CALCUTTA HIGH COURT

Bengal Potteries Ltd

Vs.

Employees State Insurance Cop

Matter No. 435 of1970

(Sabyasachi Mukharji, J.)

16.02.1973

JUDGMENT

Sabyasachi mukharji, J.

1. This is an application by Bengal Potteries Ltd. under Article 226 of the Constitution directed against certain orders or communications by the respondents who are the Regional Director. West Bengal Region. Employees' State Insurance Corporation and Union of India. It appears that the company manufactures and sells various kinds of pottery and in the said business the petitioner-company employs workmen. On 1st August. 1966 a Memorandum of Settlement was entered into before a Conciliation Officer between the petitioner and its workmen whereby it was agreed between the petitioner-company and its workmen that discussion to negotiate and finalise a Quality Incentive Scheme should be initiated. Pursuant to that agreement during November. 1966 to January. 1969 the petitioner company introduced schemes for Quality Incentive Bonus on production efficiency. It would be relevant in order to determine the controversy in this case to set out relevant clauses of the said schemes. Clause (1.2) provides as follows:

> "(1.2) Incentive Not Part of The Wages :
> Incentive bonus under this scheme is not payable as a part of the terms of employment of any of the workmen or supervisory personnel concerned but by virtue of a separate and independent contract: the terms of which are contained in this scheme under which the Company undertakes to pay the Incentive Bonus outlined in the Scheme upon fulfilling the conditions of the Scheme.
> Accordingly, for the purpose of computing other benefits. like Provident Fund. Gratuity. Statutory Leave, ESI Benefits. Profit sharing bonus etc. the incentive bonus paid under scheme shall not be considered as part of the wages." Clause (1.6) is in the following terms :
> "(1.6) Validity :
> This scheme has been based on existing methods of manufacturing loading. viz. sagger loading handling etc. and shall be valid only as long as the process is not changed. In the

event of introduction of automatic machines. conveyors, slab loading or implementation ,of any modern methods, the norms for the levels of efficiency shall change. and Company shall have the right to withdraw this scheme fully or partially as may be found necessary against an alternative scheme which will incorporate the consequential change in norms of efficiency indicts."

Clause (2.2) is to this following effect :

"(2.2) Minimum Loading Targets :

(a) The earning of Incentive Bonus would be conditional upon fulfilment of the minimum average loading targets per day as at present subject to an allowance of minus three per cent. These targets will be displaced from time to time at notice boards of the respective kilns and manufacturing department under the signatures of the Works Manager. These targets are always subject to changes according to production programme.

(b) the days on which there is shutdown in kilns or Gas Plant or both fully or partially the production of such days shall not be included in working out average production in pieces and also in average per cent. yield. The workmen shall not get any incentive payment for such days.

In case of break-down shut-down of Gas Plant. Kilns or both for continuous period of ten days in any calendar month ,or a loss in production caused due to such break-down is to the extent of 30% of the average production: whichever is higher, worker shall not be eligible to any incentive bonus for such calendar month."

Apart from the clauses referred to hereinbefore. the said clauses made provisions for payment of incentive bonus to the categories of workmen mentioned in the scheme on certain conditions and on certain targets being reached. The respondents by letters dated 6th August, 1968, 14th August 1968. 13th September, 1968. 19th October. 1968. 5th November, 1968. 30th November 1968. 1st March, 1969 and 6th July. 1969 contended that the amount paid under the said schemes by the petitioner were "wages" within the definition of the Employees' State Insurance Act 1948 and accordingly demanded payment of contribution thereon from the petitioner. The petitioner-company denied the said liability. The propriety and the validity of the aforesaid contention and demand by the respondents for contribution is the point at issue in this application under Art. 226 of the Constitution.

2. The expression "wages" has been defined in the Employees' State Insurance Act. 1948 as follows:

"2 (22) '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 authorized leave lock-out. strike which is not legal or lay off and other additional remuneration, if any, paid at intervals not exceeding two months, but does not include -

(a) any contribution paid by the employer to any pension fund or provident fund or under this Act:

(b) any travelling allowances or the value of any travelling concession:

(c) any sum Paid to the person employed to defray special expenses entitled on him by the nature of his employment: or

(d) any gratuity payable on dis-charge:"

The first question for consideration in this case is whether the payments made by the petitioner-company under the aforesaid scheme were remuneration in terms of the contract of employment. In considering this question it has to be remembered that in the original terms of employment there was no term for payment of this incentive bonus. It has further to be remembered that in this scheme it has been categorically agreed between the parties that the incentive bonus is not paid as a part of the term of employment to any workmen. It is true that by itself this statement of the parties may not be conclusive on the question whether the aforesaid payment forms part of the terms of employment or not. But this is certainly an indication which the Court is entitled to take into consideration. It is apparent, therefore, firstly that the parties did not treat these payments as payments made in terms of employment. The second significant fact that has to be remembered in this case is that this scheme was introduced later. It is true that the payment of incentive bonus was introduced as a result of an agreement between the par ties but the question is whether the terms of the agreement become the terms of "the contract of employment". It appears that the company reserved the right to modify the scheme and also in case of break-down, shut-down of the Gas Plant, Kilns or both for continuous period of ten days in any calendar month or if loss in production was caused due to such break-down to the extent of 30% of the average production the workmen concerned would not be eligible for payment of this bonus. The Company also reserved the right to modify the scheme. The scheme was based on existing method of manufacturing and was valid only as long as the process was not changed. A similar question was considered by the Supreme Court in the decision of *M/s. Braithwaite & Co. (India) Ltd. v. The Employees' State Insurance Corporation*[1], There the appellant company introduced the Inam scheme in December. 1955. This payment of Inam was not amongst the original terms of contract of employment of the employees of the company. In those terms there was no offer of any reward or prize to be paid for any work done by the employees. The employees were expected to work. for certain specified periods at agreed rates of wages. The only offer under the scheme was to make incentive payment if certain specified conditions were fulfilled by the employees. In that case also the company re- served the right to withdraw altogether without assigning any reason or to revise its conditions at its sole discretion. The Payment of the Inam dependent upon the employee exceeding the target of output appropriately applicable to him. But though primarily the right to receive Inam was depended on the efficient working of the employees, there was another clause which laid down that if the targets were not achieved due to lack of orders, lack of materials, break- down of machinery. lack of labour, strike, lock out, go slow or any other reason whatsoever no Inam was to be paid. The company had also laid down that if any deterioration of workman- ship was noticed on the part of the employees in order to achieve the targets prescribed for earning the Inam the scheme would be abandoned forthwith. It was also made clear to the workmen in this scheme that the payment of reward was in no way connected with or part of wages. The Supreme Court held that the payment of Inam, though remuneration. could not be said to have become a term of the contract of employment within the meaning of the definition of wages as given in Section 2 (22) of the Employees' State Insurance Act, 1948 Counsel for the respondents con- tended that unlike the Supreme Court decision, in the instant case, the company had no right to withdraw the pavement of incentive bonus without assigning the, reason. But taking into consideration the totality of the

terms of the incentive) bonus scheme and in the background of how the parties have treated it in my opinion. it cannot be said that the

[1] AIR 1968 SC 413

said payments made under the incentive bonus scheme can be considered as remunerations which are payable or paid as part of the terms of the contract of. employment.

3. The next question that requires consideration in this case is whether it comes within the next part of the definition i.e. the definition which provides 'and includes other additional remuneration' This part of the definition was not considered as this point was not urged be- fore the Supreme Court. The question that has to be decided in this case is what meaning is to be given to the expression "other additional remuneration". Counsel for the petitioner contended that the expression "and includes" suggested generally an extended meaning only by including those things that the definition declared should include in the generic meaning of the word or its natural import. In other words. it was contended the expression 'and includes' was not similar to a deeming provision. Therefore the remuneration which was not part of the wages in its generic meaning or its natural meaning not included by the expression 'and includes other additional remuneration'. In this connection reliance was placed on a decision in the case of *K. Sambasiyaraju v. M. V. S. R. Chandrayya Chetty*[2], In my opinion counsel is right. It(seems to me that the additional remuneration which is sought to be included by the expression 'and includes other additional remuneration' must be remuneration which though no part of the wages which could be paid as part of the terms of contract of employment. It is true that the payments under the incentive bonus scheme are remuneration but these are remunerations for doing additional work. These are not additional remunerations for doing work under the terms of employment. If one construes the expression 'and includes other additional remuneration' in the context of the preceding expressions. i.e. payment to an employee in respect of any period of authorized leave, lock out. strike which is no legal or lay off. one is apt to lead to con elusion that this expression 'and includes' was intended to include only tho remunerations which can by their natural or in generic meaning can form pa of wages. 3

4. Counsel for the respondent drew my attention to a decision of the Punjab and Haryana High Court in the case of *Hans Raj Mahajan & Sons v. Employees' State Insurance Corpn*[3].. There the Division Bench of the Punjab and Haryana High Court observed that the definition of 'wages' in Section 2 (22) of the Employees' State Insurance Act. 1948 included any remuneration payable or paid, to an employee in pursuance of the terms of contract of employment. whether that contract expressly provided to that effect or those terms were inferable by implication from the contractual obligation. To the aforesaid expression of view. I am in respectful agreement. If on consideration of the contract it appears that the payments made under any scheme become part of payments made under the contract of employment then such payments become wages in terms of Section 2 (22) of the said Act. But the Pun- jab and Haryana High Court further went on to observe that any amounts paid as production incentive by an employer to his employees in pursuance of a settlement arrived at between them would therefore constitute wages on which contributions would have to be paid under the Act as such payments were in pursuance of a contract even if such a contract might not be express in writing. It is true that the contract of employment may not be express or in writing. But the relevant question is, whether the particular payment was made in terms of the contract of employment. I am

[2] AIR 1967 Andh Pra 87

[3](1972) 41 FJR 404 (Punj)

not concerned with the actual contract that the Punjab and Haryana High Court had considered. In view of the incentive scheme that is before me. it appears to me that the payment made under the said scheme cannot be described to have become part of the contract of employment. It may, however, be observed that there was no term in the scheme as in the instant case that the payments made under the scheme would not be treated as part of the contract of employment. Secondly. it appears to me that the aforesaid decision of the Supreme Court was not placed before the Punjab and Haryana High Court.

5. In the view I have taken I am of tit- opinion that the respondents 'were not right in contending that the amounts paid to the employees came within the definition of the Employees' State Insurance Act and demanding contribution thereof from the petitioner. In the premises there will be a Writ in the nature of Mandamus prohibiting the respondents from demanding any contribution from the petitioner in respect of payment made under the said scheme and directing that the demand to the extent made in the aforesaid letters referred to hereinbefore cannot be enforced against the petitioner. Rule is made absolute to the extent indicated above. In the facts of this case there will be no order as to costs.

Rule made absolute.