BOMBAY HIGH COURT

Mahalaxmi Glass Works Private Ltd.

Vs.

Employees' State Insurance Corpn.

A.F.O.D. No. 484 of 1974

(Vimadalal and Nail, JJ.)

16.04.1975

JUDGMENT

Vimadalal, J.

1.This is an appeal filed by an employer under Section 82 of the Employees' State Insurance Act, 1948 (hereinafter referred to as "the Act", from an order passed by the Employees' Insurance Court constituted under the Act, dismissed the appellant's application under Section 75 of the Act. The facts giving rise to that application were as follows :

2. On May 25, 1950, the appellants put up a notice, which is Ext. No. 18 in the present proceedings, expressing its intention to introduce an Incentive Bonus Scheme with effect from June 1, 1950. It was stated in the said notice that the intention of the Scheme was to increase the production of the company and, at the same time, to increase the "earnings" of the workmen. It was, however, stated in that notice that the Scheme would, in the first instance, be introduced on a trial basis for a period of three months, and the management might continue the same in future, or extend or amend or withdrew the same without giving any notice to the workers. The said Scheme was stated to be introduced, in the first instance, in the production of furnace departments of the appellant-company. It was further stated in the said notice that the standard production of bottles for eight hours work would be fixed by the management and the workmen would be paid production in excess of the standard. It was also stated in the said notice that the Incentive Bonus has "nothing to do with the normal wages of the workers which were fixed for eight hours work". In the concluding part of the said notice, it was made clear to the workmen that if the standard production was not achieved due to the lack of machinery, lock-outs, go-slow or any other reasons whatsoever, no production bonus would be paid. In the Scheme itself, which is part of Annexure "A" to the application, various provisions were made for working out the incentive bonus, but it may be noted that throughout the Scheme, in the various situations dealt with by it, the terminology used is that the workmen would be "entitled" to the bonus which was

to be worked out, as stated therein. From the year 1954 the appellants started making contributions under the Act on the basis that Incentive Bonus was included in the wages paid by them to the workers. It may be mentioned that from 1956 upto 1964 the Scheme was extended to the other departments of the appellant-company, one by one. In 1963, and again in 1965, certain modifications were made in the Scheme in regard to the norms as well as in regard to the method of payment to which reference has been made by witness Shankar Garde, the Personnel Officer of the appellant-company, in the course of his evidence in the lower Court, but it is unnecessary for me to refer to those modifications.

3. On October 6, 1967, the Supreme Court delivered judgment in the case of *Braithwaite and Co. v. The Employees' State Insurance Corporation*[1], which dealt with an Incentive Bonus Scheme almost identical with the Incentive Bonus Scheme in the present case, on an application made by an employer for reliefs which were the same as the reliefs claimed in the application filed by the appellants in the present case. The Scheme before the Supreme Court was called the Inam Scheme, and its features were discussed by the Supreme Court in its judgment (para 4). It was pointed out by the Supreme Court that the payment of the Inam under that Scheme was not amongst the original terms of the contract of employment of the employees under which the employees were expected to work for certain periods at agreed rates of wages, that the only offer under the Scheme was to make incentive payments, if certain specified conditions were fulfilled by the employees; that the employers reserved the right to withdraw the Scheme altogether without assigning any reason, or to revise its condition at their sole discretion; that the payment of Inam was dependent upon the employees exceeding the target of output appropriately applicable to them; that if the targets were not achieved due to lack of orders, lack of materials, breakdown of machinery lack of labour, strikes, lockout, go-slow, etc., not Inam was to be awarded; and that it was made clear to the workmen in the Scheme that the payment of reward was in no way connected with or part of wages. On a consideration of those features, it was held by the Supreme Court (also at para 4) that though there was a payment to the employees and since that payment depended on their achieving certain targets, it had to be held to be remuneration, that payment of Inam could not be held to have become a term of contract of employment. The Supreme Court proceeded to hold (para 6) that having regard to the definition of the term "wages" in the Act, remuneration paid to an employee could only be covered by the definition of "wages". If it was payable under a clause of the contract of employment, and, in that connection, it pointed out, in particular, that the Scheme in the case before it expressly excluded from it the contract of employment, by which the Supreme Court presumably referred to the provision in which it made it clear that the payment of reward was in no way connected with or part of wages. The Supreme Court, therefore, allowed the appeal, set aside the order passed by the High Court and restored the order passed by the Employees' Insurance Court which had accepted the appellants' plea that the Inam was not covered by the definition of wages, as it has nothing to do with the terms of employment and the workmen were not entitled to claim the Inam as a condition of service. The employees' Insurance Court had taken the view that it could not be held that the remuneration was paid or payable, if the terms of the contract of

employment, express or implied, were fulfilled and under those circumstances, it had granted the employees' application and passed a decree in their favor, making a declaration that Inam was not wages and that no contribution in respect of Inam paid to the workmen was payable by the employers, and decreed the claim for refund of the amount already paid by them to the Employees' State Insurance Corporation.

4. It was in view of the decision of the Supreme Court in Braithwaite and Co.'s case
[1] AIR 1968 SC 413
(supra) that the appellants in the present case addressed in letter dated April 1, 1969, to the Regional Director of the respondent-Corporation stating that they were not liable to make any contribution under the Act in respect of the incentive bonus paid by them to their workers, and claiming a refund of the amount of Rupees 75,909.86 p. (inclusive of interest) already paid by them to the respondent-Corporation. In the respondent-Corporation by their reply dated July 28, 1970 rejecting the contention of the appellants, the present application under Section 75 of the Act came to be filed on December 31, 1970. The application was dismissed by the Employees' Insurance Court by its order dated March 20, 1974, and it is form that order that the present appeal has been preferred under Section 82 of the Act.

5. The first question that arises in this appeal is, whether the point that arises before us is concluded by the decision of the Supreme Court in Braithwaite and Co.'s case, [1968-I L.L.J. 550] and if so, to what extent. The definition of the term "wages" in Section 2(22) of the Act is in the following terms :

> "(22) 'wages' means all remuneration paid or payable in cash to an employee, if the terms 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 illegal 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 allowance or the value of any travelling concession;
> (c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or
> (d) any gratuity payable on discharge".

It is clearly in two parts. The first part as it lays down that all remuneration paid or payable to an employee under the terms of the contract is "wages". The second part of that definition which is expressed in an "inclusive" form states that the term "wages" would include any payment in respect of any period of authorized leave, lock-out, strike, or lay-off as well as other additional remuneration paid at intervals not exceeding two months. The Supreme Court has made it clear in is judgment in Braithwaite and Co.'s case (supra) that the counsel appearing before it had

made it clear that they did not seek to rely on the second part of the definition of the term "wages" in Section 2(22) of the Act, and the Supreme Court had, therefore, to confine its decision to the interpretation of the first part of the definition of "wages". As far the first part of the definition of the term "wages" is concerned, the Supreme Court has, on interpreting the same, held (para 6) that remuneration paid to an employee could only be covered by the definition of "wages", if it was payable under a clause of the contract of employment. On a consideration of the feature of the Inam Scheme before it, the Supreme Court took the view (para 4) that the payment of the Inam in that case could not be held to have become a term of the contract of employment. The feature of the Scheme before us are identical, even terminologically, with the features of the Scheme before the Supreme Court, with, perhaps, only one difference, and that is, that whereas in the Supreme before the Supreme Court it had been made clear to the workmen that the payment of Inam was in so way connected with or part of wages, all that we have in the present case is a clause that incentive bonus has nothing to do with normal wages which have been fixed for eight hours work, and might be paid by the management with the earned wages for eight hours shift work or separately. The clause in the Scheme before us does not go as far as the clause before the Supreme Court in so far as it does not categorically state, as was done in the Scheme before the Supreme Court, that the bonus was not connected with or part of wages. In fact, it might well be contended that Scheme before us shows by implication that the bonus in question was wages, but that it was not part of the normal wages. I am, however, not prepared to take the view that if the Scheme before the Supreme Court at the clause which made it clear that the payment of Inam was in no way connected with or part of the wages were not there, the Supreme Court would have taken a different view. The view taken by the Supreme Court is founded on several features of the Scheme of which this is only one, and, in my opinion, on a careful reading of the judgment of the Supreme Court in Braithwaite and Co.'s case, it is clear that even without the clause which made the payment of Inam unconnected with wages, the Supreme Court would have taken the same view as it did, viz., that though the Inam was remuneration, it could not be held to have become a term of the contract of employment, whether express or implied. All the features of the Scheme before the Supreme Court were, as already pointed out by me above, identical with the features of the Scheme before us and, under those circumstances, I hold that as far as the first part of the definition of the term "wages" in Section 2(22) of the Act is concerned. It must be held that the incentive bonus in the present case does not fall within that part of the definition of wages because, though it amounts to remuneration, it cannot be said to have become a term of contract of employment, express or implied and was not payable under the contract of employment as such.

6. The question, however, still survives for our consideration as to whether the incentive bonus payable under the Scheme in the present case amounts to wages within the second part of the definition of that term in Section 2(22) of the Act. The Supreme Court has, in the judgment in Braithwaite and Co.'s case, (supra) made it abundantly clear that its decision was confined to the first part of the definition of the term "wages" in Section 2(22) of the Act. Under those circumstances, not only can said decision not have any binding force in regard to the second part

of that definition, but it does not, with respect, afford any guidance in regard to the interpretation, thereof, except in one respect, and that is that incentive bonus is "remuneration", as was held by the Supreme Court in that case. The definition of the term "remuneration" cannot be different under the two parts of Section 2(22) of the Act, as Mr. Paranjape has himself rightly contended. The second part of the definition of the term "wages" must, therefore, be interpreted on a plain reading of the term of that definition on the footing that the incentive bonus payable in the present case as remuneration within the terms of that part. The question that rises, is whether the "additional remuneration" which is dealt with in the concluding part of that definition must also be one which is payable under the terms of the contract of employment, as the Supreme Court has held in respect of the first of that definition. It was the contention of Mr. Paranjape on behalf of the appellants that the expression "additional remuneration" in the second part of the definition must be interpreted to mean payment made or to be made under the terms of the contract, as in case of the first part, but that it need not be remuneration the payment of which depends upon the fulfillment of the terms of employment. I am unable to accept that contention of Mr. Paranjape. In may opinion, it is a contradiction in terms to say that the remuneration must be payable under the terms of the contract, and yet it need not be something that is payable on the fulfillment of those terms. The example which Mr. Paranjape gave in that course of his argument was that it related to remuneration such as it is payable for authorized leave, lock-outs, strike, or lay-off, but those are contingencies which are expressly provided for in the second para of the definition of the term "wages", and the residuary expression "additional remuneration" must, therefore, be interpreted to mean remuneration which need not be related to those matters which are expressly provided for immediately before the use of that expression. In my opinion, the word "additional" which governs the word "remuneration" clearly shows, as a matter of plain language, that the remuneration which is contemplated in the concluding part of that definition is remuneration over and above the remuneration payable under the terms of the contract with which the first part of the definition deals. The use of the word "paid" in the concluding part of the definition, in contradiction to the use of the words "paid or payable" in the first part of the definition, is also significant in the so far as it shows that the additional remuneration is not one which becomes payable under the terms of the contract, but is one which is, in fact, paid by the employer de hors the terms of the contract of employment itself. On this interpretation of the expression "additional remuneration" used in the concluding part of the definition. I hold that the incentive bonus paid by the appellants in the present case falls within the expression "wages", in so far as it is remuneration which the employer has undertaken to pay de hors the terms of the contract of the employment. In order to fall within the concluding part of the definition of "wages" it is, however, necessary that the payment should be one made at intervals not exceeding two months. As far as that requirement is concerned, it is an admitted fact that payments have been made by the appellants every month, and there is, therefore, no difficulty in holding that this requirement of the concluding part of the definition of the term wages is also fulfilled. The incentive bonus in the present case does not fall under any of the cls. (a), (b), (c) and (d) of sub-s. (22) of S. 2 of the Act which are expressly excluded from the ambit of the term "wages" in the definition and, under those circumstances I hold that the incentive bonus paid by the appellants, to their workmen

under the Scheme before us is wages, as being additional remuneration paid at intervals not exceeding two months within the concluding part of the definition of the term "wages" in Section 2(22) of the Act. In that view of the matter, the appellants' application under Section 75 of the Act must be held to have been rightly dismissed by the lower Court, and it is not necessary for me to consider the further question as to whether the Employees' Insurance Court has jurisdiction under Section 75 of the Act to grant relief by way of refund of the amount of contribution already paid by the appellants, in respect of which relief has been sought in prayer (b) of the application. Suffice it to say, that such an order was made by the Supreme Court in Braithwaite and Co.'s case (supra). We are, however not called upon to consider the same in the view which we have taken of the matter that this application should be dismissed.

Naik, J.

7. I agree that this appeal must be dismissed. It is evident that although the appellant who had introduced the incentive Bonus Scheme in 1950, went on making contributions right from 1954, when the Insurance Scheme was introduced, they were provoked into starting the proceedings giving rise to this appeal by reason of the decision of the Supreme Court in Braithwaite and Co,'s case (supra) referred to by my brother Vimadalal. No doubt the examination of the Scheme in the instant case, in the light of the Scheme discussed by their Lordships in para 4 of the case, would show that the two Schemes are strikingly similar, except in one respect, viz. Whereas in the Scheme before the Supreme Court, it was made clear to the workmen that the payment of Inam was in no way connected with or part of wages, in the Scheme with which we are concerned, it is provided that the said incentive bonus has nothing to do with the normal wages of the workers which is fixed for eight hours work. But then, having regard to the fact that several considerations have weighed with their Lordships in allowing the appeal, and those considerations included the consideration of the fact that in the scheme before them the payment of Inam was expressly excluded form the contract of employment, it is not possible to hold that it is that solitary consideration which was the foundation for the decision of their Lordships. Since several other considerations have also weighed with their Lordships in holding that the Scheme in question did not amount to wages, as defined in Section 2(22) of the Act, and since those considerations are also available in the Scheme with which we are concerned, it would appear that, that authority is applicable to the instant Scheme on all fours, and therefore, it would appear that the incentive bonus payable under the Scheme would not be wages as interpreted by their Lordships in Braithwaite and Co.'s case (supra). But then that does not dispose of the controversy. As was clearly pointed out by their Lordships in para 2 of the judgment, in that case the High Court had held that the Inam in question was covered by the first part of the definition of "wages" where it is laid down that "wages" means all remunerations paid or payable in cash to an employee, if the terms of the contract of employment express or implied, were fulfilled. If further appears that reliance was not at all placed on the second part of the definition which includes other additional remuneration, if any, paid at intervals not exceeding two months. What is more, the further observations show that counsel appearing for the respondent before their

Lordships also did not rely on the second part of the definition and sought to support the decision of the High Court only on the basis that it was covered by the first part. What is more, counsel appearing for the appellant also did not rely on the second part of the definition which excludes from the definition of "wages" items mentioned in cls. (a), (b), (c) and (d). In the case before them, therefore, their Lordships observed that that had to confine their decision to the interpretation of the first part of the definition of "wages". In Braithwaite and Co.'s case (supra), therefore, their Lordships were only concerned with the question as to whether the Inam under the Scheme in question before their Lordships amounted to "wages" as defined by the first part of Section 2(22) of the Employees' State Insurance Act, 1948. Their Lordships have perfectly made it clearly that their decision was confined only to the interpretation of the first part of the definition of "wages" and not the second part. It is, therefore, necessary for us to consider whether notwithstanding the fact that the terms of the Scheme before us appear to be strikingly similar to the Scheme before the Supreme Court, on the facts of the case before us, the incentive bonus which was paid uninterruptedly till the decision of the Supreme Court in Braithwaite and Co.'s case (supra), is wages. For appreciating that question, it is necessary to set out the provisions of Section 2(22) of the Act of for ready reference which reads thus :

> "(22) wages means all remuneration paid or payable in cash to an 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 illegal 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 allowance or the value of any travelling concession;
> (c) any sum paid to the person employed to defray special expenses entailed on him or the nature of his employment, or
> (d) any gratuity payable on discharge."

It would appear that the definition is in two parts, viz, (1) "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 (2) other additional remuneration, if any, paid at intervals not exceeding two months, but does not include the items mentioned in cls. (a), (b), (c) and (d). In order to find out whether the incentive bonus is wages, under the second part of the definition, the first question to be considered is as to whether it is additional remuneration. That it is remuneration is clear from the observations of their Lordships of the Supreme Court in Braithwaite and Co.'s case (supra) at the end of para 4 of the judgment, wherein their Lordships have observed "thus, though there was a payment to the employees and since that payment depended on their achieving certain targets, it has to be held to be remuneration, this payment of Inam cannot be held to have become a term of the contract employment" Therefore, this additional bonus is remuneration. Mr. Paranjape, has drawn our attention to the dictionary meaning of the word "remuneration". The Concise Oxford Dictionary defines "remunerate" as

reward, pay for services rendered. Therefore, it would appear that what is being given under the Incentive Scheme is remuneration. It is also an admitted fact that in our case this was being paid and has been paid regularly every month, and, therefore, it is, in fact, paid at intervals not exceeding two months, to use the language of the second part of the definition of wages. But then what is, however, argued by Mr. Paranjape is that, in order that the second part of the definition of the wages may apply, there must be a contract to pay the additional remuneration as mentioned in the first part of Section 2(22). In support of this submission, Mr. Paranjape relied upon a decision of the Karnataka High Court reported in the case of *Regional Director of Employees' State Insurance Corporation v. Management of Mysore Kirloskar Ltd*[2]*., in para 8* of which the learned Chief Justice has observed :

> "The second part of the definition, in our opinion, merely takes in additional remuneration of the same nature as remuneration falling under the first part. In other words, the additional remuneration contemplated is also remuneration payable under the terms of employment express or implied."

With respect I am unable to agree with the submission of Mr. Paranjape, or the decision of the Karnataka High Court relied upon by him. As I have already pointed out, Section 2(22) which defines wages is in two parts, the first part dealing with the remuneration paid or payable under the terms of the contract of employment, whereas under the second part there is no question of the terms of the contract of employment. The expression "additional remuneration" in the second part has been evidently used in contradistinction with the expression "remuneration" referred to in the first part of the definition. Again, whereas under the first part we have got the expression "paid or payable", in the second part we have got the expression "paid", but not the expression "payable". It would,

[2][1974-II L.L.J. 396]

therefore, appear that on a plain grammatical construction, the expression "terms of the contract" appearing in the first part of definition could not qualify the expression "additional remuneration" occurring in the second part of the definition. What is being done by Mr. Paranjape is to read in the section something which is not there which is not permissible. On a plain grammatical construction of the section, therefore, it is clear that whereas the first part deals with a contractual aspect of the employment, the second part does not. Therefore, no question of the second part being governed by the terms of the contract of employment would arise. Now adverting to the decision of the Karnataka High Court no doubt after referring to the decision of the Supreme Court in Braithwaite's case (supra) in para 7 at p. 398 of L.L.J. it is observed :

> "The result is that the Supreme Court has made a declaration that the Inam paid or to be paid under the Inam paid or to be paid under the Inam Scheme is not 'wages' as defined under the Act. The declaration made by the Supreme Court is not merely that the Inam paid under the said scheme is not wages within the first part of the definition of the word "wages" but that the Inam paid is not "wages" but that the Inam paid is not "wages" as

> defined in Section 2(22) of the Act. If this Court, accepting the argument of the learned counsel for the appellant were to hold that payments of the same character as were concerned in Braithwaite 's case (supra), the wages, as defined in Section 2(22) of the Act, we should be disregarding the law as laid down by the Supreme Court. It was down open to the Corporation to urge before the Supreme Court in Braithwaite's case (supra) that the second part of the definition, viz., other additional remuneration, is not of the same nature as the remuneration defined in the first part of the definition and that the Inam under the scheme is also "wages" as defined under the Act. Such an argument was advisedly not pressed ..... When there is a decision of the Supreme Court to the effect that payment in Inam made by an employer to his employees which does not form a term of contract of employment, express or implied is not 'wages' as defined in Section 2(22) of the Act it is not open to any High Court to take a contrary view on the ground that before the Supreme Court reliance was not placed on the second part of the definition."

Further in para 8 of L.L.J. we find the observations strongly relied upon by Mr. Paranjape, and they are to this effect :

> "According to the decision in Braithwaite's case (supra) the first part (of definition) of word 'wages' included remuneration paid under the term of the contract of employment, express or implied, but not voluntary payment by the employer which can be withdrawn or varied at his will and pleasure. The second part of the definition, in our opinion, merely takes the additional remuneration of the same nature as remuneration falling under the first part. In the other words, the additional remuneration contemplated is also remuneration payable under the terms of employment, express or implied".

With respect, I cannot agree with the above observations. As I have endeavoured to point out in the earlier part of this judgment, the Supreme Court in Braithwaite's case (supra) in para 2 of the judgment has made it clear that both in the High Court and in the Supreme Court the solitary question posed was as to whether the Inam paid by the appellant in the said case was covered by the first part of the definition of "wages" as given in Section 2(22) of the Act, and the question as to whether it was wages within the second part of the definition of "wages" under Section 2(22) was not at all raised. What is more, it has been perfectly made clear that the said decision of the Supreme Court was confined to the interpretation of the definition of the term "wages" as defined in the first part of the Section 2(22). Apparently this important paragraph appears to have been overlooked by the Karnataka High Court in the case referred to above, and the observations therein are, in my opinion, not borne out by the said reported judgment of the Supreme Court. That being the position, it is perfectly open to any High Court to consider whether in a given case an incentive bonus or Inam payable under a scheme would fall under the second part of the definition of Section 2(22) of the Act. There is nothing in the decision of the Supreme Court which has a bearing on the interpretation of the second part of the definition of the term "wages", except to the limited extent that it goes to show that the incentive bonus or Inam would be

remuneration. I fail to see how, therefore, it could be said that additional remuneration contemplated by the second part of the definition of wages in Section 2(22) of the Act must be based on the terms of the contract of employment. I, therefore, find no force in the submission of Mr. Paranjape that even for the purpose of the second part of the definition of wages it must be shown that the said wages were payable by the terms of employment. I may also mention here that the judgment under appeal does not show that the Employees' Insurance Court had kept in view the clear distinction between the first and the second part of the definition of "wages" under Section 2(22) of the Act, inasmuch as, even though it has held that the bonus was paid at intervals not exceeding two months intending to convey thereby that it was wages under the second part of the definition, it has observed that it was an implied or express term of the contract of employment, having regard to the notice which was displayed and the services which were rendered. Since I have taken the view that on the facts and circumstances of this case the incentive bonus payable by the appellants is wages within the second part of the definition of wages given in Section 2(22) of the Act, it would follow that the order of the lower Court has got to be confirmed, though for different reasons.

By The Court

8. The appeal is dismissed with costs.
Appeal dismissed.