SUPREME COURT OF INDIA

Management of Churakulam Tea Estate (P) Ltd.

Vs.

Workmen

C.A.No.552 of 1966

(J. M. Shelat, V. Bhargava and C. A. Vaidialingam, JJ.)

03.09.1968

JUDGEMENT

VAIDIALINGAM, J.:-

1. In this appeal, by special leave, Mr. H. R. Gokhale, learned Counsel for the management-appellant, challenges the Award, dated September 21, 1964, of the Industrial Tribunal, Alleppey, in I. D. No. 10 of 1962.

2. We may briefly refer to the circumstances, leading up to the passing of the award in question. The appellant owns the Churakulam Tea Estate, in Kottayam, Kerala State. From 1946 onwards, the Planters' Association of Kerala (South India) used to enter into agreements, with the representatives of the workmen, from time to time, for the payment of bonus. The first agreement, in 1946, related to the payment of bonus for the years 1947, 1948 and 1949; and by Exhibit W-5, the said agreement was extended for the years 1950 and 1951. A fresh agreement, Exhibit W-15, was entered into in 1955, for payment of bonus for the years 1952,1953 and 1954 and there appear to have been subsequent agreements also. There is no controversy that the appellant paid bonus for nine years, i.

e., from 1947 to 1951 and 1953 to 1956. There is also no controversy that the payment of bonus, for these years, was not at a uniform rate. For instances, from 1946 to 1949 bonus was paid at 4% of the total earnings whereas, for the year 1950, it was increased to 8 1/2 % of the total earnings. From that year onwards an initial payment of 4% was fixed, leaving the balance to be determined by industry-wise agreements. Again, in 1955 and 1956, the initial payment was raised to 6 1/4 % of the total earnings. So far as the year 1952 was concerned, the appellant's case was that it had not paid any bonus, as such, but, on the other hand, it had made an ex gratia payment of Rs. 3/- to each worker; but the Tribunal has not accepted this plea and it has held that the said payment must be treated as one having been made towards bonus. According to the appellant, it paid bonus for the years, mentioned above, because it was earning profits.

3. For the years 1960 and 1961 also, the appellant paid bonus to its workers in accordance with the industry-wise agreements. In respect of the years 1957-1958 and 1959, there was a memorandum of settlement, Exhibit M-4, dated January 25, 1960, between the managements of the various plantations and their workers, relating to payment of bonus. So far as tea estates are concerned, the agreement provides for payment of bonus, at a particular percentage of the annual total earnings of a worker, for the three years in question, depending upon the total extent of the estates concerned. There is no controversy that, under Cl. 7 of this agreement, it was provided that the agreement will not apply to the appellant's estate. Therefore, so far as the payment of bonus for these three years is concerned, the appellant was not a party to any agreement.

4. The appellant, on the ground that it had not earned any profit during these years and, on the further ground that it was not bound by the agreement, Exhibit M-4, declined to pay any bonus for these three years. The workmen started an agitation claiming bonus at the rates mentioned in Exhibit M-4, and conciliation proceedings in that regard failed. Twentyseven workers, in the factory of the appellant, struck work on the afternoon of November 30, 1961. The management declined to pay wages, for that day, to these factory workers. The management also laid off, without compensation, all the workmen of the estate, from December 1, 1961 to December 8, 1961.

5. The State Government, by its order dated May 24, 1962, referred three questions, for adjudication, to the Industrial Tribunal, Alleppey:

"1. Bonus for years 1957, 1958 and 1959.

2. Wages for days of lay off from 1-l2-1961.

3. Wages for 30-11-1961 for factory workers."

6. Before the Tribunal, both the management and the workmen were agreed that the bonus, which was the subject of adjudication, was not to be on the basis of available surplus and the said aspect need not be considered by the Tribunal. The respondents also accepted that the bonus claim, made by them, was not for profit bonus, production bonus or bonus connected with any festival or celebration. On the other hand, the specific claim, for payment of bonus, by the workmen, was on the basis that the said payment had become traditional and customary; or, at any rate, it had become an implied condition of service. So far as the strike, on November 30, 1961, was concerned, according to the workmen the strike was legal and justified and that the factory workers were entitled to wages, for that day. It was the further case of the workmen that the lay off, from December 1, 1961 to December 8, 1961, was illegal and it disclosed a vindictive attitude, on the part of the management, and that the workmen were entitled to wages for that period also.

7. The management resisted the claim of the workmen, in respect of all the three matters. Regarding the claim for bonus, it pleaded that it was not a party to the agreement, Exhibit M-4. The management contended that the payment of bonus had not become either traditional, or customary, in the plantation industry, nor was it an implied condition of service. It also urged that inasmuch as the claim for bonus, in this case, was not connected with any festival and, as previous payments had not also been at an uniform rate, the question of payment of bonus having become either a customary payment, or payment by virtue of an implied condition of service, was not sustainable in law. According to the management, the strike, on November 30, 1961, was both illegal and unjustified and hence the factory workers, who went on strike, were not entitled to wages. The Management also pleaded that the lay-off, from December 1 to December 8, 1961, was perfectly justified, in view of the conduct of the workmen of the estate.

8. After referring to the fact of payment of bonus, by the plantation industry, from 1946 and onwards, though not at an uniform rate, the Industrial Tribunal held that payment of bonus could be considered to have become an implied condition of service. The Tribunal, inasmuch as it was admitted that the claim for bonus had nothing to do with any festival, held that the question of its being a customary or traditional bonus, in the strict sense of the word, did not arise for consideration. In consequence, the Tribunal only considered the alternative basis of the claim, viz., that the payment of bonus had become an implied condition of service.

9. In this connection, the Tribunal referred to the decision, of this Court, in Ispahani Ltd., Calcutta v. Ispahani Employees' Union, (1960) 1 SCR 24=(AIR 1959 SC 1147) and held that a term, for paying bonus, may be implied, even though the payment may not have been at an uniform rate throughout; and, under such circumstances, it is open to the Tribunal itself to consider what should be the quantum of payment in a particular year. The Tribunal held that the tests laid down in Ispahani's case, (1960) 1 SCR 24=(AIR 1959 SC 1147), about payment being unbroken and having been made for a sufficiently long period, under circumstances excluding the payment being made out of bounty or as ex gratia, were all satisfied, in the instant case. Having come to the conclusion that the payment of bonus had become an implied condition of service, for the purpose of fixing the

quantum that shout be awarded, the Tribunal referred to the agreement, Exhibit M-4. While conscious of the fact that the appellant was specifically excluded from the operation of this agreement, the Tribunal was of the view that the percentage of bonus, fixed under Exhibit M-4 for tea industry, could be safely adopted. On this basis, the Tribunal awarded to the workmen, bonus at six-and-two-thirds per cent of the total earnings of the workmen, for each of the three years 1957, 1958 and 1959.

10. The Tribunal was also of the view that the strike of the factory workers, on November 30, 1961, was both legal and justified and hence directed the appellant to pay wages for that day. The Tribunal further held that the lay-off, of the workmen, by the management, for eight days from December 1, 1961, was without just cause and it was done as a retaliatory measure. It made the management liable for payment of wages to the workmen for this period.

11. We shall first take up the question about the legality of the award of bonus. Mr. Gokhale urged that the claim of the workmen was on the basis that payment of bonus had become an implied term of the conditions of service. Admittedly, the claim for bonus is not related to or connected with any festival. Even according to the workmen, and as found by the Tribunal, the payment over the years had not been at an uniform rate. There can be no claim for payment of bonus, under such circumstances, as an implied condition of service, unconnected with any festival; and the claim cannot also be recognized, either on the basis of customary or traditional payment, in view of the fact that one of the essential ingredients, for sustaining such a claim, viz., payment at a uniform rate, is absent in this case. Counsel also urged that the Tribunal, when it held that in order to recognize a claim for bonus as an implied condition of service, the payment need not have been at a uniform rate, has misunderstood the observations of this Court, in Ispahani's Case, (1960) 1 SCR 24=(AIR 1959 SC l147), which was a case of a claim for bonus relating to a festival. Mr. Puri, the learned Counsel for the respondent, in view of the decisions of this Court, to which we will presently refer, quite naturally found great difficulty in supporting the Tribunal regarding its award of bonus.

12. In Ispahani's Case, (1960) 1 SCR 24 = (AIR 1959 SC l147), this Court had to consider a claim for Puja bonus, in Bengal, and the essential ingredients, for sustaining such a claim when it is based on an implied agreement. After stating that the claim, for Puja Bonus, can be based, either as a matter of implied agreement between the employers and employees, creating a term of employment for payment of Puja bonus, or that even where no implied agreement can be inferred, it may be payable as a customary bonus, this Court, in the said decision, specifically dealt with a claim, for payment of bonus, as an implied condition of service. This Court further accepted, as correct, the tests, laid down by the Appellate Tribunal, in Mahalaxmi Cotton Mills Ltd., Calcutta v. Mahalaxmi Cotton Mills Workers' Union, 1952 Lab AC 370 (LATI), for inferring that there is an implied agreement, for grant of such bonus. The three circumstances, laid down by the Appellate Tribunal, were: (1) that the payment must be unbroken; (2) that it must be for a sufficiently long period; and (3) that the circumstances, in which payment was made, should be such as to exclude that it was paid out of bounty. The Appellate Tribunal had also held that even if payment was not at a uniform rate throughout the period, an implied agreement to pay something could be inferred, and it would be for the Tribunal to decide what was the reasonable amount to be paid as Puja bonus. All these

principles were approved, by this Court, in Ispahpani's Case, (1960) 1 SCR 24=(AIR 1959 SC l147).

13. Pausing here it must be noted that the payment, at a uniform rate, was not found necessary for establishing a claim for payment of bonus, as an implied condition of service, as that claim was held to relate to a festival. This aspect has been missed by the Tribunal in the award under consideration, and it has proceeded on the basis that this Court has laid down that, notwithstanding that a payment is not at a uniform rate, nevertheless, a claim based on an implied condition of service, can be recognised, provided the other tests are satisfied.

14. This Court, again, had to consider the essential ingredients, to be established, when payment of bonus, as customary or traditional, is claimed - again related to a festival - in The Graham Trading Co. (India) Ltd. v. Its Workmen, (1960) 1 SCR 107 at p. 111 = (AIR 1959 SC 1151 at p. l153), and dealt with the question, as follows:

"In dealing with Puja bonus based on an implied term of employment, it was pointed out by us in (1960) 1 SCR 24 = (AIR 1959 SC l147) that a term may be implied, even though the payment may not have been at a uniform rate throughout and the Industrial Tribunal would be justified in deciding what should be the quantum of payment in a particular year taking into account the varying payments made in previous years. But when the question of customary and traditional bonus arises for adjudication, the considerations may be somewhat different. In such a case, the Tribunal will have to consider: (i) whether the payment has been over an unbroken series of years; (ii) whether it has been for a sufficiently long period, though the length of the period might depend on the circumstances of each case: even so the period may normally have to be longer to justify an inference of traditional and customary Puja bonus than may be the case with Puja bonus based on an implied term of employment; (iii) the circumstances that the payment depended upon the earning of profits would have to be excluded and therefore it must be shown that payment was made in years of loss. In dealing with the question of custom, the fact that the payment was called ex gratia by the employer when it was made, would, however, make no difference in this regard because the proof of custom depends upon the effect of the relevant factors enumerated by us; and it would not be materially affected by unilateral declarations of one party when the said declarations are inconsistent with the course of conduct adopted by it; and (iv) the payment must have been at a uniform rate throughout to justify an inference that the payment at such and such rate had become customary and traditional in the particular concern. It will be seen that these tests are in substance more stringent than the tests applied for proof of Puja bonus as an implied term of employment."

It will be seen from the above extract that an additional circumstance has also been insisted upon, in the case of customary or traditional bonus, that the payment must have been at a uniform rate throughout to justify an inference that the payment at such and such a rate had become customary and traditional in the particular concern. Therefore, even if the claim, in the case before us, is considered as a customary or traditional bonus, this test will have to be satisfied and, as mentioned earlier, it is lacking in this case.

15. These two decisions were again adverted to by this Court in Management of Bombay Co. Ltd. v. Workmen, (1964) 7 SCR 477 = (AIR 1964 SC 1770). The Industrial Tribunal, whose award was under consideration, by this Court, in the said decision, had held that payment of bonus, as an implied condition of service, need not be attached to any festival. This Court did not accept that proposition as correct. After referring to the decision in Ispahani's Case, (1960) 1 SCR 24= (AIR 1959 SC l147): this Court observed at p. 479 (of SCR) = (at p. 1771 of AIR):

"Now where the payment is connected with a festival it is possible to infer that there is an implied condition to pay something at the time of the festival, even though the evidence discloses that in previous years payment has not been made at a uniform rate. But it is difficult to see how the principle which applies to a case of payment at the time of a festival can be extended to infer an implied term of payment where the payment has been made entirely unconnected with any festival and at rates which have varied from year to year. We are therefore of opinion that when this Court laid down that there was an implied condition of service to pay something about the time of Puja festival in Ispahani's case, (1960) 1 SCR 24 = (AIR 1959 SC 1147), it was clear that such implied condition of service could be inferred where the rate of payment was not uniform only when such payment was obviously connected with some festival. In the present case also, the payment has not been uniform over the years and therefore before an implied term of service to pay bonus can be inferred it must be shown that the payment was connected with some festival. It would in our opinion be impossible to infer an implied condition of service where payment has not been uniform in the past, unless such payment can be connected with some festival. We are therefore of opinion that the tribunal was wrong in holding that an inference could be drawn for payment of bonus as an implied condition of service in the circumstances of the present case when the payment was not uniform in the past even though it was not connected with any festival.

16. The above observations clearly establish that when payment of bonus has not been uniform, over the years, as in the case before us, it is impossible to infer its payment as an implied condition of service, unless such payment is connected with some festival; and in this case, we have also referred to the fact that the respondents have not made any claim for bonus, in relation to a festival.

17. All these decisions have again been reviewed, by this Court, in Bombay Company (Private) Ltd. v. Their Employees Civil Appeal No. 659 of 1966 D/-22-9-1967 (SC). In this decision, this Court rejected the approach made, by the Tribunal, for accepting a claim for bonus, as an implied condition of service; but proceeded to consider the question as to whether the claim can be rested as a customary or festival bonus. This Court negatived even such a claim, on the ground that payment had not been made at a uniform rate. It further adverted to an earlier decision, in Jardine Henderson Ltd. v. Workmen, (1962) Supp 3 SCR 582=(AIR 1963 SC 474), wherein it has been held that customary bonus must always be connected with some festival.

18. From the decisions, cited above, it follows that the Tribunal, in the instant case, was wrong in

holding that an inference could be drawn for payment of bonus, as an implied condition of service, in the circumstances of the present case, the payment, admitted, was not uniform and was not connected with any festival. In our view, it is impossible to infer an implied condition of service, where payment has not been uniform in the past, unless such payment can he connected with some festival. In this case, admittedly, the payments have neither been uniform, nor were they connected with any festival.

19. The claim cannot also be sustained; even as a customary or traditional bonus, because, apart from the fact that it is not connected with any festival, one of the essential ingredients, viz., that the payment should have been at a uniform rate throughout, is also admittedly lacking in this case. Therefore, the Tribunal was in error in awarding bonus for the three years in question.

20. The second question, that arose for consideration by the Tribunal, related to the claim for wages, of the twenty-seven factory workers, who went on strike on November 30, 1961. There is no controversy that the factory workers alone went on strike, for half a day, on November 30, 1961. The Tribunal has awarded wages for this period. Mr. Gokhale, learned Counsel, contended that the strike was both illegal and unjustified. The events leading up to the strike, on that date, may be briefly noted. The conciliation proceedings relating to the claim for bonus having failed, the question of referring for adjudication to the Tribunal was under consideration of the Government. The Labour Minister had called for a conference of the representatives of the management and the workmen and the conference had been fixed on November 23, 1961. The representatives of the workmen attended the conference, but the management boycotted the same. It is the case of the workmen that to protest against the recalcitrant attitude of the management in not attending the conference, the twenty-seven factory workers alone went on strike, from 1 P. M. on November 30, 1961.

21. In support of his contention that the strike was illegal, Mr. Gokhale relied on,Section23 (a) of the Industrial Disputes Act, 1947 (Act XIV of 1947) (hereinafter called the Act). The said provision is as follows:

"23. No workman who is employed in any industrial establishment shall go on strike in breach of contract and no employer, of any such workman, shall declare a lock-out

(a) during the pendency of conciliation proceedings before a Board and seven days after the conclusion of such proceedings:

* * * *"

22. The expression 'Board' is defined inSection2 (c) as a Board of Conciliation, constituted under the Act. Admittedly there were no conciliation proceedings pending before such a Board on November 30, 1961, the day on which the factory workers went on strike and hence the strike does not come underSection23 (a). No doubt if the strike, in this case, is hit bySection23 (a), it will be illegal underSection24 (1) (i) of the Act; but we have already held that it does not come underSection23 (a) of the Act. It follows that the strike, in this case, cannot be considered to be illegal.

23. Alternatively, Mr. Gokhale contended that in any event the strike on November 30, 1961, was thoroughly unjustified. Counsel urged that the management had participated in the conciliation proceedings, relating to the claim for bonus and, when those proceedings failed, the question of referring the dispute, for adjudication, was pending before the Government. The workmen could have made a request to the Government to refer the dispute for adjudication and, therefore, the factory workers' going on strike cannot be justified. In this connection Mr. Gokhale referred us to the observations, made by this Court in Management of Chandramalai Estate, Ernakulam v. Its Workmen, (1960) 3 SCR 451=(AIR 1960 SC 902). In the said decision, this Court deprecated the conduct of workmen going on a strike, without waiting for a reasonable time to know the result of the report of conciliation proceedings. In our opinion, this decision does not at all support the appellant.

24. There is a fundamental fallacy, in this contention of the appellant, when it proceeds on the basis that the strike by the factory workers, on November 30, 1961, was directly in connection with the demand for bonus for the years 1957 to 1959. On the other hand the evidence, which has been placed before us by Mr. Puri, learned Counsel for the respondent, clearly establishes that the strike was as a protest against the unreasonable attitude of the management in boycotting the conference held on November 28, 1961, by the Labour Minister of the State. The evidence of W-1, the Secretary of the Union, is to the effect that to protest against the attitude of the management in boycotting the conference held on November 23, 1961, the factory workers went on a token strike for half a day, on November 30, 1961. There is no cross-examination of this witness, on this aspect. There is also nothing in the evidence adduced by the management to show that the strike on November 30, 1961 was not for the reason spoken to by the Union Secretary. Therefore, the strike must be held to be neither illegal nor unjustified and in consequence it must be further held that the factory workers are entitled to wages for that day. The finding of the Tribunal in this regard, is accepted.

25. The last question, that arises for consideration, relates to the claim for wages of the workmen, for the period of lay-off, viz., December 1, 1961 to December 8, 1961. On the very day that the factory workers went on strike i.e., November 30, 1961, the management put up a notice, Ex. M-15, to the effect that since all the factory workers had gone on strike at 1 P. M. without previous intimation, the management was forced to lay-off without compensation all the workmen in the entire establishment as from December 1, 1961, underSection25E (iii) of the Act which lays down

that no compensation shall be paid to a workman who has been laid-off, if such laying-off; is due to a strike or slowing down of production on the part of workmen in another part of the establishment. The correspondence shows that due to the intervention of the Deputy Labour Officer, the Management was assured, on December 7, 1961, that the workmen would not resort to any strike and accordingly, the lay-off was withdrawn from December 8, 1961, but the management stated that no compensation would be paid for the period of the lay-off.

26. Here, again, the plea of the workers is that all of them reported for duty on December 1, 1961, but they were not given any work by the management on the ground that there was a lay-off. This plea has been found to be true, by the Tribunal; but, according to the management, the lay-off, in this case, during this period, is justified, under the provisions ofSection25E (iii) and hence the workmen are not entitled to compensation. According to the management, inasmuch as there was a strike in the factory section, work in the other sections could not be carried on; and, as the management were not sure whether the workmen would turn up for work, lay-off, in the circumstances, was justified. We are not inclined to accept this contention advanced on behalf of the management. We have already referred to the finding of the Tribunal that twenty-seven factory workmen alone went on strike on November 30, 1961, and the entire body of workmen presented themselves for work on December 1, 1961, but they were declined work by the management on the ground of lay-off. The plea of the management that they suffered loss, on account of the half a day's strike on November 30, 1961, justifying the lay-off, has not been accepted by the Tribunal. In fact the Tribunal has accepted the plea of the workmen that the effect of the three hours' token strike on November 30, 1961, would not have resulted in any loss to the management, if they had allowed the workmen to do work on December 1, 1961. The Tribunal has also held that the lay-off, by the management, was as a retaliatory or vindictive measure against the factory workers, who went on strike on November 30, 1961. We are in agreement with the findings, recorded by the Tribunal in this behalf and the award by the Tribunal of wages to the workmen for this period is justified.

27. In the result, the award of the Industrial Tribunal, dated September 21, 1964, in I. D. No. 10 of 1962, in so far as it granted bonus to the workmen for the years 1957 to 1959, is set aside, and the appeal is allowed to that extent; in other respects, the appeal stands dismissed. Parties will bear their own costs of this appeal.

Order accordingly.