it is directed that the Corporation will make *de novo* assessment of the contributions payable by the employer in the light of the observations made above after hearing the management. Similar course was adopted by the apex Court in *Royal Talkies, Hyderabad and others* v. *Employees State Insurance Corporation through its Regional Director, Hill Fort Road, Hyderabad* (2), wherein it was observed thus :—

"We agree. The assessment of the quantum of the employers' contribution has now been made on *ad hoc* basis because

(2) A.I.R. 1978 S.C. 1478.

they merely pleaded non-liability and made no returns. On the strength of Section 45-A the contribution was determined without hearing. In the circumstances of the case,— and the learned Attorney General has no objection—we think it right to direct the relevant Corporation authorities to give fresh hearing to the principal employers concerned."

(8) For the reasons recorded aforesaid, F.A.O. Nos. 275 and 276 of 1988 succeed as indicated above and F.A.O. Nos. 500 and 501 of 1990 are dismissed, but there will be no order as to costs.

J.S.T.

(FULL BENCH)

Before M. S. Liberhan, Jawahar Lal Gupta and V. K. Jhanji, JJ.

DR. ISHAR SINGH,—*Petitioner.*

versus

STATE OF PUNJAB AND ANOTHER,—*Respondents.*

Civil Writ Petition No. 4970 *of* 1988

12th January, 1993.

(1) *Punjab Civil Services Rules, Vol. II—Rls.* 2.2 (*a*) (b) (c), 9.9, 9.14 *and* 9.16—*Pension and Gratuity Act,* 1871—*S.* 11—*Pensionary benefits—Person due to retire—Initiation of disciplinary proceedings one day before date of his retirement—Effect of on commutation during pendency—Held, State is bound to pay* 100 *per cent provisional pension—Mere anticipation of finding pensioner guilty of misconduct or finding he caused pecuniary loss to State cannot affect his right to pension though other retiral benefits can be withheld in order to protect State's interest.*

Held, that since the statutory rules provide for sanction of 100 per cent provisional pension. I fail to comprehend that the legislature would have intended to affect the pension in anticipation of finding the pensioner guilty of misconduct or his conviction in judicial proceedings or finding him having caused pecuniary loss to the State during the tenure of service. The State cannot escape its liability to pay pension solely in anticipation of the liability of the pensioner being fixed in disciplinary proceedings initiated. Allowing the State to pay reduced pension in anticipation of an adverse finding in a pending proceedings, as suggested by the