(1958) 09 KL CK 0018

High Court Of Kerala

Case No: C.R.P. No. 382 of 1956

Koshi		APPELLANT
	Vs	
A.D. Cotton Mills Ltd. and Another		RESPONDENT

Date of Decision: Sept. 23, 1958

Acts Referred:

- Payment of Wages Act, 1936 - Section 15, 16, 2(kkk), 2(vi), 2(vi)

Citation: (1958) KLJ 1169

Hon'ble Judges: N. Varadaraja Iyengar, J

Bench: Single Bench

Advocate: M. Krishnan Nair, for the Appellant; T.N. Subramonia Iyer, S. Subramonia Iyer, P.R. Balachandran for Respadent No. 1 and S. Narayanan Potti, P. Karunakaran Nair, N.K. Verkay for Respadent No. 2, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

N.V. Iyengar, J.

This revision arises out of a petition under sections 15 and 16 of the Payment of Wages Act 4 of 1936 (Indian) hereinafter called the Act, filed by the Petitioner, President of the Quilon Cotton Mills Workers'' Union, on behalf of 112 employees of the 1st respondents Messrs. A, D. Cotton Mills Ltd., Quilon. These parties will hereafter be referred to as Workers and employers respectively. During the course of this Revision the 1st respondents assigned all their rights in the Mills to Messrs Parvathi Mills (Private) Ltd., and hence their impleading as additional 2nd respondents. In Industrial Dispute, I.D. 1 of 1124 between the workers and the employers, the Industrial Tribunal, Trivandrum made an award granting dearness allowance in favour of the workers at the rate of 2 As. 4Ps. per point above 100 points on the cost of living index figures of the Madras State. This award was

modified on 17-5-1951 by the Appellate Tribunal of India on Appeals 39 and 49 of 1950 taken by both the parties, so as to reduce the rate of dearness allowance to Rupee one per day. Pending appeal the employers had made payments of dearness allowance to the workers at the excess rate sanctioned by the Tribunal of first instance. These over-payments amounted in all to Rs. 17,672-15-5 Ps.

2. There was next an Industrial Dispute, I.D. 11 of 1124 between the parties regarding compensation to the workers for 44 days of unemployment between 23-4-1949 and 6-6-1949. The Industrial Tribunal, Trivandrum in the first instance granted relief to the workers in respect of 17 days thereof at the rate of Rs. 15/- per mensem, viz., at Rs. 8-8 as per head. The Appellate Tribunal in Appeal No. 185 of 1951 quashed this award on 4-9-1951. Pending appeal the employers had paid compensation amounting in all to Rs. 6,979-6-10 as per award of the Industrial Tribunal.

3. There was still later an Industrial Dispute between the parties before the Industrial Tribunal, Quilon as I.D. 7 of 1952 concerning bonus for the three years commencing 1949-1950. The Industrial Tribunal granted certain bonus to the workers by its award dated 30-8-1954. This award also was totally set aside by the Appellate Tribunal in Appeals 411 and 421 of 1954 before it, though after date of the order under revision herein, viz on 15-5-1956.

4. Soon after the Appellate Tribunal''s award in the matter of the dearness allowance, viz. on 18-7-1951, the employers notified the employees of the recovery by them of the excess they had paid as stated above. With the passing of the Appellate Award on the unemployment compensation, they made fresh notification on 24-11-1952 as to the recovery of both the compensation and excess dearness allowance "from the earnings of the employees from December 1952 or from any other payment or payments which the managements may have to make." The question of recovery was some how or other put off until finally on 27-10-1954, the employers made adjustments out of (i) Rs. 1,043-7-1 bonus awarded to the workers under I.D. 7 of 1952 above referred to, and (ii) Rs. 116/- wages due to the workers on 6-12-1954, and 7-12-1954.

5. It was this adjustment as above that led to the petition herein on 17-12-1954 under sections 15 and 16 of the Payment of Wages Act. The grounds of complaint were mainly (i) That there was and could be no excess payment of dearness allowance because according to the petitioner the relevant appellate award was in terms and under law not retrospective but only prospective. (ii) That the unemployment compensation granted under the award of the Industrial Tribunal, did not fall within the definition of wages in section 2(vi) of the Payment of Wages Act and the overpayment on that account did not therefore fall within the category of permissible adjustments of wages provided for in section 7(2)(f) of that Act, and (iii) That the adjustment having been commenced for the first time on 27-10-1954 long after the relevant over-payments were made, was barred by limitation. The

employers by categorical denials contested the petition. The authority under the Payment of Wages Act before whom the application was made, upheld the contentions of the workers and so allowed refund to the workers of all the amounts adjusted and by way of punitive action also gave a compensation of one rupee per worker as against the employers. The District Court as the appellate authority under the Act, in appeal by the employers, has now set aside the order of the trial Authority in toto. Hence this Revision by the petitioner on behalf of the workers and reiterating all the contentions raised by them.

6. The first question for consideration is whether the appellate award as to dearness allowance, in terms provides only for its prospective operation. Its operative portion is as follows:

we are of the view that whereas in Travancore Cochin no cost of living index figures are prepared or are otherwise available it is undesirable to link the dearness allowance with the rise or fall in the cost of living index and to do so would lead to needless friction from time to time and we perceive considerable complications arising in the future from the application of the Madras indices to Quilon. Upon a consideration of the facts before us, and with the knowledge that the we have of dearness allowance given in certain other places in Travancore-Cochin we are of the view that dearness allowance at Re. 1 per day would be a fair figure to give to the workmen and it is ordered accordingly.

The contention of the workers based on the wording as above and particularly on the use of the expression ''future'' is that the object of the variation introduced was only to ensure a definite basis of calculation and consequent smooth working for the future apart from any question or aspect of hardship to the employers arising out of the adoption even so far of the Madras figures of living indices as proposed by the Industrial Tribunal below. Reference was also made to the provision in section 9 cl. (7) of the Industrial Disputes (App. Tribunal) Act, 48 of 1950.

"9 (7). The Appellate Tribunal may confirm, vary or reverse the award or decision appealed from and may pass such orders as it may deem fit, and where the award or decision is reversed or varied, the decision of the Appellate Tribunal shall state the reliefs to which the Appellant is entitled"

and the absence of positive words indicating retrospective operation. I am not however impressed. The question, in my opinion, depends upon the presence of specific words indicating operativeness one way or the other. The normal rule as to the effect in law of an appellate order modifying the order of the Authority below must otherwise apply.

7. This leads on to the second question of the exact scope of the appellate Tribunal''s order vis-a-vis the order of the Subordinate Tribunal. Section 15 dealing with the commencement of the decision of the Appellate Tribunal provides that it will be enforceable on the expiry of 30 days from the date of its pronouncement,

except in circumstances with which we are not concerned. Section 16 then states the effect of the decision of the Appellate Tribunal as follows:--

Where on appeal from any award or decision of an industrial tribunal, the Appellate Tribunal modifies in any manner whatsoever that award or decision, the decision of the Appellate Tribunal shall, when it becomes enforceable u/s 15, be deemed to be substituted for that award or decision of the industrial tribunal and shall have effect for all purposes in the same manner and in accordance with the same law under which the award or decision of the industrial tribunal was made as if the industrial tribunal made the award or decision as modified by the decision of the Appellate Tribunal.

The argument here on behalf of the workers is that the appellate award to the extent it did not specify the exact date when it was to take effect become operative only from the date it become enforceable u/s 15, viz., after the expiry of 30 days from the date of its pronouncement. The substitution therefore of the Subordinate Tribunal''s award by the appellate award so the argument ran, has perforce to take place on such date, so as to leave the former in operation till then. And distinction was sought to be made in this connection between awards granting lump sum payments, e.g., bonus, gratuity or compensation on the one side and those providing for recurring rights and liabilities on the other, e.g. dearness allowance as here, from the point of view of the materiality of the date of effect. In the former such date was not material except in computing the period of operation while in the latter it was always very material.

8. The above argument however overlooks the effect of the appellate award as described in section 16 above viz., the substitution of the appellate award in place of the primary award "for all purposes" just as in the case of decrees of courts appellate and original. We may here recall the classic observations of Bhashyam Iyengar, J., in Krishnama Charier v. Rangammal, ILR 26 Mad. 21,

When an appea is preferred from a decree of a court of first instance, the suit is continued in the court of appeal and re-heard either in whole or in part, according as the whole suit is litigated again in the court of appeal or only a part of it. The final decree in the appeal will thus be the final decree in the suit, whether that be one confirming, varying or reversing the decree of the court of first instance. The mere fact that a matter is litigated both in the court of first instance and again though only in part, in the court of appeal, cannot convert or split the suit into two and there can be only one final decree in that suit, viz., the decree of the court of appeal. There cannot be two final decrees in such a suit, one by the court of first instance, and the other by the court of appeal. Section 577 Civil Procedure Code, therefore provides that the appellate judgment may be for confirming, varying or reversing the decree appealed against.

9. The Industrial Disputes (Appl. Tribunal) Act, 48 of 1950, has only accepted and carried out the well-established principle that an appeal is a continuation of the proceedings in the original tribunal, that these proceedings are removed to the court of appeal and that the proceedings in the appellate court are in the nature of a rehearing. It is no doubt true that an original Award is not suspended by presentation of an appeal nor is its operation interrupted where the Award on appeal is one of dismissal in limine. But once the original award is varied or reversed or may be dismissed on the merits, there can be no doubt that there is a merger of the original award in that of the appellate tribunal and the latter alone can speak whether for purposes of limitation, jurisdiction, res judicata and lis pendens. The principle we apply is the same as in the proceedings of the civil courts. Reference may in this connection be made to Kumaraswamy v. S.T.E. Workers'' Union, 1957 KLT 994= 1957 K.L.J. 1016, where a plea of limitation against enforcement of the appellate award and urged on the basis of the original award was met by reference to the modification of the latter u/s 16.

Once the appellate Tribunal modifies an award of the Industrial Tribunal the appellate Tribunal''s award alone subsists and that alone is capable of enforcement and not the superseded original award.

10. Learned Counsel for the workers says that the wording adopted in section 16 of the Act, 48 of 1950 precludes the application of the principles settled under the CPC as stated above and refers to the use therein of the expression "deemed to be substituted" instead of "deemed to have been substituted" and again "as if the Industrial Tribunal made the award" instead of "as if the Industrial Tribunal had made the award" and he referred to State of Kerala v. Joseph, 1958 KLT 5= 1958 K.L.J. 69. There are no doubt certain observations in that case in support of Learned Counsel''s contention. But the case had nothing to do with the main question here arising. In fact it was a case of prosecution and conviction of an employer by a Magistrate of first instance for failure to pay compensation to three discharged employees within one month of the publication of the Award. The award as regards one of the employees was however set aside, the rest being confirmed, in appeal before the Appellate Tribunal and on this account the Sessions Judge acquitted the employer, "because the award could never be deemed to have existed." The High Court in appeal by the State, quashed the acquittal on the grounds, (1) that the cancellation of the award in favour of one of the employees did not in any manner affect the award in favour of the remaining two, and there was therefore no question of applying section 16 of the Act, 48 of 1950, and (ii) the accused''s offence was complete when he broke the award long before its modification i.e. when it was fully binding on him. The observations in the decision referred to are therefore not of much help. I may concede however that the argument of Learned Counsel based on the distinction in ''tense'' is very ingenious. But that cannot be allowed to turn the scale. Indeed the acceptance of the view contended for the Learned Counsel would render anomalous the exercise by the appellate court, of its jurisdiction clearly

available, to stay in whole according to their discretion the operation of the original award pending final disposal of the appeal.

11. It follows that the contention of the workers that the original award as regards dearness allowance survived in operation, in spite of the relevant appellate award so as to preclude an over-payment by the employers to the extent of Rs. 17,672-15-5 or at all under that head is clearly unfounded. Learned Counsel for the 2nd respondent immediately says that it must further follow that the adjustment effected by the employers whether of Rs. 1,043-7-1 out of bonus or of Rs. 116 out of wages affords no cause for complaint as here. There is a good deal of point in this argument. For the claim of the workers to recover Rs. 1,043-7-1 (bonus awarded under I.D. 7 of 1952) treating that amount as wages has lost its foundation with the passing of the relevant appellate award in I.D. Appeal 411 and 426 of 1954 though subsequently on 15-5-1956 and as regards the surviving claim of Rs. 116/- it will stand far exceeded by the dearness allowance (admittedly wages) which had been over-paid as just found, so as in the result to leave no question under sections 15 and 16 of the Act as here complained against. But as the question whether the compensation for unemployment for 17 days under I.D. 11 of 1124 amounted to wages u/s 2(vi) and thus permitted an adjustment of over-payment on that account u/s 7(2)(f) of the Act, was fully discussed before me and is likely to arise again, I will deal with that aspect also.

12. On this question whether the unemployment compensation granted to the workers in I.D. 11 of 1124 amounted to wages, there was no doubt in the minds of the two authorities below without much discussion that it was so. The contention of the Learned Counsel for the workers on the other hand is that in the circumstances in which it was granted it could not properly be classified as wages. Now the closure of the Mill and the consequent unemployment of the workers at the time was as found by the Industrial Tribunal and confirmed by the Appellate Tribunal, due to trade reasons beyond the control of the managing agents, viz., shortage of cotton and over stock. According to Clause 15 of the Standing Orders (the reference in the Industrial Tribunal''s order to Cl. 14 is apparently wrong) then in force, the employees were in such situation not entitled to any remuneration for the period though at the same time they were not deemed to be discharged. Nevertheless, the tribunal made the award as to "compensation or unemployment relief by whatever name it may be called", basing itself for the purpose on a decision taken in Tripartite conference between the Government, the Management and the Labour with reference to comparable situation though later in time. In the opinion of the Appellate Tribunal that decision could not be a proper precedent and so it struck off the award of first instance. The point however for us is whether the compensation granted as above and received by the workers until the appellate award intervened can be deemed to be wages within the meaning of section 2(vi) of the Act.

13. Section 2(vi) defines ''wages'' as follows:--

2(vi) "wages" means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable, whether conditionally upon the regular attendance, good work or conduct or other behaviour of the person employed, or otherwise, to a person employed in respect of his employment or of work done in such employment, and includes.

Then follows an enumeration of certain items which are included and others which are excluded, with which we are not concerned. The definition is no doubt very wide. Even so, remuneration must be (i) comprehended by the terms of the contract of employment express or implied, and (ii) in respect of the employment or work done in the employment. Here without doubt, the terms expressly discounted a remuneration. There was again not work but unemployment. The instant compensation would thus appear to fall outside the definition. Learned Counsel for the workers says that the decisions in the matter only reinforce the above conclusion and he referred to Jogendra Nath Chatterjee and Sons Vs. Chandreswar Singh, ; M.B. Government v. Bramhodatta, AIR 1956 M.B. 152; N. Venkatavaradan Vs. Sembiam Saw Mills, Sembiam, Madras, and certain other cases. Learned Counsel for the employers on the other side referred to the analogy "Layoff" in section 2(kkk) as follows :--.

2 (kkk). ''Lay-off'' (with its grammatical variations and cognate expressions) means the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the break-down of machinery or for any other similar reason to give employment to a workman whose name is borne on the muster rolls of his industrial establishments and who has not been retrenched.

(There is an explanation which it is unnecessary to refer) and also to Chapter V-A of that Act containing sections 25A to 25H and dealing with compensation on occasions of ''lay-off'' and retrenchment, both introduced by Ord. V of 1953.

14. In Jogendra Nath Chatterjee and Sons Vs. Chandreswar Singh, , (Sen and K.C. Chunder, JJ.) referred to above the question was whether an increase in the remuneration granted by the Industrial Tribunal apart from the agreement between the parties, would amount to wages for the purpose of an application u/s 15 of the Payment of Wages Act. It was held:

Wages" consist of the amounts fixed by the parties by an agreement between them which resulted in a contract. It cannot be said that the parties when they entered into the contract of employment agreed that if there was any industrial dispute between the employers and the employees and if the dispute was referred to the arbitration of an Industrial Tribunal and if the Industrial Tribunal increased the amount payable to the workman, the employer would pay such increased amount.

Repelling an argument as to implication in the agreement fixing wages, of such a term, the learned Judges said:

It seems to us that it would be very far-fetched if we are to take the view that these matters were in the minds of the parties when they entered into the contract. An implied term must be a term which was in the minds of the parties at the time of the contract and which although they did not so express they had agreed to carry out.

15. The next case of M.B. Govt. v. Bhramhodatta, AIR 1956 M.B. 152 (Dixit, J) was concerned with the question whether standard wages fixed by the Government and accepted by the employers with the consent of the employees came within the purview of wages in section 2(vi) of the Payment of Wages Act. Answering the question in the negative the learned Judge, Dixit, J., observed:--

To me it appears that the plain meaning of the expression ''remuneration which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable'' in S. 2(vi) means no more than the remuneration payable under a contract between the employer and the employees. The matter does not seem to me to admit of any controversy now after the decisions of the Supreme Court in The Divisional Engineer, G.I.P. Railway Vs. Mahadeo Raghoo and Another, and in A.V. D''costa Vs. B.C. Patel and Another, .

16. In the first of the Supreme Court cases above referred to, the observation occurred:

Shorn of all verbiage, ''wages'' are remuneration payable by an employer to his employee for services rendered according to the terms of the contract between them. The question then arises what are the terms of the contract between the parties.

17. To the same effect is the decision in N. Venkatavaradan Vs. Sembiam Saw Mills, Sembiam, Madras, where Krishnaswami Nayudu, J., observed:

The jurisdiction of the authority under the Payment of Wages Act is limited to all claims arising out of deductions of wages and delay in payment of wages only. It is clear that "wages" is dependent upon the terms of the contract and not otherwise, and if the terms of the contract do not show that the employee is entitled to continue in service irrespective of his not attending or working, then the amount claimed for the period during which he did not work cannot be considered to be "wages" within the definition of the term under the Act.

18. The reference to ''lay-off'' compensation relied upon by the Learned Counsel for the respondent employer is not of much help. For it contemplates a period where possibly the relationship between master and servant even does not subsist from the stand-point of the Standing Orders binding the parties otherwise. But even here the view has been expressed that the compensation statutorily provided for does not amount to "wages". See per Chagla C.J. in Nutan Mills Vs. Employees State

Insurance Corporation, and Mervin Albert Veiyra Vs. C.P. Fernandes and Another, .

19. I therefore hold that the compensation for the 17 days of unemployment in question did not amount to wages u/s 2(vi) of the Act and the over-payment on that account could not be adjusted against wages u/s 7(2)(f) thereof. But this finding, as I said, does not affect the adjustment here made, viz., with reference to the large amount of dearness allowance overpaid by the employers as well.

20. There remains only the question of limitation. Here it is enough to say that there is no provision in the Act limiting the period within which the employer should make the deduction for adjustment of over-payment of wages. Indeed the Primary Authority held in favour of the workers only because it thought that Or. 8, r. 6 of the CPC under which the amount claimed to be set off must legally recoverable, and Art. 97 providing for 3 years for recovery of money paid upon an existing consideration which afterwards fails, applied here. And again the aspect of limitation was not pressed before the appellate authority below. I therefore overrule this plea as to limitation raised by Learned Counsel for the workers. The revision fails in the result. It is therefore dismissed. There will be no order for costs however.