
(1979) 07 CAL CK 0033
In the Calcutta High Court

Reyrolle Burn Limited

APPELLANT

Vs

E.S.I.C. and Another

RESPONDENT

Date of Decision : 17-07-1979

Acts Referred:

Employees State Insurance Act, 1948 — Section 2, 75
Industrial Disputes Act, 1947 — Section 19

Citation : (1979) 07 CAL CK 0033

Hon'ble Judges : Chittatosh Mookerjee, J

Bench : Single Bench

Judgement

Chittatosh Mookerjee, J.—The petitioner-company at the material time had a factory at No. 99, Dr. Abani Dutta Road, Howrah. It is undisputed that the Employees' State Insurance Act, 1948 (hereinafter called the said Act) applied to the said factory of the petitioner and the persons employed therein were "employees" as defined by Section 2(9) of the said Act. The petitioner has claimed that it had been regularly depositing contributions in respect of the "wages" paid to the said employees in accordance with the provisions of the Employees' State Insurance Act.

2. On June 8, 1970 there was a Memorandum of Settlement between the petitioner-company and its workmen for resolving outstanding disputes. The Conciliation Officer, Government of West Bengal also signed the said Memorandum of Settlement. It is not necessary for the present purpose to refer to the terms of the said settlement relating to grade, scales of pay, dearness allowance, etc. The Term No. 54 of the said settlement provided "the incentive scheme shall be as detailed in Annexure III." The Annexure III to the said Memorandum of Settlement contained detailed provisions relating to payment of incentive bonus both for hourly rated workers and for monthly paid staff and sub-staff.

3. The case of the petitioner was that the said incentive/production bonus paid by it to its employees was not "wages" and therefore, no contribution was

payable by the petitioner under the said Act to the Employees' State Insurance Corporation. On the other hand, the Employees' State Insurance Corporation claimed that the said incentive/production bonus paid to petitioner's employees was covered by the expression "wages" defined in Section 2(22) of the said Act and therefore, the Corporation repeatedly demanded immediate payment of the contribution upon the said incentive bonus and threatened legal action in case of default of making such contribution. The petitioners have obtained the present Rule *inter alia*, for commanding the respondent No. 1 not to demand contribution to the Corporation in respect of the incentive bonus paid by the petition to its workmen and further for commanding them not to enforce, execute, proceed with the demand notices for enforcing payment of contribution upon the incentive bonus paid by the petitioner to its workmen.

4. Mr. Tapas Banerjee, learned advocate for the petitioner, has submitted that the incentive bonus paid by the petitioner was not "wages" as defined in Section 2(22) of the said Act. He further submitted that the point whether or not incentive bonus was wages has been now settled by the decision of S.C. Ghose and R.N. Pyne, JJ. in *Regional Director, W.B. Region, E.S.I.C. and Ors. v. Bengal Potteries Ltd.* (1978) Lab IC 793. The Division Bench in the said case had dismissed the appeal preferred by the Regional Director of the Employees' State Insurance Corporation against the judgment of Sabyasachi Mukherjee, J. in *Bengal Potteries Ltd. v. Regional Director, W.B. Region. E.S.I.C. and Ors.* (1973) 1. LAB IC 1328. The learned advocate for the petitioner in this connection has also placed reliance upon the judgment of N.C. Mukherji and Guha, JJ. in *Hindustan Motor's Ltd. v. E.S.I. Corporation and Ors.* (1978) 1 C.I.J. 503, Mukherji and Guha, JJ. in *M/s. Hindusthan Motor's case (supra)*, held that overtime payments were not wages under the Employees' State Insurance Act. The other submission of Mr. Banerjee, learned advocate for the petitioner, was that a dispute having arisen between the petitioner-company and the Corporation as to whether the incentive bonus paid to employees of the petitioner was wage; and whether any contribution in respect of the said incentive bonus was payable by the petitioner, the Corporation ought to have referred the said dispute to the Employees' Insurance Court for decision u/s 75 of the Employees' State Insurance Act, 1948.

5. I may first take up the consideration of the aforesaid point regarding reference of the aforesaid dispute u/s 75 of the Act. In my view, the petitioner is not entitled to urge the above point. The petitioner company in the present Rule has raised the point that the incentive bonus not being "wages" as defined in Section 2(22) of the said Act, the respondents should be commanded not to enforce payment of contribution by the petitioner in respect of such incentive bonus paid to its employees. Secondly, Mr. Banerjee has not disputed that his client itself could have instituted a proceeding u/s 75 for decision upon the above dispute by the Employees' Insurance Court. Therefore, the petitioner cannot pray that the Corporation should be commanded to institute the said proceeding before the Employees' Insurance Court. It is not relevant to consider the further question

whether or not the Employees' Insurance Court can grant interim orders regarding payment of contribution pending decision on the dispute as to whether such contribution is payable by an employer.

6. I may now proceed to consider the submission of the petitioner that incentive bonus paid by it to its employees was not wages and therefore no contribution under the Act was payable in respect of such incentive Bonus. The term "wages" u/s 2(22) of the said Act has four parts:

- (i) All remuneration paid or payable in cash under express or implied terms of contract of employment;
- (ii) Any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off;
- (iii) Other additional remuneration, if any, paid at intervals not exceeding two months; and
- (iv) Payments specified in Sub-clause (a) to (d) are not included in the terms "additional remuneration."

7. Mr. Debesh Mukherjee, learned advocate for the respondent No. 1, has submitted that incentive bonus payable to the petitioner's employees in terms of the aforesaid tripartite agreement should be considered as one of the terms of their employment. Alternatively, Mr. Mukherjee has submitted that such incentive bonus was an additional remuneration within the meaning of Section 2(22) of the said Act. Therefore, according to Mr. Mukherjee, in either view of the matter the petitioner-company was liable to make contributions to the Corporation in respect of the incentive bonus paid to its employees.

8. The Supreme Court in *Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation*, , reversed a decision of this Court reported in ILR 1966 2 Cal. 140 and held that Inam paid to the workmen of the appellant-company under the Inam Scheme initiated on 28th December, 1955 was not "wages" as defined in Section 2(22) of the said Act and, therefore, no contribution was payable by the company in respect thereof. In *M/s. Braithwaite and Co. (India) Ltd.'s case (supra)*, both the Employees' Insurance Court and the High Court held that Inam paid under the scheme in question was covered by the term "remuneration" used in the definition of wages. But the Employees' Insurance Court held that payments of Inam had nothing to do with the terms of employment of the workmen whereas the High Court held that this remuneration was paid and became payable if the terms of the contract of employment express or implied were fulfilled. The Supreme Court reversed the decision of the High Court, After reexamining the features of the scheme, the Supreme Court held that remuneration payable by way of Inam did not become a term of the contract of employment express or implied. In *Braithwaite Co.'s case (supra)*, the original terms of contract of employment did not contain offer of any reward or prize to be paid for any work done by the employees. Upon examination of the terms of

the incentive scheme which was introduced at a later stage, the Supreme Court held that the right to receive Inam did not become an implied condition of the contract of employment. The main reason given was that the employer had reserved the right to withdraw or vary the conditions of the said scheme without assigning reason and without agreement from the employees concerned. Another reason given by the Supreme Court was that a condition of the scheme was that Inam might become non-payable even if production target was not achieved for reasons for which the employees were not at all to blame. Such exemption from payment of Inam on grounds for which the employees could not be blamed and for which the employer itself might be responsible, showed that the payment of Inam was not enforceable as one of the terms of the contract of employment.

9. Thus, in order to consider whether payment of incentive bonus was a term of employment of the employees concerned, the Court may examine the original terms of their employment. But in case the said terms of employment were silent, the same would not be decisive. The Court may then proceed to consider whether or not by a subsequent agreement between the employer and the employees incentive bonus became payable. Such agreement may be either express or implied. Where the terms of a particular incentive bonus scheme show that the employer unilaterally and gratuitously offered to pay incentive bonus and at the same time reserved his right to withdraw or vary the terms of the incentive scheme without consent of the employees, such incentive bonus scheme cannot form part of the terms of employment express or implied. But when incentive bonus is payable in terms of agreement made either at the time of commencement of employment or at a subsequent stage and such provision for incentive bonus is not liable to be withdrawn or varied, the incentive bonus must be considered to be payable in terms of employment. We may note that in *Braithwaite Co's case* (supra), the Supreme Court did not consider whether the Inam payable in the said case was included in "other additional remuneration" and confined their decision to the interpretation only of the first part of the definition of "wages" in Section 2(22) of the Employees' State Insurance Act, 1948.

10. The two Schemes respectively considered in *Braithwaite Co.'s case* (supra) and in *Bengal Potteries case* (supra), contained express stipulations that the payments of Inam in one case and bonus in another will not form part of contracts of employment. *Sabyasachi Mukharji, J.* in his judgment in *Bengal Potteries case* (supra), quoted the provisions of the scheme which stipulated that for the purpose of computing other benefits, like Provident Fund, Gratuity, Statutory Leave, E.S.I, benefits profit sharing bonus, etc., the incentive bonus paid under the scheme shall not be considered as the part of the wages. According to the learned single Judge, incentive bonus could not be also considered as an additional remuneration because in the said case the payment of the incentive bonus was not a part of the terms of contract of employment. The incentive bonus in the said case was payable for additional work and not for performing work done under the contract of employment. *S.C. Ghose and R.N.*

Pyne, JJ. in *The Regional Director, W.B. Region, E.S.I. Corporation and Ors. case* (supra), dismissed the appeal and affirmed the above judgment of Sabyasachi Mukherji, J. It may be pointed out that Ghosh, J. in paragraph (21) of his judgment emphasised that the incentive bonus scheme in *Bengal Potteries case* (supra) was not a statutory settlement and bonus was earned on extra work done as and by way of reward. Therefore, the payment of incentive bonus which depended on the doing of certain minimum quantity of normal work, according to Ghosh, J., cannot be included either in the first part or the third part of the definition of "wages" under the Act. On interpretation of the scheme in *Bengal Potteries" case* (supra), the Court held, that, an employee was not entitled as a matter of right to receive incentive bonus. The said right depended on the performance of a minimum percentage of normal workload and gradually increase of such performance of work. Thirdly, the incentive bonus under consideration in the said case could be withdrawn totally or modified at the option of the employer.

11. I may refer to the Full Bench decision of the Andhra Pradesh High Court in *E.S.I Corporation, Hyderabad v. Andhra Pradesh Paper Mills Ltd.* AIR 1978 Lab IC 19, which had differed from the views of Sabyasachi Mukharji, J. in *Bengal Potteries" case* (supra), that "other additional remunerations" in the third part of the definition of "wages" in Section 2(22) of the Act must be paid as a part of the terms of contract of employment. The reason given by the Full Bench of the Andhra Pradesh High Court in holding that the incentive bonus payable in the said case came within the ambit of other additional remuneration may be found in paragraph (19) of their judgment (at page 26). According to the Full Bench, "the word "other" appearing at the commencement of the third part of the definition of wages u/s 2(22) indicates that it must be remuneration or additional remuneration other than the remuneration which is referred to in the earlier part of the definition, viz., all remuneration paid or payable, in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled..". The Full Bench in the said case emphasised that under the third part of the definition of "wages" it is actual factum of payment which counts because the word used is "paid" as distinguished from "paid" or "payable". The moment any additional remuneration is received at intervals not exceeding two months, it becomes "wages" by virtue of the third part of the definition of "wages".

12. S.C. Ghose and Pyne, JJ. in their appeal late decision in *Bengal Potteries" case* (supra), in paragraphs (21) and (23) of their judgment had disagreed with the above Full Bench decision of the Andhra Pradesh High Court regarding the meaning of "other additional remuneration". According to the Division Bench "other additional remuneration" must be of the same nature as remuneration mentioned in the first part of the definition of "wages" in Section 2(22) of the Act.

13. In the light of the above decision of the Supreme Court in *Braithwaite Co."s case* (supra) and of this Court in *Bengal Potteries" case* (supra). I may now proceed to examine the terms and conditions under which the incentive bonus

was payable to the employees of the petitioner-company. In the first place, the incentive bonus was payable as a term of tripartite agreement which was statutory binding upon the parties (vide Section 19 of the Industrial Disputes Act). Unlike the terms of Inam payable in Braithwaite Co.'s case (supra), or the incentive bonus payable in Bengal Potteries (supra), incentive bonus payable by the petitioner-company to its employees was not dependent upon its unilateral decision. Secondly, the tripartite agreement between the petitioner-company and its workmen did not contain any provision for withdrawal or varying the terms of the said incentive scheme without consent or agreement of the employees. I have already pointed out that the ratio decide and in Braithwaite Co.'s case (supra) was that the employer made, one-sided promise to pay Inam and therefore, no right had accrued to the employees to receive Inam as an implicit condition of their contract of employment. In the instant case, the incentive bonus payable was not one-sided but right to receive such bonus was an integral part and parcel of the tripartite agreement referred to above. The petitioner as employer was, therefore, not entitled under the said agreement to withdraw the said incentive bonus at its discretion without assigning any reason nor could the petitioner vary its conditions without agreement from the employees concerned. Further, in the tripartite agreement made between the petitioner-company and its workmen, there is no condition that the said incentive bonus will not form part of the terms of employment unlike the provisions to the said effect contained both in Braithwaite Co.'s case (supra), and in Bengal Potteries" case (supra). Upon interpretation of the terms of the aforesaid tripartite agreement, I hold that the incentive bonus payable by the petitioner to its employees had become one of the terms of their employment within the scope of the first part of the definition of "wages" in Section 2(22) of the Act. In the present case, the incentive bonus was payable as a part of the contract of employment. Therefore, the said payment of incentive bonus may be also considered as "other additional remuneration" within the meaning of the third part of the said definition of "wages". In considering whether a payment forms part of the wages, we need not confine our consideration only to the original terms of employment, i.e., the terms subsisting at the date of appointment or engagement. The terms were obviously subject to variation by agreement and by statute. I have found that as a result of the aforesaid tripartite agreement, incentive bonus became payable to the employees of the petitioner-company as one of the terms of their employment. Therefore, the decision of the Division Bench and the learned single Judge in Bengal Potteries" case (supra), are distinguishable on facts. I, accordingly conclude that incentive bonus payable in the instant case was part of wages of the employees and therefore, the petitioner as the employer was liable to make contributions under the Employees" State Insurance Act in respect of such payment of incentive bonus.

14. During the hearing of this Rule, the petitioner-company filed an affidavit affirmed by its Chief Executive on 5th July, 1979 giving details of the incentive scheme. I take it that this affidavit elaborated the provisions of the tripartite

agreement included in its Annexure III relating to the payment of incentive bonus. It is unnecessary for me to examine in detail the contents of the said affidavit. There is no assertion in the affidavit that the incentive bonus scheme under the tripartite agreement was liable to be withdrawn or varied. Further, even the right of the petitioner as employer to announce every month the incentive scheme was derived from the tripartite agreement. In view of the tripartite agreement itself, I am bound to reject the assertion of the petitioner made in paragraph (11) of the said affidavit that no worker covered by the scheme had any right to claim incentive bonus as such. The said affidavit dated 5th July, 1979 merely attempts to prove that the incentive bonus could be claimed on fulfilling the scheme announced for the particular month and not otherwise. The points raised in paragraph (11) of the said affidavit so far as they are not consistent with the tripartite agreement referred to above cannot prevail. I do not, however, propose to examine the correctness or otherwise of each of these assertions because the workmen employed by the petitioner are not parties to the Rule and any dispute between the petitioner and its workmen regarding the terms of payment of incentive bonus cannot be finally decided. If necessary, it may be hereinafter adjudicated according to the machineries laid down by the Industrial Disputes Act. However, as already stated, I have found in the instant case, the incentive bonus was payable as a part of wages as defined in Section 2(22). Therefore, the Rule should fail. I have not considered the effect of the recent Division Bench decision of N.C. Mukherjee and Guha, JJ. in M/s. Hindusthan Motors case (supra), because the said decision was rendered on the question whether or not over-time wages was included in Section 2(22) of the Act.

15. I accordingly discharge this Rule.

16. There will be no order as to cost. Let the operation of this order be stayed for six weeks.