

(1968) 03 CAL CK 0003

In the Calcutta High Court

Case No : Appeal from Original Order No. 24 of 1966

Indian Standard Wagon Co. Ltd.

APPELLANT

Vs

First Industrial Tribunal of West Bengal

RESPONDENT

Date of Decision : 07-03-1968

Acts Referred:

Defence of India Rules, 1962 — Rule 81A

Citation : (1968) 2 ILR (Cal) 207

Hon'ble Judges : Sinha, C.J.;Arun K. Mukherjea, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sinha, C.J.—The facts in this case are as follows: The Appellant is a company incorporated under the Indian Companies Act and has its registered office situate at No. 12 Mission Row, Calcutta. Its business consists of the manufacture and sale of railway wagons and other engineering products. It has a factory at Santa in Burnpur near Asansol where it employs a large number of workmen. Before 1925, the subscribed capital of the company was Rs. 58,64,000. Owing to losses suffered, the share capital had to be reduced in the year 1925 to Rs. 29,40,875. In or about the year 1946 a trade dispute arose between the company and its workmen with respect to bonus and other claims made by the workmen of the company along with the workmen of Indian Iron and Steel Co. Ltd. and Steel Corporation of Bengal Ltd. By an order dated December 7, 1946, the Government of Bengal referred the dispute for adjudication of Mr. Justice McSharpe under Rule 81A of the Defence of India Rules. One of the issues referred was as follows:

Whether a profit-sharing bonus scheme should immediately be introduced in all or any of the three factories? If so, on what basis should such scheme or schemes be passed and should any existing scheme or schemes be abolished or altered, and if so, to what extent?

The parties came to settlement and the terms were incorporated in an award given by Sharpe, J., based on the settlement and dated March 3, 1947. The said award ceased to be in force sometime in 1947 with the expiry of the Defence of India Rules. On October 31, 1947, the State Government made another reference of certain industrial disputes between the workmen and the company to the adjudication of a Tribunal consisting of Sri S.K. Sen, Sri P.R. Mukherjee and Sri P. Sarkar. One of the matters in dispute so referred was the question of bonus. On May 25, 1948, the Tribunal published its award dated April 1, 1948. The award directed that the McSharpe formula should continue. It may be stated here that this award was not based on a settlement between the parties. In terms of the Industrial Disputes Act, the said award expired on or about April 30, 1949. According to the workmen there was a term incorporated in the standing orders of the company regarding profit sharing bonus. The company seems to have prospered after 1952. It issued 38,985 bonus shares of Rs. 25 each to its share-holders on November 30, 1953. On December 16, 1957, the company issued another bunch of bonus shares numbering 77,970 of Rs. 25 each to the existing share-holders. In the year's 1957-58 and 1958-59 the company paid bonus for each of the years at the rate of 65 days' wages, which was in excess of the rates specified in the award of Sharpe, J. The workmen were not satisfied and claimed that, as the company had issued bonus shares, they were entitled to much more than was awarded by Sharpe, J. or which was paid by the company. For the year 1950-60, the company declared bonus at the rate of 67 1/2 days' wages, but the workmen disputed this and it was not paid. On July 4, 1961, the company declared bonus at the rate of 65 days' wages for the year 1960-61, but the workmen demanded more and the bonus was not paid. By an order dated July 6, 1961, the Government of West Bengal referred to the First Industrial Tribunal a dispute between the company and its workmen, namely, as to the payment of additional bonus for 1957-58 and 1958-59 and bonus for the years 1959-60 and 1960-61. A copy of this order is set out at pp. 72-73 of the paper-book. Within two days thereafter, the company by a notice withdrew its previous declaration for bonus for 1959-60 and 1960-61. The industrial dispute was contested by the workmen through the Asansol Iron and Steel Workers' Union, Burnpur, and the United Iron and Steel Workers' Union, Burnpur. The calculation of bonus or additional bonus could be made on three footings: (i) the McSharpe formula, (ii) modification of the McSharpe formula and (iii) the Full Bench formula, formulated by a Full Bench of the Labour Appellate Tribunal in *Mill-owners' Association, Bombay v. Rashtriya Mill Mazdur Sangh* (1959) II L.L.J. 247, which has now been accepted by the Supreme Court with certain modifications. Briefly speaking, this formula is based on the "available surplus", that is to say, the surplus available for distribution after meeting prior charges like depreciation, taxes, return on paid-up capital, return on working capital and cost of rehabilitation. This available surplus was to be allocated under three heads: (i) Labour's claim for bonus, (ii) Industry's claim for the purposes of expansion etc. and (iii) Share-holders' claim for additional return on capital invested by them. The company contested the claim of the workmen and

submitted that there was no justification for the claim of additional bonus for the years 1957-58 and 1958-59 in view of the fact that the same was paid according to the principle which had been accepted by the workmen. It was further contended that the issue of bonus shares did not justify a payment of bonus at a higher rate. According to the company the bonus was to be calculated either on the terms of the agreement contained in the award of Sharpe, J. or on the principle indicated in the Full Bench formula. In August 1961, the Unions filed an application for an interim award of bonus for each of the years 1959-60 and 1960-61. It was stated that the Durga Puja was near at hand and as the dispute could not be fully heard and decided before the Pujas and the workmen were badly in need of money, an interim award should be given, directing the company to pay within a week from the date of the interim award, a bonus for 1959-60 and 1960-61 as earlier declared by the company. This application was contested on behalf of the company which stated that for the years 1959-60 and 1960-61 no bonus was legally payable. The main difficulty, however, facing the workmen in relation to the interim award was as follows: An interim award is a final payment and not an interim payment and, as such, could not be paid until the available surplus was determined if the calculation was to be under the Full Bench formula. Neither could it be paid under the other headings because, according to the company, the McSharpe award had been repudiated by the workmen and they could no longer avail themselves of it. In fact, it was even stated that if there was any agreement contained in the standing orders it had also been repudiated by the workmen. On September 6, 1961, the Unions filed two separate applications wherein it was stated as follows:

the workmen of the company being in serious want of money because of impending Pujas, and to facilitate the proceedings of the Tribunal in respect of the prayer for interim award, have decided not to press its case in the final proceedings on the Full Bench formula and shall essentially confine its case on the McSharpe award and its modification because of the issue of bonus shares and other connected matters, and the aforesaid contentions of the Unions are intended to explore means of settlement without embittering the relations which the inspection of the company's voluminous account might mean.

2. The applications were disposed of by an order made by the First Industrial Tribunal on September 19, 1961. The entire interim award has not been printed in the paper-book, but copies have been furnished by the learned Counsel appearing on behalf of the company and copies have also been made available to the learned Counsel appearing on behalf of the workmen. The relevant part of the award is important and is set out below:

The first question for decision is whether any such interim award, order or relief is at all legally possible on the contentions of the Unions in their original written statements. The Asansol Iron & Steel Workers' Union in para. 41 of its written statement enunciated four broad principles for awarding an enhanced bonus for the years in question. The four broad principles are:

(a) The share basis now being four for one, three free shares for each holder of the share at the reduced value, the bonus quantum also should be four times by suitable modification of the number of days for each percentage of dividend with the provisions that the calculation should not be made just on the dividend declared but on the dividend which could have been declared if provisions would not have been made on heads of reserves and the like.

(b) The rate of payment to the head office employees of the company and the discriminatory treatment meted out to the factory workers in this regard:

(c) Full Bench formula of the Labour Appellate Tribunal.

(d) Prevailing quantum of bonus in the different respectable concerns, less prosperous and less important than this company.

The other Union, namely, the United Iron & Steel Workers Union, in para. 5 mentions three of these principles, namely a, b and c. Unless, therefore, the Unions were prepared to modify their stand on the principles on which they asked for an enhanced bonus for the years in question it would be necessary to decide the principles on which bonus for the years 1959-60 and 1960-61 could be computed and that would practically mean a final determination of that part of the issue referred for adjudication. When the matter was being argued, it was made clear on behalf Of both the Unions that they would ask for an enhanced bonus only on the principal ground, namely, modification of the formula laid down in the McSharpe award of 1947 in the light of the changed circumstances, such as the issue of three free bonus shares to the holder of one share in 1947. Both the Unions have filed applications to that effect. One of their applications says that in view of its anxiety to

facilitate the proceedings of the Tribunal in respect of the prayer for interim award it has decided not to press its case in the final proceedings on the Full Bench formula and shall essentially confine its case on McSharpe award and its modification because of the issue of the bonus shares and other connected matters among others.

That necessarily narrows down the controversy as regards the principle on which bonus is to be computed for the years in question. The main issue; therefore, now becomes whether the bonus is to be awarded strictly on the basis of the McSharpe award as it stands as the company contends or on the basis of certain modifications of the McSharpe award in the light of certain changes that have taken place since the McSharpe award as both the Unions claim. This provides a clue to the greatest common measure of agreement between the company on the one hand and the Union on the other. It is this that what is payable strictly according to the McSharpe award must be paid to the workmen as bonus so that an interim bonus at least to that extent may be directed to be paid and if at the final hearing on a consideration of the materials to be produced by the parties, the Tribunal comes to hold that there can be no further modification of the McSharpe award this interim award will be the final award; if, on the other hand

it holds that the McSharpe award should in fairness be modified in the light of the changed circumstances then, the final award may modify the interim award according to the modification of the McSharpe formula which the Tribunal may consider just and fair.

3. On or about September 27, 1961, the company made an application to this Court in the writ jurisdiction and a Rule was issued, copy whereof is set out in the paper-book at pp. 145-46. In the said Rule the Respondents were the State of West Bengal, the workmen of the company represented by the two Unions, and the First Industrial Tribunal. It directed the Respondents to show cause why the interim award mentioned above should not be cancelled or quashed and for other reliefs. It was further ordered that if the company kept in a separate account with the State Bank of India, the amount awarded, within a week, then the execution of the interim award would be stayed. Thereafter on October 5, 1961, the order of interim stay was varied to give effect to an agreement between the parties that the company would make an advance to the workers of the amount of the interim award and that the workers would accept the amount paid as an advance and that the same would be deducted from future payments if the company succeeded in the application. But if on the other hand the Rule nisi was discharged, then the "payment made was to be treated as payment made in terms of the above-mentioned award". This Rule was heard by Banerjee, J. and a copy of his order is set out at pp. 151 to 160 of the paper-book. It was argued before Banerjee, J. that the Tribunal had fallen into an error in assuming that the McSharpe award represented the greatest common measure of agreement between the parties because the workmen had repudiated the McSharpe award and, therefore, the only basis was the Full Bench formula for calculating the amount of bonus and the workers had agreed that the Full Bench formula will not be applied. On behalf of the workmen Mr. Mukherjee, their counsel, argued that the terms of the McSharpe award as to bonus had been incorporated in the standing orders of the company and thus had become a condition of service of the workmen and, therefore, the dispute did not call for an application of the Full Bench formula. The learned Judge did not accept this argument. It was held that the provisions for profit sharing bonus or for any kind of bonus at all, was not a matter which was included in the schedule of the Standing Orders Act and, therefore, it was not covered by that Act and was no more than a contractual agreement which had been repudiated by the workmen. In the opinion of the learned Judge the workmen repudiating the contract could not both approbate and reprobate, that is to say, repudiate it and at the same time aspire to get interim advantage on the basis of it. The learned Judge accepted the argument that the Tribunal was wrong in assuming that even though the dispute as to bonus had been referred to the Tribunal under the Industrial Disputes Act, the McSharpe award formed the basis of the "greatest common measure of agreement. Briefly speaking, the learned Judge held that neither the McSharpe award, nor its modifications, nor the conditions incorporated in the standing orders regarding the dispute as to payment of bonus

were binding on the parties and the calculation can only be done under the Full Bench formula. The learned Judge proceeded to say as follows:

The terms of the McSharpe award as to bonus were no doubt binding between the disputants, as, later on, by agreement (sic) continued. It was also capable of being modified or substituted by new terms in the interest of industrial peace in an industrial adjudication. But the power of the Tribunal to modify or substitute it was conditioned by the industrial law on the point, viz., the Full Bench formula. If the terms of the McSharpe award were contrary to the Full Bench formula, it could not be enforced by an award, interim or otherwise. The agreement as to the terms of the McSharpe award having been repudiated, by reason of the dispute raised/the Tribunal should not have used that as the basis of the industrial award unless it came to the conclusion that there was nothing contained in that award which went against the Full Bench formula.

The workers have made an unwise choice by giving up their legal rights under the Full Bench formula. Consequences thereof they will have to face and the Tribunal shall have to decide that at the final adjudication of the dispute.

Be that as it may, the bonus under the interim award has already been paid to the workers under orders of this Court. I do not, therefore, desire to interfere with the interim award which has now been executed. I, however, direct that at the time of making the final award over-payment of bonus under the interim award, if any at all, must be directed to be deducted from the bonus or bonuses to be declared by the company in future.

Save as to the modifications hereby made, this Rule is discharged. There will be no order as to costs.

4. On July 1, 1963, the workmen made an application to the Tribunal for permission to revive the issue as to whether any bonus was payable under the Full Bench formula and to deliver certain interrogatories. On September 13, 1963, the Tribunal made an order that the Workmen were entitled to revive their claim for bonus on the basis of the Full Bench formula, but that it was not open to the workmen to claim any bonus on the basis of the McSharpe award. By an order dated December 17, 1963, the Tribunal ordered that certain interrogatories may be delivered. On January 31, 1964, the company made another application to this Court against the orders of the Tribunal and a Rule was issued and interim stay granted. This Rule was disposed of by G.K. Mitter, J. by his order dated August 24, 1965. The learned Judge observed that the order dated February 23, 1962, should not have been made in the form in which it was passed and the interim award should have been quashed. The learned Judge was, however, of the opinion that strictly speaking the workmen did not get any payment under the interim award, but by way of advances to be adjusted against the final declaration of bonus to be made. The learned Judge was of the opinion that the Tribunal was justified in holding that the calculation of bonus should be made according to the Full Bench formula. In the opinion of the learned Judge this was

a procedural matter, and the parties by agreement could not fetter the Tribunal from calculating the bonus according to the Full Bench formula, that being the only method by Which it could be calculated. As regards interrogatories, two of them framed by the Tribunal were allowed, but the others were rejected as being not in proper form. It is against this order that this appeal is directed.

5. We agree with the finding of the learned Judge that it was not open to the parties to agree that the Full Bench formula was not to be applied for the calculation of the bonus. If the McSharpe award and its modifications be out of the way, then the only manner in which bonus can be calculated is under the Full Bench formula. If this course be not followed then it means that the workmen cannot get any bonus at all. The difficulty in this case has arisen because, of the order of Banerjee, J. At an interim stage, a final decision should not have been given as to the validity or otherwise of the McSharpe award or its modifications. However, he has done so and Mr. Ginwalla contended that the order has not been appealed against and is binding on the parties. The award of the Tribunal dated September 20, 1961, the relevant portion whereof has been set out above, shows that the parties had not been consistent in their attitude. Before the Tribunal the company emphatically, took up the position that the bonus could be granted only on the basis of the McSharpe award as it stood, whereas the workmen contended that it could be awarded only with modifications. It was only on this footing that the interim award was made. The order of Banerjee, J., however, completely altered the position. He held that the McSharpe award was not binding nor the modifications. He also went to the extent of saying that the standing orders were also not binding. If this is so, then the whole basis of the interim award seems to have vanished. It would be great injustice to hold that neither the McSharpe award nor the modifications thereof nor the Full Bench formula applies. That would mean that the workmen cannot claim any bonus at all. On the other hand, the workmen had received a benefit in consideration of the fact that they gave up the method of calculation under the Full Bench formula. Had they not given" it up, no interim award could have been made. Can they be permitted to retain the benefit and still have the bonus calculated on the Full Bench formula?

6. A number of cases have been cited by Mr. Ginwalla on the point that if a party to a proceeding had obtained a benefit by an agreement, he cannot repudiate the agreement and yet retain the benefit. The first case cited is an English case, *Foster v. Robinson* (1950) 2 A.E.R. 342. The facts in that case were as follows: The landlord, a farmer, was the owner of a cottage which had been occupied for many years by the Defendant's father who worked for the landlord on the farm and paid yearly rent. In May 1946 the Defendant's father, owing to age and infirmity, had ceased to work and it was then verbally agreed between him and the landlord that he need not pay any further rent but could continue to live in the cottage for the rest of his life rent-free. Thereafter rent was neither paid nor demanded until January 1950 when the father died. The daughter, the Defendant, claimed that she was a tenant and refused to give up vacant

possession. Held that the agreement of May 1946 was effective and the Defendant was estopped from claiming that the old tenancy still existed.

7. The next case cited is *Lessenden v. C.A.V. Bosch Ltd.* (1940) A.C. 412. In that case, a workman who had obtained an award of compensation under the Workmen's Compensation Act had accepted a weekly sum payable thereunder. It was contended that he had lost right of appeal and that he could not both approbate and reprobate. Viscount Maugham explained the law as to approbation and reprobation and said that it approached the law as to election and held that the filing of the appeal does not operate as a stay of execution and, therefore, the mere fact that the Appellant had accepted sums payable under a decree which is under appeal does not attract those principles.

8. In my opinion it is not necessary to go into these technical points. It may be taken to be generally true that if in course of a legal proceeding a party induces the other party to change its position by an agreement, it could not later on resile from it. What then is the position here? The workmen were asking for an interim payment. This they could not get at that particular time because no amount can be paid until the available surplus is determined. In order to get over the difficulty they said that they gave up the Full Bench formula, which meant that it would no longer be necessary to calculate the available surplus for the purpose of determining the amount of compensation payable. On that footing an interim award was made and interim payment of bonus directed. Now the workmen say that the Full Bench formula should be followed. If the matter stood there the principle of approbation and reprobation could be attracted. But there are other facts to be considered. Firstly, as pointed out in the Court below, calculation according to the Full Bench formula is a matter of legal procedure, and if the circumstances show that that is the proper legal method by which bonus should be calculated it is not open to any litigant to say that it should not be used. The right that is vested in the workmen is a right to get bonus and not the right to have it calculated in any particular manner. The manner in which it should be calculated is laid down by the law. It is impossible to argue that the bonus will have to be calculated and yet the Court should be fettered from using the only method which is lawful under the circumstances. It has rightly been held that no such fetter can be imposed upon the Court. The next point is as to the benefit that has been received by the workmen. It is true that the original application was for an interim award and the workmen proposed that they should be given an interim payment and gave up the Full Bench formula. But the matter did not rest there. As against the interim award there was an application made under the writ jurisdiction of this Court. At first it was ordered that if the amount of compensation was kept in a separate account, then there will be a stay. Later on an order was made that the amount may be paid by way of "advance", and if the Rule was discharged, then the company would be entitled to recover it from future payments. In fact, the Rule was discharged, so that the amount paid can now be recovered as an advance. I think, therefore, that, justice will be done if it is made clear that the calculation of bonus will be according to the Full Bench

formula as explained by the Supreme Court, but that the company will be entitled to deduct the amount paid as interim bonus to workmen as an advance from wages and bonus, that is, or may be found, payable to them. Subject to this the appeal fails and is dismissed, but no order is made as to costs.

Arun K. Mukherjea, J.

9. I agree.