

(1996) 11 BOM CK 0031
In the Bombay High Court
Case No : F.A. No. 771 of 1996

Eagle Flask Industries Ltd.

APPELLANT

Vs

Employees' State Insurance Corporation, Pune

RESPONDENT

Date of Decision : 11-11-1996

Acts Referred:

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

Citation : (1997) 2 LLJ 1141

Hon'ble Judges : V.H. Bhairavia, J

Bench : Single Bench

Advocate : S.S. Naphade, for the Appellant; M.V. Jaykar, for the Respondent

Judgement

1. This appeal arises out of the proceeding u/s 75 of the Employees' State Insurance Act, 1948 and the Order dated August 18, 1995 in application ESI No. 14190. The appellant M/s Eagle Flask Industries Ltd. is a registered company having Code No. 331505 1. It is stated that the appellant company engages contractors in the Double Wall Workers Glass 1 Division and the workers of the said Glass Division are the employees of the contractors who 10,, work on different machines and give desired, production as per the specifications of the company. The wages of the contract labourers are i paid by the respective contractors and that the 1 appellant company is not the employer of those 15 i employees. The contractors disburse the wages to the contract labourers and that contractor obtains receipt for the payment of the wages from 1 the employees. It is the case of the appellant that 1 as per the policy of the appellant company, 201 whenever an urgency occurred on account of i the market demand for its goods, based on export orders, the appellant company offers an i Inam to the employees to complete the target 1 based on the quality. This is with a view to encourage such contract employees to give timely 1 production as required by the appellant company to meet with the demand of the market. This payment of "Inam" are paid to the employees by the contractors for and on behalf of the appellant Company. The employees passed receipts in favour of the Company in

token of having accepted the amount of "Inam " and this payment of "Inam" is checked and verified by the appellant company's auditor. These payments are not a feature of regular salary but it is once in a while in a year.

2. It is stated that respondent's officer inspected the record of the appellant company 40 and found that the appellant company paid Rs. 48 lakhs to the employees for a period from 1982-83 to November 1988 to March 1989. The respondent's officer has considered this payment of "Inam" as wages and found that no. 4.5 contribution u/s 45 A of the E. S. 1. Act, 1948 was made by the appellant company. Further, on inspection, it was found by the Inspecting Officer that the account of payment of amount of Inam was shown under the head "Incentive Account". The respondent had considered the payment of Inam as wages u/s 2(22) of the E.S.I Act, 1948. therefore, the proceeding was initiated and ordered to pay the contribution on the payment of Inam and accordingly, the appellant-company was informed to pay by the Inspecting Officer by his letter dated August 16, 1990. Against that, this 10 application was filed u/s 75 of the Act and the same was decided against the appellant company holding that the payment of Inam is wages under the definition of Section 2(22) of the Act by order dated August 18, 1995. Hence is this appeal.

3. A short but very important question that has been raised in this appeal is, whether the Inam is a remuneration and wages fall within the purview of definition u/s 2(22) of the Act. The learned counsel Mr. Naphade appearing on behalf of the appellant submitted that in view of the Supreme Court judgment reported in *Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation*, the Supreme Court 23 held that Inam is not the wages which followed by the Full Bench of Karnataka High Court in the case of *Regional Director of Employees State Insurance Corporation v. Management of Mysore Kirloskar Ltd.* reported in 1974 XI LLJ 396.

4. In the case of *Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation*, the Supreme Court 35 has held thus :

"(A) Employees' State Insurance Act, 1948 SS. 2(22) and 41 Inam scheme-Payment under, if "wages"-Fiction u/s 41, Explanation not to be utilized for interpreting Section 2(22) ILR (1966) Cal. 140 Reversed.

The appellant Company introduced the 45 Inam Scheme in December 1955. "Rise in payment of Inam was not amongst the original terms of contract of employment of the employees of the Company. In those terms, there was no offer of any reward or prize to be paid for any work done by the employees. The employees were expected to work for certain periods at agreed rates of wages. The only offer under the Scheme was to make incentive payments if certain specified 5 conditions were fulfilled by the employees. The Company, however, reserved the right to withdraw the scheme altogether without assigning any reason or to revise its conditions at its sole discretion. The payment of 10 the Inam was dependent upon the employees exceeding the target of output appropriately

applicable to him. But though primarily the right to receive the Inam depended on the efficient working of the employee, there was 15 another clause which laid down that, if the targets were not achieved due to lack of orders, lack of materials, breakdown of machinery, lack of labour, strikes, lockouts, goslow or any other reason whatsoever, no. 20 Inam was to be awarded. The Company had also laid down that if any deterioration of workmanship was noticed on the part of the employees in order to achieve the targets prescribed for earning the Inam, the Scheme 25 could be abandoned forthwith. It was also made clear to the workmen in the Scheme that the payment of reward was in no way connected with or part of wages.

Held that the payment of Inam, though remuneration, could not be said to have become a term of the contract of employment within the meaning of the definition of wages given in Section 2(22) ILR (1966) Cal. 140, Reversed.

If the Inam had become an implied condition of the contract of employment the employer could not withdraw that right at its discretion 40 without assigning any reason nor could the employer vary its conditions without agreement from the employers.

The exemption from payment of the Inams 4, 5 on grounds for which the employees could not be blamed and possibly for which the Company itself might be responsible clearly showed that the payment of the Inam was not enforceable as one of the terms of the so contract of employment whether implied or express .

The High Court committed an error in extending the legal fiction,,stated in Section 41 Explanation to the definition of "wages" when dealing with the question of payment in the nature of Inam under the Scheme. The Explanation to Section 41 is not to be utilized for interpreting the general definition of "wages" given in Section 2(22) of the Act and is to be taken into account only when the word "wages" requires interpretation for purposes of Sections 40 and 41 of the Act. It cannot, therefore, be held that remuneration payable under a scheme is to be covered by the word "wages", if the terms of contract of employment are taken to have been fulfilled. What is really required by the definition is that the terms of the contract of 9 employment must actually be fulfilled. It is, therefore, not correct to hold that because payments made to an employee for no service rendered during the period of lockout, or during the period of legal strike, would be 5 wages. Inam paid under that scheme must also be deemed to be wages.

The mere fact that a reward for good work offered by the employer was accepted by the 0 employee after he had successfully satisfied the requirement laid down by the employer for earning reward could not mean that this payment became a part of contract of employees .In fact, in the case, there was no. 5 question of offer by the appellant and acceptance by the employees as a condition of the service. The employee were already working in accordance with the terms of their contract of employment when the employer decided to make this extra

payment if the employees did successfully what they were already expected to do under that contract. It cannot, therefore, be held that this payment of Inam ever became even an implied term of the contract of employment of the employees of the appellant.

(B) CPC 1908, Preamble Interpretation of Statutes Legal fiction It is 0 adopted in law for a limited and definite purpose-No justification to extend it beyond the purpose for which the Legislature adopted it."

This judgment is followed by the Karnataka High Court in Regional Director of Employee. State Insurance Corporation v. Management of Mysore Kirloskar Ltd., (supra).

5. However, the learned counsel Mr. Jaykar for the Respondent vehemently submitted that the Supreme Court in the case of Wellman (India) Pvt. Ltd. Vs. Employees" State Insurance Corporation, has observed thus. 15

To appreciate the controversy between the parties, it is necessary to understand the salient features of the Bonus Scheme. The Bonus Scheme was a part of a settlement entered into between the appellant employer 20 and the union of the workmen in 1966. According to this scheme which was introduced w.e.f. July 1, 1966, if a worker is present for all the working days during a quarter, he is entitled to attendance bonus equivalent to four days" wages. If he remains absent for one day in a quarter ,he is to be paid attendance bonus equivalent to two days wages for the first four quarters. If he is absent for two days in a quarter, he is entitled to attendance bonus equivalent to one day"s wages in that quarter. If a worker is absent for more than two days during a quarter, he is not entitled to any attendance bonus in that quarter. For the purpose of attendance bonus, the 35 quarters prescribed are April June, July September, October-November and January-March. If a worker is newly appointed in the middle of the quarter he is not entitled to attendance bonus for the relevant quarter. 40 The attendance bonus is to be paid in the month following each year. For entitlement to the attendance bonus, further, casual leave or any kind of leave is to be treated as absence. Only privileged leave taken in. ale single quarter is to be treated as presence in that quarter".

This Court (Coram : D. R. Dhanuka, J.) in All India Glass Works Pw. Ltd. v. Regional Director, Employees"State Insurance Coporation and Anr., in F.A. No. 801 of 1973. has followed the aforesaid ruling of the supreme Court and has observed thus -

"Mr. Samant has very fairly invited attention of the Court to the recent judgement of the Supreme Court in the case of Wellman (India) Pvt. Ltd. v. Employees State Insurance Corporation (supra). In this case, the Supreme Court held that the attendance bonus payable to the employees under the terms of the settlement was covered within the first part of the definition of wages u/s 2(22) of the Act. It was consequently 5 held by the Court that the attendance bonus payable to the employees under the terms of the settlement amounted to

remuneration payable to the employees under the terms of a contract express or implied. In the latter, part of the judgment, the Supreme Court interpreted latter part of the definition of the expression "wages" i.e. the words other " additional" remuneration and in terms observed as under :

"Hence, the expression" other additional remuneration if any, paid" not only does not refer to remuneration payable under any contract but refers to such remuneration which is payable at the will of the employer".

The learned counsel for the appellant is justified in pointing out that no reference is to be found to the well known case of *M/s Braithwaite and Co. (India) Ltd. v. employees" State Insurance Corporation* in this case. Perhaps no such reference was necessary. It cannot be forgotten that in the case 10 of *M/s Braithwaite and Co. (supra)* the Supreme Court did not go into the question whether amount payable by the employer to the employees under the Inam Scheme in question was liable to be considered as "other additional remuneration. " For the reasons best known to parties, the parties restricted and confined their respective submission only to First part of the definition of the expression "wages" as set out in Section 2(22) of the Act. It is well settled law that even the obiter dicta of the highest Court of the land binds the High Courts and other Courts. The High Courts are bound by the obiter dicta of the Supreme Court in absence of declaration of law on the subject in another case decided by the Supreme Court 5 where the question directly arose and is in terms decided. In this view of the matter, I respectfully follow the above referred observations of the Supreme Court made by P. B. Sawant, J. speaking for the Apex Court 10 in para 6 of his judgment. I am not merely bound by the above referred observations of the Supreme Court but, I also respectfully agree with the view taken by the Court on interpretation of the expression "Other additional remuneration" used in third part of the definition of the expression " wages."

6. In view of the Supreme Court judgment reported in *Braithwaite and Co. (India) Ltd. Vs. The Employees" State Insurance Corporation*, it is not possible to agree with submission of Mr. Jaykar. The reliance placed by him on Supreme Court case reported in *Wellman (India) Pvt. Ltd. Vs. Employees" State Insurance Corporation*, and the judgment of Bombay High Court (D. R. Dhanuka, J.) in F.A. No. 108 of 1973 is on different facts and circumstances. In those cases, the question was whether the payment of bonus falls within the definition of the wages or not and in that context, the Courts had taken the view that bonus being additional remunerations falls within the definition of wages. The learned counsel Mr. Jaykar has emphasized the second part of the definition "additional remuneration" considered by Justice Dhanuka in the case of *All India Glass Works Pvt. Ltd. v. Regional Director, Employees" State Insurance Corporation and Anr*, F.A. No. 801 of 1973. Mr. Jaykar has vehemently submitted that the judgment rendered in *Braithwaite and Co. (India) Ltd. Vs. The Employees" State Insurance Corporation*, has also been considered, by Justice Dhanuka and it is held Obiter dicta and Mr. Jaykar submitted that it should be

followed in this case also. With respect, I am not impressed by the argument of Mr. Jaykar.

7. It has been held by the Apex Court in the 45 case of Anil Kumar Neotia and Others Vs. Union of India (UOI) and Others, wherein it is observed thus :

"In that view of the matter this question is no longer open for agitation by the petitioner. It is also no longer open to the petitioners to contend that certain points had not been urged and the effect of the judgment cannot be collaterally challenged, See in this connection the observations of this Court in T. Govindaraja Mudaliar Vs. The State of Tamil Nadu and Others, , where this Court observed as follows at P 978 :

"The argument of the appellants is that prior to the decision in Rustom Cavasjee Cooper Vs. Union of India (UOI), it was not possible to challenge Chapter IV-A of the Act owing to the decision of this Court that Article 19(1)(f) could not be invoked when a case fell within Article 31 and that was the reason why this Court in all the previous decisions relating to the validity of Chapter IV-A proceeded on an examination of the argument whether there was infringement of Article 19(1)(g), and Clause (f) of that Article could not possibly be invoked. We are unable to hold that there is much substance in this argument. Bhanji Munji and other decisions which followed it were based mainly on an examination of the inter-relationship between Article 19(1)(f) and Article 31(2) . There is no question of any acquisition or requisition in Chapter IV-A of the Act. The relevant decision for the purpose of these cases was only the one given in Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others, after which no doubt was left that the authority of law seeking to deprive a person of his property otherwise than by way of acquisition or requisition was open to challenge on the ground that it constituted infringement of the fundamental rights guaranteed by Article 19(1)(f) . It was, therefore, open to those affected by the provisions of Chapter IV-A to have agitated before this Court the question which is being raised now based on the guarantee embodied in Article 19(1)(f) which was never done. It is apparently too late in the day now to pursue this line of argument, in connection we may refer to the observations of this Court in Mohd. Ayub Khan Vs. Commissioner of Police, Madras and Another, according to which even if certain aspects of a 50 Question were not brought to the notice of Court it would decline to enter upon re-examination of the question since the decision had been followed in other cases. In Smt. Somawanti v. State of Punjab AIR 1463 SC 151 a contention was raised that in none of the decisions the argument advanced in this case that a law may be protected from an attack under Article 31(2) but it would be still open to challenge under Article 19(1)(f) had been examined or considered. Therefore, the decision of the Court was invited in the light of that argument. This contention, however, was repelled by the following observations at page 974 :

"The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with

reference to which an argument was subsequently advanced was actually decided. "

8. In view of this observation of the Supreme Court, the argument of Mr. Jaykar does not stand and hence rejected. It has been in clear terms held in the case reported in Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation, that Inam is not wages, as discussed therein. Therefore, in my view, the question involved in this appeal is squarely covered and this Court cannot go beyond that.

In the result, the appeal is allowed. The Judgment and order dated August 18, 1995 is set aside.