
(1995) 09 AP CK 0053

In the Andhra Pradesh High Court

Case No : W.A. No. 247 of 1989 and Batch

Mishra Dhatu Nigam Limited

APPELLANT

Vs

Industrial Tribunal and Another

RESPONDENT

Date of Decision : 25-09-1995

Acts Referred:

Payment of Bonus Act, 1965 — Section 16(1B)

Citation : (1995) 3 ALD 821 : (1995) 3 ALT 899 : (1999) 3 LLJ 1189

Hon'ble Judges : Lingaraja Rath, J;B.K. Somasekhara, J

Bench : Division Bench

Advocate : K. Srinivasa Murthy, for the Appellant; Government Pleader for Social Welfare For Respondent No. 1 and V. Venkataramana, for the Respondent

Judgement

Lingaraja Rath, J.—The question that falls for decision in these appeals and the Writ Petition is whether a newly set up establishment for production of goods is liable to pay bonus to its workmen, even though it has not started selling its manufactured goods and its infancy period of five years from the setting up is not over but has otherwise earned some income in a different venture during that period, for the sixth and successive accounting years commencing from the year when the income was made.

2. A narration of the facts is necessary to go into the question of law raised.

3. Writ Appeal No. 247 of 1989 and Writ Petition No. 7897 of 1994 have been preferred by Mishra Dhatu Nigam Limited, commonly referred as Midhani. The company is a Defence establishment set up for manufacturing of Missiles and special type alloys for which there is collaboration agreement, so far as Technical know how is concerned, with a French Company Creusot-Loire. Though Midhani was set up in 1977-78 yet production had not been started till April 24, 1981. But even before the starting of production, it is the case of the workmen the industry functioned from 1976-77 as Commission Agent of the sister concerns of the French Company when certain Indian Companies imported the special type alloy from them, and received commission on account of the sales. The workmen

raised a dispute of being entitled to bonus in terms of Section 16(1-B) of the Payment of Bonus Act, 1965 (referred hereinafter as "the Act") from the sixth year onwards when the commission was first earned. The Industrial Tribunal having given the award in favour of workmen, it was challenged before this Court in W.P.No. 17439 of 1986 by the Management. During the pendency of the case, the workmen also filed W.P. No. 6735 of 1987 seeking mandamus to the Management to act according to law and pay the minimum Bonus for the accounting year 1985-86 as per Section 10 of the Payment of Bonus Act. Both the cases were disposed of by a common judgment allowing W.P. No. 17439 of 1986 and dismissing the other case, setting aside the award and remitting the case to the Tribunal to consider whether the Marketing Department of the Industry was a separate establishment u/s 16(2) of the Act. As against the order of remand the workmen have preferred Writ Appeal No. 1199 of 1988. Writ Appeal No.247 of 1989 has been preferred by the Management against the same judgment complaining the question of their liability or otherwise to pay the bonus as claimed of not having been decided. Writ Appeal No. 1200 of 1988 has been preferred by the Union against the dismissal of Writ Petition No. 6735 of 1987. After remand the Tribunal, on evidence, held the Marketing Department to be not a separate establishment of the Company. Writ Petition No. 7897 of 1994 has been filed by the Management against the fresh award.

4. For an appreciation of the questions urged Section 16(1), (1-A) and (1-B) of the Act needs to be extracted :

"16. Special provision with respect to certain establishments--

(1) Where an establishment is newly set up, whether before or after the commencement of this Act, the employees of such establishment shall be entitled to be paid bonus under this Act in accordance with the provisions of Sub-sections (1-A), (1-B) and (1-C).

(1-A) In the first five accounting years following the accounting year in which the employer sells the goods produced or manufactured by him or renders services, as the case may be, from such establishment, bonus shall be payable only in respect of the accounting year in which the employer derives profit from such establishment and such bonus shall be calculated in accordance with the provisions of this Act in relation to that year but without applying the provisions of Section 15.

(1-B) For the sixth and seventh accounting years following the accounting year in which the employer sells the goods produced or manufactured by him or renders services, as the case may be, from such establishment, the provisions of Section 15 shall apply subject to the following modifications, namely--

(i) for the sixth accounting year--

set on or set off, as the case may be, shall be made in the manner illustrated in the (Fourth Schedule) taking into account the excess or deficiency, if any, as the

case may be, of the allocable surplus set on or set off in respect of the fifth and sixth accounting years ;

(ii) for the seventh accounting year--

set on or set off, as the case may be, shall be made in the manner illustrated in the (Fourth Schedule) taking into account the excess or deficiency, if any, as the case may be, of the allocable surplus set on or set off in respect of the fifth, sixth and seventh accounting years."

A break up of Sub-section (1 -A) yields to show that a newly set up establishment becomes liable for payment of bonus when the events, as follows occur :

i) If in any accounting year the establishment sells the goods produced or manufactured by it from such establishment", or renders service from such establishment; the bonus is payable only for the accounting year, within the first five years of the accounting year in which the goods are sold or service is rendered, in which the employer derives profit from such establishment. As the language shows, the establishments which amongst themselves may cover the whole range, may be of three kinds, i.e.

(i) Those which sell goods produced or manufactured by them;

(ii) those which render service; or

(iii) those which both sell goods as above and also render service.

The use of the words "such establishment" in the provision imports the meaning that the earning of profits so as to invoke the liability to pay bonus, is to have been out of selling of the goods or from the act of rendering service qua the establishments which may be of either of the three kinds. If it has/for its purpose either of the three alternatives and in pursuance of that purpose and in discharge of that activity profit is earned, bonus in the manner stipulated becomes payable. Hence, if any profit is earned by the establishment not by either selling its goods or by selling its service for which it is set up, but otherwise, the profit is not earned by the establishment qua the establishment for which reason the provisions of Sub-section (1-A) would not become applicable. When Sub-section (1-A) expressly states the bonus to become payable only in respect of the year in which the profit is earned, it is clear that rendering of service has to be understood in the sense of rendering of service for price with contemplation of earning profit. The establishment hence must be, when it is service oriented, one which has the object of making profit by selling service and may also be a firm of commission agents.

5. Even the report of the Bonus Commission which formed the basis for framing of the Act in many respects also made the same recommendation regarding selling of services, as would appear from paragraph 12.9 of the report.

" 12.9. We recommend that the general bonus formula proposed by us should

not apply to new concerns until they have recouped all early losses including all arrears of normal depreciation admissible under the Income Tax Act, subject to a time-limit of six years. In other words, in such cases we recommend that the liability to pay bonus (including minimum bonus) in accordance with our formula should commence only--

(a) from the year in which there is for the first time an over all net profit, i.e. sufficient profit, after providing for that year's normal depreciation, to wipe off all accumulation of previous losses and arrears of depreciation; or

(b) from the sixth year following the year in which the undertaking begins to sell its products and/or services", whichever may be earlier.

6. It thus appears that the concept of payment of bonus, so far as newly set up establishments are concerned was linked to selling of the products and/or services. But whatever may be the type of the establishment i.e., either for selling of a product or selling of service or both, the liability to pay bonus arises, within the first five years of the setting up, only when profit is earned out of the activity of such sale only in the character of such establishment. A firm commission agents, set up as such may also be an establishment set up for selling services as such and would be liable to pay bonus for the year in which any profit is earned within the period as above, out of such activity.

7. The provisions of Section 16(2) makes the provisions of Sub-sections (1), (1-A) (1-B) and (1-C) of Section 16 applicable also to new departments or undertakings or branches of existing establishments with the proviso added that if in any existing establishment consisting of different departments etc., set up at different periods prior to May 29, 1965 bonus was being paid to employees of all the departments etc., on the basis of consolidated profits computed in respect of all the departments etc., the liability to pay bonus to the employees of all such departments etc, in accordance with the provisions of the Act on the basis of the consolidated profits would be there. It is clear that apart from the exception provided for in the proviso, bonus in respect of the new departments set up in an existing establishment would be payable only to the employees of that department when the conditions under Sub-sections (1), (1-B) and (1-C) are satisfied. The learned single Judge also decided in the same way while remanding the case to the Tribunal for a finding as to whether the Marketing Department of the appellant was a separate establishment. It would hence follow that if the department is a new department i.e., a separate department set up for the purpose of either production and sale of goods or for selling of service, the liability to pay bonus will commence only when the event as specified in the different sub-sections of Section 16 happen. The liability year so far as Sub-section (1-A) is concerned is the accounting year following the accounting year in which the profit is earned qua the activity of the new department and for the purposes of the Sub-section (1-B), the sixth year of the setting up of the new department as such. The bonus so payable would be to the workmen of the establishment as a whole unless a separate balance sheet and profit and loss

account are prepared and maintained in respect of the new department.

8. While the question of earning profit is essential for a claim of bonus under the provisions of Sub-section (1-A), it has no relevance so far as the claim under Sub-section (1-B) is concerned for which the only condition is that the goods produced or manufactured must have been sold or the service must have been rendered and five years have elapsed from the event. The words so used are necessarily to be understood in the context of Sub-section (1-A) and hence so far as rendering service is concerned, it must have the same meaning as in that sub-section. The entitlement of bonus under Sub-section (1-B), so far as rendering of service is concerned, would be from the date the service is sold from the establishment which would implicitly mean, applying the same logic as was seen in the case of Sub-section (1-A), that the service must have been rendered qua the establishment i.e., by an establishment set up for the purpose of selling of the service. Hence the question assuming importance is whether the act of the appellant working as Commission Agent was in pursuance of setting up of an establishment to sell services as a commission agent or, as is claimed by the respondents, the purpose was not to earn profit by selling services as a business venture and the activity was undertaken only as incidental to a different purpose.

9. The Tribunal has itself found in the fresh award of the Marketing Department being not a separate establishment, to have emerged in the year 1977; and to have continued as part and parcel of the industrial establishment for which reason it could not be regarded as a new department or separate undertaking u/s 16(2) of the Act. That being the finding of fact has to be accepted as such. But the finding by itself does not resolve the question arising as the issue to be answered. Whether the marketing department was set up as a separate establishment or was part and parcel of Midhani and whether the department was setup along with Midhani or was later on created are not relevant so far the problem is concerned, since the question to be considered is whether, even accepting that the marketing department is part and parcel of Midhani, the service rendered by Midhani through the marketing department as commission agent is such which would create the liability u/s 16(1-B) to pay the bonus. The Tribunal itself has found Midhani to be an industrial establishment predominantly occupied in production of super alloys etc. The Memorandum of Association and the Articles of Association of Midhani shows the main object of it to be to manufacture and process special metals and super alloys required for aircraft, rockets, missiles, electronics, instruments and allied industries and for the purpose to manufacture all the grades, types and sizes of the enumerated special metals and super alloys etc. It was never set up as an establishment to act as the commission agent of imported super alloys. The marketing department which is part and parcel of Midhani, even if would have been set up along with setting up of Midhani itself, would have had the work of marketing Midhani's own products and undertaking activities connected with it. The department was however set up later. The resolution passed in the inter-departmental meeting held on May 11, 1976 in the department of Defence Production relating to the

setting up of the marketing department was as follows :

"MIDHANI may consider the setting up a small nucleus marketing organisation with application engineering services and obtaining sole selling rights in respect of alloys and metals of its collaborators in India with a view to familiarize the Indian users with these alloys and metals."

From the Minutes it appears that objection was taken by Dgtd to the setting up of an elaborate sales organisation in the Midhani as it being a manufacturing organisation it should concentrate on production activities. The decision was ultimately taken as evidenced in the resolution extracted above that the very object of setting up the nucleus organisation was to familiarize the Indian users with the alloys and metals which Midhani was going to produce. The Manager (Marketing) of the appellant was examined as M.W. 1 before the Tribunal and stated that Midhani made no offer of any material to sell to the parties for sale and they only told them that certain parties at Europe had the material for sale. The Indian parties contacted the foreign exporters and placed orders directly with them to whom the appellant supplied the addresses of local parties. The Deputy General Manager, (Mills) of the appellant was examined as M.W. 3 and answered to the specific question as to what was the object of Midhani to act as intermediary and have links with the local customers, that the main purpose from the appellant's point of view was that they wanted to project Midhani as prospective manufacturer to the prospective customers and that when the transactions were taking place as per/Exs. M.8 to M. 11 viz., the agreements for supply of the imported materials, the information was being analysed by the appellant for their own market study. He further stated "the object of establishing Midhani is to manufacture goods indigenously, meet the indigenous demands and eventually to stop the imports". It was his evidence that M.8 to M. 11 were stopped operations from 1981 and it also appears from the evidence of M.W. 1 that commercial production of Midhani was started on April 24, 1981. M.W. 2, the Deputy Manager (Finance) stated the commission earned by the appellant in 1977-78 was Rupees 11 thousand, in 1978-79, 38 thousand, in 1979-80, lakh 24 thousand, and in 1980-81, 72 thousand. Ex M-12 filed before the Tribunal shows respectively the selling agency commissions earned and the marketing development expenses respectively for upto March 31, 1977 and 1977-78, 1978-79, 1979-80 and 1980-81. While the commissions earned were as such, the respective expenses were in term of rupees 3 lakhs 30 thousand, 10 thousand, 2 lakhs 19 thousand, 2 lakhs 4 thousand, and 3 lakhs 66 thousand.

10. It thus appears that the appellants acted as commission agents only during the period the commercial production had not started and once it started the working as commission agents stopped. The work as commission agents was undertaken with a view to develop customer awareness in respect of the productions to be made so as to assess and be assured of the local market. The purpose hence was not one to set up an establishment exclusively or primarily to act as commission agents and to sell services as such but to undertake an

activity to familiarize the Indian customers with the goods to be manufactured and developing the market for which purpose they were brought in contact with the foreign exporters and for the services so rendered to the foreign companies, some commission was earned even though that was negligible in comparison with the expenses incurred. Though for the purpose of Sub-section (1-B) earning of profit is immaterial, yet the negligible incomes made vis-a-vis the expenses incurred would rather show that selling of services as an establishment for the purpose in a venture was never intended. The very activity to act as commission agents was also never intended to be a permanent one. The stray and sporadic acts for a few years to take up some commission agency works would not characterize the marketing department to have been set up for selling of services as commission agents. That being so, the liability to pay bonus as claimed u/s 16(1-B) would not arise. Though, because of the view taken, the bonus paid is recoverable, yet considering the hardship to be faced by the workmen to make good the amount paid, and as has been fairly agreed to by Mr. Srinivasa Murthy, we direct that only 50% of the bonus already paid is to be recovered by way of adjustment only from the workmen to whom any ex gratia payment in lieu of bonus is payable in future commencing from the year 1995-96.

11. In the result Writ Appeal No.247/89 and Writ Petition No.7897/94 are allowed. The award dated June 8, 1993 in I.D. No. 4 of 1992 by the Industrial Tribunal, Hyderabad-2 is set aside. Since Writ Appeal No. 1199/88 was preferred against setting aside of the award in the judgment of W.P. No. 17439/86 but the fresh award also went in favour of the workmen but has been quashed by us in the Writ Appeal No. 1199/88, the appeal on the one hand has no merit and on the other hand has become infructuous and is dismissed. Writ Appeal No. 1200/88 is also dismissed as having no merit. In the circumstances, there shall be no order as to costs.