

KUNDANMALS INDUSTRIES
v.
COMMISSIONER OF LABOUR AND OTHERS

COURT OF APPEAL.

PALAKIDNAR J. (PRESIDENT C/A) AND

DR. A. DE Z. GUNAWARDENA, J.

C.A NO. 1065/84

JANUARY 11, 1994.

Writs of certiorari and prohibition – Award of Industrial Court under Industrial Disputes Act – Bonus – Basis of bonus payment.

Bonus is neither a deferred wage nor part of a wage. It usually comes out of profits. It is paid if after meeting prior charges, there is an available surplus. It is not based on contract. Wages in contract are not dependent on profits and are contracted for.

Bonus as the term implies is generally an *ex gratia* payment out of the bounty and goodwill at the pleasure of the employer and an employee has no claim on it as a matter of right.

Exceptions to this rule are –

- (i) if an employee passes an exam;
- (ii) where there is an express or implied agreement to pay a bonus;
- (iii) where wages fall short of the living standard and the employers make a profit;
- (iv) by joint contribution of capital and labour the employer makes a profit.

For an award of bonus to be made on profit, a finding that profits were made in the particular year is a vital fact and a pre-condition to an award for the payment of bonus. The finding that there was profit cannot be based on figures provided in the written submissions without evidence at the inquiry.

Cases referred to:

1. *Lipton Ltd. v. Their Employees* AIR 1959 SC 676.
2. *Abdul Sather v. Bogstrar* 54 NLR 102.
3. *Muir Mills Co. Ltd. v. Suti Mills Mazdoor Union* AIR 1955 SC 170.
4. *Sree Meenakshi Mills Ltd. v. Their Workmen* AIR 1958 SC 153.
5. *C.M.U. v. Millers and Cargills (Ceylon) Ltd.* I.D. 145.
6. *Dissanayake v. Kulatillake* 59 NLR 310.
7. *Management of Tocklain Research Station v. The Woodmen* AIR 1962 SC 1340.

APPLICATION for writs of certiorari and prohibition.

L. Kadirgamar P.C. for petitioner.
Shirley Fernando P.C. for respondent.

Cur adv vult.

January 19, 1994.
PALAKIDNAR, P/CA

The petitioner is seeking to squash the award of the second respondent arbitrator by writ of certiorari and a further writ of prohibition on the respondents to prevent the enforcement of the award. In the matter of the two writs prayed for the same principles would apply. Certiorari would issue to vitiate the order by reason of error on the face of the record or *ultra vires* and prohibition would be complementary to forbid such decision which would be *ultra vires*.

The award sought to be quashed was made by an Industrial Court under provisions of the Industrial Disputes Act No. 43 of 1950. The award of the 2nd respondent gave two months wages as bonus to the worker members of the 4th respondent Union payable by the petitioners for the year 1980.

The bonus awarded by the Arbitrator has been in due recognition of an year end practice of paying the workers a sum of money *ex gratia* on a purely voluntary basis by the employer. There was no settled basis of such payment. The sum was worked out by the employer and was related to the profits made by the company. It is neither a deferred wage nor part of a wage. It usually comes out of profits. It is paid if after meeting prior changes, there is an available surplus. It is not based on contract. Wages in contract are not dependent on profits and are contracted for, *Lipton Ltd. v. Their Employees*.⁽¹⁾

Bonus as the term implies is generally an *ex gratia* payment out of the bounty and goodwill at the pleasure of the employer and an employee has no claim on it as a matter of right *Abdul Sather v. Bogstra*.⁽²⁾

Exceptions to this rule have been recognized in *Muir Mills Co. Ltd. v. Suti Mills Mazdoor Union*⁽³⁾ and *Sree Meenakshi Mills Ltd. v. Their Workmen*.⁽⁴⁾ They are –

- (1) If an employee passes an exam.
- (2) Where there is an express or implied agreement to pay a Bonus.
- (3) Where wages fall short of the living standard and the employees make a profit.
- (4) By joint contribution of capital and labour the employer makes a profit *C.M.U. v. Millers and Cargills (Ceylon) Ltd.*⁽⁶⁾

The facts that emerged in this case do not show that the payment of bonuses could be based on any one of these exceptions. An employer can be compelled to pay on the principles laid in these exceptional circumstances.

The more important of these exceptions is the existence of an implied or express agreement to pay a bonus by the employer. On this matter there is a specific finding by the arbitrator that the circumstances do not warrant an implied term.

The award has been made on the basis of profitability of the business.

This position has to be examined to find out whether the evidence led at the inquiry showed clearly that there was a profit for the year 1980. No profit bonus is payable unless there are profits from which the payments can be made.

A proper determination should have been made whether there were profits or not. There has been no specific finding that profits were made in 1980. Such a finding could not have been possible because the statement of profit and loss reflected in the balance sheet, R6 and R11 and R6 showed loss. There was no other material before the arbitrator to come to a clear finding that there were profits for 1980. It is strenuously urged by counsel for the petitioner that the arbitrator has based his findings on figures provided by the written submissions of the Union and not on evidence placed at the inquiry.

This method of arriving at a conclusion has been disapproved in *Dissanayake v. Kulatillake*⁽⁶⁾ – Basnayake, J. has stated that material

other than which appears in the record could not be used by an inferior tribunal and that the use of such material amounts to an error on the face of the record. The very relevant question of profits for the year 1980 has not been determined by the arbitrator. If one were to proceed on the basis of profitability such a finding is a vital fact and indeed a pre-condition to an award for the payment of bonus. The surmises that the company has lost due to faulty trade policies is a factor in my view totally irrelevant in deciding this matter. Profit bonus can be awarded only by reference to that particular year. *Management of Tocklain Research Station v. The Woodmen.*⁶⁷

On the established fact the order to pay two months wages would only be possible by drawing on the reserves of previous years. This would not be in accord with the established principles of the payment of annual bonus.

Therefore the contention that there is error on the face of the record is valid.

In the submissions tendered to Court by the 4th respondent Union it is urged that there was no compliance with rule 46 in so far that with the tendering of the petition the relevant and necessary papers were not filed.

If this non-compliance had caused a suppression of material or caused grave prejudice to the respondent or even hampered the proper dispensation of justice by Court the argument would be tenable. I do not think such a situation has arisen in this matter. At the stage of argument all relevant material has been furnished to Court and indeed a full argument was proceeded with.

On a full review of the legal aspect of the concept of bonus payment as received in Industrial relation the position that it is an *ex gratia* payment at the pleasure of the employer out of the profits has never been deviated from. A court can therefore order the payment of bonus only on the recognized principles as set out from the decision of the Courts discussed above.

•Therefore I make order allowing both writs of certiorari and prohibition as prayed for.

However I would direct that on an *ex gratia* basis four (4) weeks wages be paid to every worker for the year 1980. This directive is based purely on the offer that was made to pay a bonus for 1980 by the employers at some stage of the dispute. Although the Union precipitated a strike and caused considerable loss to the petitioner in the interests of continued industrial peace, I direct that 4 weeks wages be paid to the members of the 4th respondent Union.

There will be no costs of this application.

DR. A. DE Z. GUNAWARDENA, J. – I agree.

Writs of Certiorari and Prohibition issued.

Four weeks wages ordered as bonus on settlement offer.
