
(1999) 07 BOM CK 0054
In the Bombay High Court
Case No : Writ Petition No. 812 of 1996

Modistone Limited

APPELLANT

Vs

Modistone Employees Union and another

RESPONDENT

Date of Decision : 01-07-1999

Acts Referred:

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 28
Payment of Bonus Act, 1965 — Section 10, 2(13), 31, 8

Citation : (1999) 4 ALLMR 99 : (1999) 4 BomCR 477 : (1999) 1 BOMLR 668 : (1999) 2 LLJ 1008 : (1999) 3 MhLj 241

Hon'ble Judges : A.P. Shah, J

Bench : Single Bench

Advocate : P.K. Rele and Vijay Tayde, instructed by S.S. Pakale, for the Appellant; R.S. Kulkarni, instructed by C.M. Acharya, for the Respondent

Judgement

A.P. Shah, J.—This petition under Article 226 of the Constitution of India challenges the order dated 29-3-1995 passed by the Industrial Court, Mumbai in Complaint (U.L.P.) No. 478 of 1976, a proceeding initiated under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, hereinafter referred to as the M.R.T.U. and P.U.L.P. Act.

2. The petitioner is a company engaged in manufacture of automobile tyres, tubes and flaps. The 1st respondent is the union and represents the workers of the petitioner company. A settlement dated 28-9-1973 was signed between the petitioner and the Firestone Tyres employees union then representing the employees of the petitioner company revising the service conditions and also agreeing payment of bonus. Under Clause 27 of the said settlement the company agreed to continue the rate of payment of bonus at 20% without ceiling to all employees and also agreed to pay at the rate of 2% of the annual earning and the bonus was declared accordingly for the years ending on 31-10-1973 and 31-10-1974. In the year 1975 the company, however, paid bonus with a salary ceiling as well as bonus ceiling as per the Payment of Bonus Act, 1975,

hereinafter referred to as the Bonus Act. The management of the company took up a stand that as a result of the amendment to the Bonus Act by 1975 Ordinance the existing settlement became non-est

3. Complaining the failure on the part of the company to pay bonus as per the settlement amounts to unfair labour practices falling under Item 9 Schedule IV of the M.R.T.U. and P.U.L.P. Act, respondent union lodged a Complaint (U.L.P.) No. 478 of 1976 under Chapter VI of the M.R.T.U. and P.U.L.P. Act. The contention of the union was that ever since the Ordinance under the Bonus Act was promulgated in 1965 the company was paying to its employees bonus at the rate stipulated irrespective of the ceiling that is the ceiling of Rs. 1800/- per annum to those drawing the salary between Rs. 750/- to Rs. 1600/- per month and introduction of the system was done unilaterally, and, therefore now the right is accrued to those employees becoming a part of the service contract. It was urged that in a dispute between the company and the employees, a settlement was arrived on 6-11-1969 culminating in an award whereby under Clause 29(1) it was specifically agreed between the parties and there was also an assurance by the company to the employees that all the existing benefits in previous award, settlement, custom and usage except as modified by the said settlement shall continue. The union contended that this commitment on the part of the company was honoured by them and the bonus was paid to the employees including employees drawing monthly salary above Rs. 750/- or Rs. 1600/- per month as per the custom, usage and the contract confirmed by the award and thus even those employees continued to earn advantage of 20% bonus on their salary without ceiling- By the settlement dated 28-9-1973 under Clause 27 the company agreed to pay bonus without any ceiling and 2% of the annual earning as additional payment to all the employees and the bonus was declared accordingly, for the years ending on 31-10-1973 and 31-10-1974. The union complained that by withholding 2% to all the employees the payment of excess above the ceiling to those falling within Rs. 750/- and 1600/- range and also depriving the employees who are in grade of above Rs 1600/- although the settlement speaks of the payment to all of them, the company has indulged in unfair labour practice as complained of and hence suitable directions under the relevant Act, were being sought for.

4. In the written statement filed by the company, the payment of bonus as alleged is not disputed by the company but what is being disputed is the right to receive in the first place 2% in excess of the bonus declared, secondly any payment above the ceiling on the limit prescribed to those falling within the range of Rs. 750/- to Rs. 1600/- and lastly also the right of the employees drawing salary more than Rs. 1600/- per month. In the same manner, the contentions of the union that there was a custom or usage to ignore the ceiling or to effect the various payments as referred to are also being disputed and it is urged that the act of the company namely the alleged non-payment of various sums does not amount to unfair labour practice as to fall within Item 9 of Schedule IV and is therefore urged that no directions need be given against the

company. The company contended that the provisions of section 31-A and section 34 which were brought by the 1975 Ordinance, override the settlement, and therefore it cannot be said that the company committed any unfair labour practices.

5. The Industrial Court by its judgment and order dated 27-4-1979 rejected the complaint. The union aggrieved by the said judgment and order approached the Apex Court by filing the special leave petition. The Apex Court by order dated 22-2-1994 set aside the order of the Industrial Court dated 27-4-1979 and remanded the matter back for disposal in accordance with law. After remand of the matter the Industrial Court upon hearing the parties by its order dated 29-3-1995 held that the company has engaged in unfair labour practice under Item 9 of Schedule IV of the M.R.T.U. and P.U.L.P. Act by not implementing the Clause 27 of the settlement dated 28-9-1973 and accordingly directed to pay bonus for the year ended 31st October 1975.

6. The main question which requires consideration in this petition is related to the effect of section 34 of Bonus Act: It is an admitted position that since 1964, the company has been paying bonus to the employees as a percentage of the total wages including dearness allowance and other allowance without any ceiling. During the period 1963-64 to 1965-66 the employees were paid 20% of the salary as bonus. In 1966-67 the company declared 6% of the salary/wages as bonus. The union raised an industrial dispute for payment of higher bonus which came to be referred to the Tribunal, which matter went upto the Apex Court and upon a settlement arrived between the parties the company agreed to pay 16% of the salary as bonus. Bonus was paid on the notional salary of Rs. 750/- per month.

7. There were industrial disputes between the company and the employees relating to upward revision of wage scales, dearness allowance, gratuity, leave facilities, uniforms and other conditions of service during 1967 and the said disputes were referred for adjudication to the Industrial Tribunal, Mumbai by the Government of Maharashtra, and during the said proceedings a settlement was arrived at between the company and its employees and an award came to be passed in terms of the settlement. In the said award it is specifically inter alia agreed by the company as follows:

"BENEFITS;- All existing benefits under any previous Award. Settlement, Custom and Usage, except as modified, by this settlement, shall continue."

8. When the said award was terminated i.e. 31-10-1972 the union submitted a fresh charter of demands and a settlement was signed on 28-9-1973. The relevant term of the said settlement is as under:

"a) In addition to the quantum of bonus paid to the workman as hitherto i.e. under The Payment of Bonus Act, 1965 all the workmen shall be paid for the period of this settlement a sum equivalent to 2% of the annual earnings of each year as additional payment.

b) In the event The Payment of Bonus Act, 1965 is amended to remove the maximum ceiling of 20% of the annual earnings, the ad-hoc payment as per Clause (a) hereinabove shall be adjusted against the excess over and above 20% of the annual earnings, subject, however, there shall be, no salary/wages ceiling as at present."

As indicated earlier the company paid bonus as per the settlement for 1973 and 1974. However, a dispute started between the parties when the company restricted the bonus in 1975 to the employees in terms of The Payment of Bonus Act.

9. A perusal of the settlement between the parties and evidence led before the Tribunal it appears :--

(i) that the bonus was paid by the company ever since 1964 : (ii) from 1964 onwards the bonus was paid at the rate of 20% of the salary without any ceiling barring the year 1966 ; (iii) for the year 1966 bonus was paid at the rate of 16% as per the settlement between the parties before the Apex Court; (iv) for the year 1972-73 and 1973-74 additional amount of 2% was paid ; (v) Bonus was paid not on the basis of profit calculation and usually in the month of October every year.

10. The Industrial Court in its impugned order has observed as under:

"From the submission of both the parties and legal position it is admitted that upto 1974 respondent was paying bonus to its all workmen irrespective of ceiling of wages or salary. From 1974-75 the respondent raised dispute adhering the provisions of amended Payment of Bonus Act and refused to pay the Bonus to its workmen. Admittedly there was settlement between the parties for payment of bonus which is Clause 27 of settlement dated 28-9-1973 which is referred above. From it, it is clear that the bonus agreed by the respondent was in addition to the quantum of bonus paid to the workmen under the Payment of Bonus Act, 1965. Further the said clause reads that all the workmen shall be paid for the period of this settlement a sum equivalent to 2% of the annual earnings of each year as additional payment. From this clause it reveals that the respondent has agreed to pay additional bonus to the quantum of bonus has (sic) under the provisions of Act. Similarly, it was agreed by the respondent that all the workmen shall be paid for the period of this settlement a sum equivalent to 2% of annual earning of each year as additional payment. From this clause it reveals that the additional payment of bonus was not linked with the production or productivity and therefore, the provisions of section 34 of amended Payment of Bonus Act in view of the case law cited by Dr. Kulkarni will not come in way."

11. The Industrial Court further observed:

"So far as concern the customary bonus, from the document filed by the respondent which is at Exh. C-9 it reveals that the respondent was paying bonus to its workmen irrespective of wage ceiling since 1964 to 1974, certainly, this is a

long period which can be easily said as practice, usage and custom. Therefore, in view of the case law cited by Dr. Kulkarni, it is evident that the workmen are entitled for customary bonus. From the settlement dated 28-9-1973 it is evident that the provisions under Clause 27 regarding payment of bonus was in addition to the quantum of bonus paid under The Payment of Bonus Act. Similarly, 20% of the annual earnings in sub-clause (B) of the said clause was in respect of payment of 20% of annual earnings wherein share was no relevancy regarding production or productivity as specified u/s 31-A of the Payment of Bonus Act, 1965. Therefore considering this statutory provisions and from the case law cited by Dr. Kulkarni I have no hesitation in coming to the conclusion that provision of section 34 will act same in way in payment of bonus by way of settlement, agreement or award because this is an additional payment which was not linked with the production or productivity ."

12. Mr. Rele learned Counsel for the company strenuously urged that throughout the company paid profit bonus from the date of promulgation of the Bonus Act and that the said bonus was related to profits and was at no time related to any festival, custom or usage. Mr. Rele urged that considering the fact that the bonus was paid by the company pursuant to the settlement signed between the parties from time to time and it was not paid uniformly in as much as in 1966-67 bonus was paid by the company at the rate of 16% with a ceiling on the salary it is clear that what was being paid was profit bonus not connected with any custom, usage or contract and that thus there was no long standing practice or usage for payment of bonus dehors the provisions of the Bonus Act by way of customs or usage or contract. According to Mr. Rele 1973 settlement was hit by the provisions of section 34 of the said Act and was not saved by section 31-A as admittedly the bonus agreed to be paid under the 1973 settlement was not linked with production or productivity.

13. I do not find any merit in the contention of Mr. Rele learned Counsel for the company. It is well settled that the Bonus Act is confined in its application to profit bonus and other amount of bonus recognised by the Industrial law are not covered by the provisions of the Bonus Act. In The Mumbai Kamgar Sabha, Bombay Vs. Abdulbhai Faizullabhai and Others, it has been held as under:

"The conclusion seems to be fairly clear that unless the Court strains judicial sympathy contrary-wise, that the Bonus Act dealt with only profit bonus matters connected therewith and did not govern customary, traditional or contractual bonus."

14. The above decision was affirmed in the case of Hukumchand Jute Mills Ltd. Vs. Second Industrial Tribunal, West Bengal and Others, wherein it was held that the customary or contractual bonus were excluded from the provisions of the Act and it was laid down as under:

"The Bonus Act (1965) was a complete Code but was confined to profit-oriented bonus only. Other kinds of bonus have flourished in Indian Industrial Law and

have been left uncovered by the Bonus Act. The legislative universe spanned by the said statute cannot, therefore affect the rights and obligations belonging to a different world or claims and conditions."

15. As indicated earlier the Industrial Court has found that the payment made under the settlements had no link with the profit. In the circumstances the company was not right in invoking the provisions of section 34 of the Bonus Act in as much as the said section would not alter the nature of payment so as to convert it into a bonus paid under the said Act. Bonus was paid by the company for sufficiently long period commencing from 1964. Merely because during the passage of time in one year i.e. 1966 the company paid bonus at a lower rate, is not sufficient to discard the argument of the union that the bonus was customary and during the course of time it has ripened into a contract.

16. It is true that the payment of bonus at an uniform rate all throughout is an important circumstance but that however, does not mean that the uniformity should be established from the beginning to the end. See *Vegetable Products Ltd. Vs. Their Workmen*, . Even if the payments during the years 1964-1967 could be ignored and on the basis of the payment made during the years 1968-1974 at the uniform rate at 20% of the salary, it could be said that the payment was made at a uniform rate from 1968-1974. The question is whether the said period was sufficiently long to draw an inference about the payment being customary in nature. In the case of *Workmen at Kettle welt Buljen and Co. Ltd. v. Kettle welt Buljen and Co. Ltd.* 1994(1) C.L.R. 511, there was payment of a uniform rate of 10.5% of salary for an unbroken period of 9 years, from 1965-1973, which was held to be a sufficiently long period, and it was held that the tribunal could have reasonably drawn an inference that the payment was customary or traditional bonus on the occasion of Pooja Festival. In the instant case therefore no fault can be found with the decision of the tribunal for holding that the payment of bonus was customary or traditional and had fructified in a contract. There are other circumstances to indicate that the bonus paid by the company was not linked with profit. This is clearly seen from the admission of the company contained in a communication issued by the company wherein it is stated as under:

"Another token of Management's appreciation of the cordial atmosphere is the additional payment of 2% of the employees' gross earnings made over and above the 20% bonus for the year 1971-72 even when the profit picture did not warrant it."

17. With regard to the employees drawing more than Rs. 1600/- they are obviously not covered by the Bonus Act. There is no doubt that the payment of amount as bonus or ex-gratia or in any way otherwise to the employees drawing gross salary exceeding Rs. 1600 is not provided in the Bonus Act. Such employees are not employees within the meaning and definition of section 2(13) of the Bonus Act. The ex-gratia amount paid to these employees cannot amount to bonus within the meaning of the Bonus Act. Even so, the employer is bound to honour and implement such agreement, if any, like any other agreement or

contract with any other person. There is no dispute that the settlement of 1973 covers even the employees who were drawing more than Rs. 1600 per month. Therefore in respect of these employees the bar u/s 34 of the said Act does not at all arise. In this connection a reference may be made to the decision of this Court in the case of Petroleum Employees Union v. Industrial Court, Maharashtra, Bombay and another, 1980 Bom.C.R. 442 : 1981 M.L.J. 316 wherein the Division Bench observed:

"Section 8 of the Bonus Act confers a right on every employee to get bonus in an accounting year, while section 10 of the Act casts an obligation on the employers to pay bonus to their employees out of the allocable surplus, understood in common parlance, as a profit based bonus. This section merely seeks to ensure that benefit intended for the employees under this Act is not scuttled and made ineffective either by any contrary provision in any other enactment or under any award, settlement or otherwise. The overriding effect given to the provisions of this Act is aimed to achieve this object and protect whatever is given to the employees thereunder. Prohibition implicit in the section against contracting out of the statute is for the benefit of the employees and not to his detriment. Section 31-A is an exception to this policy. It permits the employees and employers to alter the basis of bonus by linking it to production and delinking it from profits. There is nothing in this section to prevent the employers from paying more than what is required to be paid by way of the minimum. Section 34 does not prevent the employers from paying to the employees anything not covered or contemplated by the Act. There is nothing in this section to prevent the employers from implementing the agreement dated 12th May 1975. Sections 8, 10 and consequently section 34 have no application whatsoever to this payment. The bogey of legality is clearly a figment of imagination without any trace of foundation in this provision."

18. The petition is therefore dismissed. Rule is discharged with no order as to costs.

The Industrial Court is directed to release the amount deposited by the company in the Industrial Court in respect of the employees who were not in the employment or retired or died prior to the date of the award of the Industrial Court, to the concerned employees or their heirs. The company is directed to furnish the list of such employees to the Union with their addresses as noted in the record of the company. It seems that in respect of the employees who retired after the order of the Industrial Court, the company deducted the bonus amount from their legal dues. The company is directed to refund such amount to the concerned employees or their heirs as the case may be within a period of 8 weeks from today.

19. Petition dismissed.