

(1991) 08 PAT CK 0045

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 377 of 1987 (R)

Bharat Coking Coal Ltd.

APPELLANT

Vs

Presiding Officer and Others

RESPONDENT

Date of Decision : 01-08-1991

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(22)

Industrial Disputes Act, 1947 — Section 10(1)(d), 2, 2(22), 2(rr), 25(E)

Citation : (1993) 2 PLJR 82

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : M.M. Banerjee, for the Appellant; T.K. Das and S.N. Das, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, J.—In this application the question which arises for consideration is as to whether despite the fact that the concerned workmen have not been posted in the underground of the colliery, they are entitled to underground allowances or not. The basic facts of the case are not in dispute.

2. The concerned workmen at all material times had been working in the incline Nos. 40 and 47 of Busseriya Colliery of the petitioner-company.

3. It is admitted by the parties that the concerned workmen had to be transferred temporarily to No. 12 quarry of Busseriya Colliery by way of alternative employment with effect from 24.10.1983 till further orders because of water problems, as the underground section got flooded leading to reduction of working faces as well as for safety at the incline of the concerned workmen. The said orders of transfer dated 18.10.1983 were marked as Exts. W/1 and W/2. The concerned workmen worked at their transferred place till 6.1.1984.

4. In view of the fact that the concerned workmen had been posted in a quarry and not in an incline, the petitioner stopped paying underground allowances to

them. An industrial dispute was raised by the respondent no. 2 in this regard and the conciliation proceedings having failed, the Central Government being the appropriate Government in exercise of its power conferred upon u/s 10(1) (d) of the Industrial

Disputes Act, referred the following dispute for adjudication by the respondents:

Whether the demand of United Coal Workers" Union that the underground Miner/ Loaders, listed in the Annexure below of Busseriya Colliery of Messrs Bharat Coking Coal Limited, P.O. Kusunda District Dhanbad should be paid their normal wages, together with the underground and other allowances, for the period 25.10.1983 to 6.1.1984 is justified? If so, what relief are the concerned workmen entitled?

5. Before the respondent No. 1, the respondent No. 2 principally raised three contentions in support of its case i.e. withholding underground allowance of the concerned workmen by the management was illegal namely, (a) there has been a violation of the provisions of section 9A of the Industrial Disputes Act inasmuch as by reason of non-payment of the said allowance, changes have been effected in the terms and conditions of the services of the workmen (b) having been posted for doing the pick mining job at No. 12 Quarry of the Busseriya Colliery their work loads have increased (c) underground allowance having become part of their wages, non-payment thereof was impermissible in law.

6. The respondent No. 1 by reason of its impugned award as contained in Annexure-6 to the writ application answered the first two contentions as referred to hereinbefore in favour of the management and against the workmen.

The respondent No. 1 however held that in view of the fact that the concerned workmen were provided with an alternative job as contemplated u/s 25(E) of the Industrial Disputes Act and further in terms of the provisions of National Coal Wages Agreement, III, underground allowance having become part of the wages within the meaning of section 2(rr) of the Industrial Disputes Act, the action on the part of the management in withholding the said allowance was not justified.

7. Mr. M.M. Banerjee, Learned Counsel appearing on behalf of the petitioner raised a short question in support of this application. The Learned Counsel submitted that an underground allowance like any other similar allowance is payable to a workman if he is detailed for a job in the underground and such an allowance ceases to be payable as and when the concerned workmen are posted at some other place.

8. The Learned Counsel in this connection has placed strong reliance in Bharat Electronics Limited, Bangalore Vs. Industrial Tribunal, Karnataka and another reported in 1990 (6) F.L.R. page 622

9. Mr. T.K. Das, the Learned Counsel appearing on behalf of respondent No. 2, on the other hand, submitted that from a perusal of the paragraph 33 of the Chapter part I of the report of Salim Merchant as well as the National Coal Wages

Agreement No. III it will be evident that underground allowance is a part of the wages and as such it was not legal for the management to withhold the payment thereof

10. The Learned Counsel further submitted that from a perusal of section 25 (E) of the Industrial Disputes Act, it would appear that the management while providing alternative job to the concerned workmen could not have offered any wage less than what was being received by them.

Mr. Das, in support of the aforementioned contentions strongly relied upon a Supreme Court decision in Harihar Polyfibres Vs. Regional Director, ESI Corporation, .

11. The question therefore, which arise for consideration in this application is as to whether underground allowances forms part of the "wages" within the meaning of section 2 (rr) of the Industrial Disputes Act or not.

12. From a perusal of the impugned award as contained in Annexure-6 to the write application, it appears that the respondent No. (sic) himself has taken into consideration the purposes for grant of underground allowances, as it would be evident from his following observations:

In para 13 of the page 112 of the Coal Wage Board Recommendation underground allowance has been dealt with. It is stated that persons working below ground in coal mines not only do strenuous physical work in uncongenial, unnatural and disagreeable surroundings, but are also exposed to greater hazards and risks of suffering bodily injury and contracting occupational diseases like pneumoconiosis, silicosis and nystagmus than the surface worker. It is to compensate him for his disagreeableness, hazard and risk that all the world over the coal miner working underground is paid higher emoluments than his counter part working on the surface.

13. The respondent No. 1 further held:

The work load in the underground and in the quarry has been tried to be kept at par with different work load seeing the arduous nature and difficult surrounding in the underground and a comparatively better surrounding while working in the quarry.

14. From what has been seen hereinbefore, it is evident that underground allowance is paid to the workmen posted in the underground of a coal mines in view of the arduous nature of the duty and hazards which are to be faced by them.

15. It is, therefore, clear that payment of such allowance is directly referable to the nature of duty and ex-facie, the same cannot form part of the wages.

16. Section 2 (rr) of the Industrial Disputes Act reads as follows :

Section 2 (rr) : "Wages" means all remuneration capable of being expressed in

terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to a workman, in respect of his employment or of work done in such employment and includes --

(i) such allowances (including dearness allowance) as the workman is for the time being entitled to;

(ii) the value of any house accommodation, or of supply of light, water medical attendance or other articles;

(iii) any travelling concession; but does not include

(a) any bonus;

(b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force;

(c) any gratuity payable on the termination of his service;

(iv) any commission payable on the promotion of sales or business or both;

17. From a bare perusal of the said provision it would be evident that all allowances do not form part of the wages but only such allowance to which the workman become entitled to for the time being forms part of the wages. The definition of wages as contained in section 2 (rr) is an exhaustive one, in so far as both the words "means" and "includes" have been employed therein. A workman, therefore, who is not entitled to a particular allowance for the time being, being not engaged in a particular job, cannot claim allowance as a matter of right stating that the same forms part of the wages. If such an interpretation is given the words "for the time being entitled to" used therein become redundant and otiose.

18. In *B.E.L. Bangalore v. I.T. Karnataka* (S.C. 60 F.L.R. 622) the Supreme Court was considering the definition of wages under Industrial Disputes Act itself and it was held therein:

The definition of the word "wages", as given in clause (rr) of section 2 is comprehensive enough to include (vide inclusion) such of the allowances as the workman is for the time being entitled. Yet, despite such comprehension the inclusive meaning is subject to a meaningful change if there is anything repugnant in the subject or context.

19. The Supreme Court in that case distinguished its various earlier decisions and held that "night shift allowance" can never be part of wages for the purpose of section 32 (2) (b) of the said Act.

20. In view of the aforementioned decision of the Supreme Court, it has to be held that an allowance which is not payable to an employee when he is not working or is not working at a particular place of which he was entitled to such special allowance does not come within the purview of the definition of the wages

as contained in Section 2 (rr) of the Industrial Disputes Act.

21. In Harihar Polyfibres, (supra) the Supreme Court was considering the definition of "wages" within the meaning of Section 2 (22) of the Employees State Insurance Act which reads as follows:

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.

22. From a perusal of the said definition, it would appear that the same is at a variance with the definition of wages as contained in Section 2 (rr) of the Industrial Disputes Act. The definition of "wages" within the meaning of Section 2(22) of the Employees State Insurance Act is of wide import. Further in Harihar Polyfibres (supra) the question which falls for consideration in this case did not arise for consideration.

23. In that view of the matter, I am of the view that the said decision has no application in the facts and circumstances of the case.

24. Coming to the next submission of Mr. Das, it appears that Chapter VIII of V of (1) of the report of the Salim Merchant relating to the Central Wages Board for the Coal Mines Industry, the matter of wages to piece rated workmen was being dealt with, while dealing with such a question, it was observed that underground allowances at the rate of 5% and dearness allowance at 3 paise per day together with the basic pay of Rs. (Sic) for 4 days should be guaranteed as fall back wages for a week; when the concerned employee is not provided for with sufficient work. Such fall back wages were to be paid on pro-rata basis for actual piece rated work. Such wages are payable to workmen who actually perform their duties in underground coal mine on a piece rated basis and not to others. Paragraph 33 of chapter VII of Sri Salim Merchant's report, therefore, has no bearing to the facts of the case.

25. Coming to the National Coal Wages agreement itself it would appear that the matter relating to underground allowance have been dealt with in Chapter-IV thereof.

26. Clause 4. 1. 2 of the said agreement reads as follows:

The underground allowance shall continue to be paid to those employees working underground as defined in the Mines Act and the Regulations framed thereunder.

This provision in the National coal Wages Agreement itself is abundantly clear to the effect that the workman is entitled to underground allowance so long he continues to work in the underground and this such allowance shall be payable to such employees working underground and not to others.

27. Paragraph 4. 3. 1 of the said agreement provides for wages which includes underground allowance.

28. The aforementioned provision is also indicative of the fact that underground allowance is to be treated as wages as hitherto before mentioned and will also be taken into account for the purpose mentioned therein meaning thereby for those persons who continue to work underground and not to others. The provisions of 4. 3. 1 has a limited operation and must be construed in the context in which it has been therein used. For the purpose of consideration as to whether underground allowance will form part of wages or not, in my opinion, paragraph 4. 3. 1 will have to be read alongwith 4. 1. 2 and not divorced therefrom. If so read, the same would run counter to the submissions made by Mr. T.K. Das.

29. Coming to the next contention of Mr. Das namely the interpretation of the proviso to section 25 (E) of the Industrial Disputes Act, the same may be noticed for better appreciation thereof:

Provided that the wages which would normally have been paid to the workman are offered, for the alternative employment also.

30. The word "wages" used in the proviso must be read in the context of its definition as contained in section 2 (rr) of the Industrial Disputes Act.

31. From a perusal of the proviso appended to sub-section 1 of Section 25E of the Industrial Disputes Act, it would appear that what has been provided therein is that when the employer makes offer for an alternative employment, the wages which were normally being paid to the workmen cannot be curtailed. The word "normally" used in the proviso is of great significance. The respondent No. 1 itself has held that the Job provided to the concerned workmen was of the temporary nature and by reason of the said action of the management the provisions contained in section 25E of the Industrial Disputes Act have not been violated; nor thereby any change has been effected in the terms and conditions of the services of the concerned workmen.

32. It is not and cannot be the case of the concerned workmen that they could not have been transferred from the underground to the surface of the same mine. If by reason of the terms and conditions of the employment, they could have been transferred from the underground to surface of the same colliery, I fail to see any reason as to why they cannot be provided with an alternative job in terms of section 25E of the Industrial Disputes Act (assuming that the said provision has any application in this case) by posting them on the surface instead of underground.

33. In my considered opinion, therefore, underground allowance is payable to the

workmen in view of the nature of the duty which is hazardous in nature. The word "wages" has to be construed reasonably and their underground allowance must be held to be payable only when the concerned employee is posted underground and not on the surface of a coal mine.

34. Taking thus, all facts and circumstances into consideration, I am of the view that the respondent No. 1 has acted illegally and without jurisdiction in holding that the underground allowances form part of the "wages" and thus the action on the part of the management in withholding payment to the workmen was unjustified.

35. In the result, this application is allowed and the impugned award as contained in Annexure-6 to the writ application is set aside. However, regard being had to the facts and circumstances of the case, the parties shall bear their own costs.