

(1990) 11 KL CK 0053
In the High Court Of Kerala
Case No : O.P. No. 1736 of 1986

P.K. Mohankumar

APPELLANT

Vs

Dy. Labour Commissioner and others

RESPONDENT

Date of Decision : 08-11-1990

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(22), 73A
Industrial Disputes Act, 1947 — Section 10, 14, 2(11), 2(21), 25C
Payment of Bonus Act, 1965 — Section 2(21), 2(kkk), 2(rr), 21

Citation : (1991) 1 KLJ 37

Hon'ble Judges : D.J. Jagannadha Raju, J

Bench : Single Bench

Advocate : Menon and Menon, for the Appellant; M. Ramachandran, for the Respondent

Judgement

1. This O.P. is filed by the petitioner, who is a partner of Malabar Tile Works, Feroke, and who has been appointed as receiver by Court in O.S. No. 237 of 1984. The petitioner prays for the relief of quashing Ext. P2 Order dated 13.12.1985 passed by Deputy Labour Commissioner, the authority appointed u/s 21 of the Payment of Bonus Act, in Bonus Application No. 2 of 1984. The short question that arises for consideration in this O.P. is whether is the lay-off compensation paid to the employees is to be considered as "salary" or "wages" under the Payment of Bonus Act (hereinafter called the "Act") for the purpose of determining the bonus payment to the employees.

2. When the matter was taken up, the petitioner's counsel brought to my notice order dated 10.8.1990 passed by T.L. Viswanatha Iyer, J. in O.P. No. 1779 of 1986, and requested that as His Lordship was pleased to refer an identical matter for consideration by a Division Bench, the present O.P. may also be referred to a Division Bench. I am unable to accede to this request. In that order my learned Brother referred to *Nutan Mills v. B.S. I. Coporation*, AIR 1956 Bom. 336, which deals with a ease under the E.S.I. Act and *Chalthan Vibhag Sahakari Khand Udyog v. Govt. Labour Officer*.

1981 (1) LLJ 450, a decision of the Supreme Court which deals "with retaining allowance paid to seasonal employees during the off-season, and came to the conclusion that as the question is of general importance, it would be proper to have an authoritative decision by a Division Bench. I find that as far as the Kerala High Court is concerned there is not a single decision dealing with the question of lay-off compensation and the Bouns Act. In the absence of a decision of this Court, it is the bounden duty of the Judge concerned to decide the matter which arises before him. I feel that I have necessarily to decide the matter to the best of my lights in the light of the learned arguments addressed on both sides It is open to aggrieved party to test the correctness of this Court's judgment by preferring a Writ Appeal (2) I also find that the two decisions mentioned in the order relate to the ESI Act as it stood prior to the amendment and the Supreme Court decision which deals with retaining allowance and as how it should be considered under the Payment of Bonus Act cannot be said to be conflicting, decisions. In this view of matter, I have requested counsel on both sides to argue the matter elaborately and they have argued the matter In extenso.

3. The facts pertinent for decision of this O.P. are as follows. The first respondent is the Deputy Labour Commissioner, the authority appointed u/s 21 of the Act, and respondents 2 to 112 are the employees of the petitioner. Regarding bouns for the year 1983 there was settlement between the employer and employees, and it was agreed that bouns should be paid at 20% of the salary, and in addition to that 5.4% of the salary is to be paid as ex-gratia. Accordingly bonus and ex-gratia were disbursed to the employees. The employees were dissatisfied with the mode of calculation of "salary". They claim that salary should be computed including the "lay-off" compensation paid to them during the year. The employer resisted their claim. Then an application was filed before the first respondent and the first respondent decided that lay-off compensation paid is part of "salary or wages" and hence the petitioner should pay a sum of Rs. 13,218.23 to respondents 2 to 112 in settlement of their claim His order includes the lay-off compensation paid to the workers as part of "salary" or "wages". The petitioner challenges Ext. P2 order as illegal and void.

4. Shri. Chandrasekhara Das, appearing on behalf of M/s. Menon & Menon, for the petitioner, contends that Ext. P2 is illegal and without jurisdiction and it is vitiated by errors of law apparent on the face of the record. The lay-off compensation paid u/s 25C of the I.D. Act cannot come within the ambit of "salary" or "wage" as defided u/s 2(21) of the Act. The lay-off compensation is evidently not remuneration payable to the employees for work done. During the period of lay-off, the contract of employment is suspended, and not operative. The language of Section 25C of the I.D. Act. the definition of "lay-off" u/s 2 (kkk) and the definition of "wages" in the I.D. Act make this amply clear. A proper interpretation of Section 2(21) of the Act clearly indicates that lay-off compensation does not come within the definition of "salary" or "Wage". He places reliance upon Nutan Mills v. E.S.I. Corporation AIR 1956 Bom. 336, and contends that Ext. P2 order which is illegal and without jurisdiction should be set

aside.

5. On behalf of the contesting respondents Shri. M. Ramachandran contends that the definition of "salary" or "wage" u/s 2 (21) of fit the Act is a wide definition and it includes several things including the lay-off compensation. From the nature of the definition, unless language of exclusion is used to exclude lay off compensation, the lay-off compensation has necessarily to be treated as coming within the definitions of "salary" or "wage" under this Act. He also relies upon Section 14 of the Act, which clearly says that the period of lay-off to be [included to arrive at the number of working days and for the purpose of computing the bonus. This is an indication that the compensation paid during the period of lay-off should also be taken into consideration as part of "salary" or "wage" for computing the bonus. Strong reliance is placed upon the decision in Chalthan Vibhag Sahakari Khand Udyog v. Govt. Labour Officer, 1981 (1) LLJ 450, a decision of the Supreme Court.

6. Shri. Chandrasekhara Das contends that during a period of lay off the contract of employment is not in subsistence, and hence the compensation paid for the period of lay-off is not relatable to the contract of employment, while Shri. M. Ramachandran contends that during the period of layoff the jural relationship of employer and employee continues, but the obligation to do work stands suspended and there is the obligation on the part of the employer to pay wages on a diminished scale for his failure to provide employment during the period of lay-off. I shall now consider the rival arguments and find out whether lay-off compensation has to be considered as part of "salary" or "wage" as defined u/s 2(21) of the Act and whether it should be taken into consideration for computing the bonus.

7. It should be remembered that the Payment of Bonus Act, the Employees Provident Funds and Miscellaneous Provisions Act, the Payment of wages Act, the Employee's State Insurance Act, and the Industrial Disputes Act are all social welfare legislations meant for bettering the service conditions of the workmen. Each Act deals with a particular aspect, and each Act has got its own scheme and its own definitions. It would not be proper to rely upon decisions dealing with the definitions in one particular enactment for dealing with a dispute relating to a definition under another enactment. We have to consider the contentions of the parties mainly with reference to the definitions and the scheme of the "Act of that particular enactment with which we are concerned.

8. Nutan Mills Vs. Employees State Insurance Corporation, on which heavy reliance is placed upon by the petitioner's counsel deals with the definition of "wages" in Section 2(22) of the E.S.I. Act and it lays down that considering the peculiar definition given, the compensation payable for the period of lay-off need not be included for the purpose of calculating the contribution payable by the employer u/s 73A of the E.S.I. Act. It should be remembered that the Bombay decision was dealing with the definition as it stood in 1954. As can be seen from the definition section extracted at the right-hand side top column of page 337,

the definition as it stood in 1954 is far different from the definition of "wages" given in Section 2(22) after amendment by Act 44 of 1966. While the earlier definition read as follows:

"Wages" means 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 other additional remuneration, if any, paid at intervals not exceeding, two months, but does not include.....

The present definition of "wages" u/s 2(22) specifically includes payment of various other amounts like payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal, or lay-off. The definition as it now stands reads as follows:

"wages" means 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-.....

It is quite clear that the principles enunciated in the Bombay decision would apply to a situation when the old Section 2(22) was in force and it cannot apply to a situation arising after the amendment of Section 2(22) by Act 44/66.

9. There are several observations in the Bombay decision to indicate that the contract of employment is subsisting, but it stands suspended during the period of lay-off. The rights and obligations of the parties get altered during the period of lay-off. But the Jural relationship of employer and employee is not terminated. It is only suspended or kept in abeyance. The decision of the Bombay High Court cannot be a proper guide for interpretation of the law as it now stands after the amendment of section 2(22) by Act 44/66. That decision does not hold the field.

10. The definition of "salary" or "wage" given in Section 2(21) of the Bonus Act reads as follows:

"salary or wage" means all remuneration other than remuneration in respect of overtime Work capable, of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to any employee in respect of his employment or of work done in such employment and includes dearness allowance that is to say all cash payments, by whatever name called, paid to an employee on account of a rise in the cost of living, but does not include.

(i) any other allowance which the employee is for the time being entitled to;

(ii) the value of any house accommodation or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles,

(iii) any travelling concession; (iv) any bouns including incentive, production and attendance bonus;

(v) any contribution paid or payable by the employer under any law for the time being in force;

(vi) any retrenchment compensation or any gratuity or other retirement benefit payable to the employee or any exgratia payment made to him;

(vii) any commission payable to the employee.

Explanation :- Where an employee is given in lieu of the whole or part of the salary or wage payable to him, free food allowance or free food by his employer, such food allowance or the value of such food shall, for the purpose of this clause, be deemed to form part of the salary or wage of such employee.

If we examine the language of this definition we find that salary or wage is defined in a broad and wide manner, and it is an inclusive definition. Specific items which are to be excluded are specifically mentioned and excluded. Then seven different items are specified as items which are not included within the substantive part of the definition. The lay-off compensation paid to a worker u/s 25C of the I.D. Act is not one of the seven items mentioned in, the latter portion of the definition. In the substantive part of the definition, only remuneration in respect of over-time work is excluded. When we come to Section 10 we find that bonus shall be a percentage of the salary or wage earned by the employee during the accounting year. u/s 14 which deals with computation of working days, it is specifically mentioned that the period during which an employee is laid off under an agreement or as permitted by standing order under the Industrial Employment (Standing Orders) Act, 1946 or under the Industrial Disputes Act, 1947 or under any other law applicable to the establishment should also be included. If Section 14 contemplates invasion of the period of lay-off for the purpose of determining the number of working days, it positively indicates that the lay-off compensation- is also to be included in definition of "salary or wage", when it is not specifically excluded.

11. The decision in Chalthan Vibhag Sahakari Khand Udyog v. Govt. Labour Officer, (1981) 1 L.L.J. 450 (SC) is a decision of the Supreme Court which deals with the definition of "salary or wage" u/s 2(21) of the Act, and it was dealing with the question of "retaining allowance" paid to seasonal employees in a sugar factory. The court observed in paragraph 6 as follows:

.. The definition of the expression "salary or wage" given in S. 2(21) of the Act is wide enough to cover the payment of retaining allowance to the workmen. It is nothing but remuneration correlated to service and it would be a misnomer to call it an allowance. The retaining allowance does not fall within the purview of cl. (i) of the exclusionary clause of S. 2(21), but comes within the substantive part of the definition of "salary or wage" in S. 2(21) of the Act. The retaining allowance cannot be construed to be any other allowance which the employee is,

for the time being, entitled.....

The court held that the retaining allowance paid to seasonal employees is part of their salary or wage within the meaning of Section 2(21) of the Act, and therefore it must be taken into account for the purpose of calculation of bonus payable under the Payment of Bonus Act. Two particular sentences in this decision of the Supreme Court are of great significance for deciding the question involved in our case. These two sentences are:

The payment of such allowance by the management to its workmen during the off-season when there is no work and when the factory is not working, is indicative of the fact that it wants to retain their services for the next crushing season. The very fact that retaining allowance is paid to the workmen clearly shows that their services are retained and, therefore, the jural relationship of employer and the employee continues

In our case, the payment of lay-off compensation during the period when there is a lay-off and when the employer is unable to provide work is indicative of the desire of the employer to retain the services of the employee. The jural relationship of employer and the employee continues, and what is paid to him partakes of the nature of basic wage on a diminished scale.

12. It should be remembered that under the Industrial Disputes Act, Section 2(rr) defines "wages" as meaning 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. It should be remembered that this definition is also an inclusive definition. This definition also does not exclude the lay-off compensation from the ambit of "wages". Section 2(kkk) defines lay-off. This definition clearly indicates that lay-off is caused by the failure, refusal or inability of an employer or on account of shortage of coal, power or raw materials, he is not able to give employment to the workman whose name is borne on the muster-rolls of his establishment. Lay-off is similar to the nonfunctioning of a seasonal factory during the off-season. Section 25C of the I.D. Act lays down the right of workman laid-off for compensation. This Section lays down that whenever an employee is laid off whether continuously or intermittently, he shall be paid by the employer for all days during which he is so laid-off, compensation which shall be equal to fifty percent of the total of the basic wages and dearness allowance that would have been payable to him, had he not been so laid-off. The payment of fifty per cent of wages plus dearness allowance is analogous or equal to the payment of diminished wages during the off-season for a seasonal employee. The Supreme Court decision is nearest to the facts of our case, and it squarely applies to a case of lay-off compensation paid to workmen. Following the reasoning and rationale of that decision, and giving importance to the wide inclusive definition of "salary or wage" u/s 2(21) of the Act, I hold that lay-off compensation should be included within the meaning of salary or wage for the purpose of computing the bonus. The view taken by the first respondent in Ext.

P2 order is perfectly correct, and it is sustainable under law. In the result, the O.P. is dismissed as devoid of merits. Ext. P2 order stands confirmed. Each party shall bear its own costs.