APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Dixit.

THE NUTAN MILLS LTD. *v.* THE EMPLOYEES STATE INSURANCE CORPORATION* 1955 Nov. 23

Employees' State Insurance Act (XXXIV of 1948), ss. 73 A (3), 2 (22), 51—Industrial Disputes Act (XIV of 1947), ss. 25C, 25D, 25E, 25J—Whether compensation for lay-off constitutes wages—Whether employee liable to pay special contribution on the amount of compensation.

The lay-off compensation paid to an employee under s. 25C of the Industrial Disputes Act, 1947 not being wages as defined in the Employees' State Insurance Act, 1948 the employer is not liable to pay the special contribution on such compensation under s. 73A of the latter Act.

Mushram v. *Patil*,[1] *Bird* v. *British Celanese Ltd.*,[2] *Padmakant Motilal* v. *Ahmedabad Municipality*,[3] and *G. I. P. Railway* v. *Mahadeo Raghoo*,[4] referred to.

Reference made by M. N. Nagrashna, Esquire, Authority appointed under the Employees' State Insurance Act, 1948, for the local area of Ahmedabad.

The facts out of which the Reference arose are set out in the Judgment.

N. A. Palkhiwala, with *B. G. Thakore* and *J. B. Mehta*, for the Petitioners.

H. M. Choksi, Government Pleader, for the Employees' State Insurance Corporation.

Chagla C. J.—A rather interesting and important question arises under the Employees' State Insurance Act (XXXIV of 1948) as to the liability of the employer to pay special contribution on the compensation payable by the employer to his employees who have been laid-off under the provisions of the Industrial Disputes Act, 1947.

The few facts which are necessary to be considered in order to dispose of this reference are that in the last quarter of 1953 the Nutan Mills became liable to pay compensation for lay-off in the sum of Rs. 1,312-15-0 and on this amount it paid to the Employees' State Insurance Corporation incorporated under the Act a sum of Rs. 9-13-6 as special contribution under s. 73A of the Employees' State Insurance Act. In the first quarter of 1954 the Mills became liable to pay lay-off compensation in the sum of Rs. 521-11-9 and on this amount it paid a sum of Rs. 3-15-0 as special contribution. On May 12, 1954 the Mills called upon the Corporation to refund these two amounts as according to

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* Civil Reference No. 16 of 1955.

1. (1951) 53 Bom. L. R. 1009.
2. (1945) 1 K. B. 336.
3. (1942) 44 Bom. L. R. 814.
4. (1955) Labour Law Jounal Vol. I, p. 360.

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them they were not liable to pay special contribution on the lay-off compensation. As the amount was not refunded, the Mills applied to the Authority appointed under the Employees' State Insurance Act. The Authority has made a reference to us under s. 81 of the Act and in making the reference he has expressed the opinion that the Mills were liable to pay the special contribution.

In s. 73A the nature of the special contribution which the employer has to pay is set out and sub-s. (3) provides:

"The employer's special contribution shall consist of such percentage not exceeding five per cent of the total wage bill of the employer, as the Central Government may, by notification in the official Gazette, specify from time to time."

Therefore, the special contribution is payable on the wages paid by the employer to its employees, and the short question that arises for our determination is whether payment of compensation for lay-off constitutes wages as defined by the Act. The definition of "wages" is to be found in s. 2 (22) of the Act and the definition is:

"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 other additional remuneration, if any, paid at intervals not exceeding two months, but does not include—"

and then follow four sub-clauses with which we are not concerned. Therefore, the liability of the employer to pay special contribution only arises in respect of remuneration which is paid or payable, if the terms of the contract of employment express or implied were fulfilled. The view taken by the Authority under the Employees' State Insurance Act is that as a result of the lay-off the contract of employment between the employer and the employee is not suspended but is subsisting, and therefore what the employer pays to the employee, although described as compensation under the Industrial Disputes Act, is in reality wages and therefore that payment would fall within the ambit of the definition of "wages" contained in s. 2 (22) of the Employees' State Insurance Act.

In order to appreciate this argument, we must look at the scheme of the Industrial Disputes Act with regard to lay-off. The whole Chapter V-A, which deals with lay-off and retrenchment, was introduced in the Industrial Disputes Act by Act XIV of 1947. "Lay-off" is defined as meaning 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 breakdown of machinery or for any other reason to give employment to a workman whose name is borne on the muster rolls of the industrial establishment and who has not been retrenched. There is a explanation to this definition and that is:

"Every workman whose name is borne on the muster rolls of the industrial establishment and who presents himself for work at the

establishment at the time appointed for the purpose during normal working hours on any day and is not given employment by the employer within two hours of his so presenting himself shall be deemed to have been laid-off for that day within the meaning of this clause."

The nature of the compensation to be paid is described in s. 25C and that section provides:

"Whenever a workman (other than a badli workman or a casual workman) whose name is borne on the muster rolls of an industrial establishment and who has completed not less than one year of continuous service under an employer is laid-off, he shall be paid by the employer for all days during which he is so laid-off, except for such weekly holidays as may intervene, compensation which shall be equal to fifty per cent of the total of the basic wages and dearness allowance that would have been payable to him had he not been so laid-off:"

Clause (*a*) of the proviso to this section limits the amount of compensation which the employer is liable to pay and the limit is:

"the compensation payable to a workman during any period of twelve months shall not be for more than forty-five days except in the case specified in cl. (*b*);" (with which, for the purpose of this reference, we are not concerned).

Section 25D imposes upon the employer the liability to maintain muster rolls of workmen and s. 25E provides that under certain circumstances workmen would not be entitled to compensation, and those circumstances are if the employee refuses to accept any alternative employment provided for him by his employer, and if the employee accepts the alternative employment then he is to be paid wages which would normally have been paid to him for the alternative employment. He is also disqualified from receiving compensation if he does not present himself for work at the establishment at the appointed time during normal working hours at least once a day, and 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. Then s. 25J is the overriding section and it provides:

"The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law including standing orders made under the Industrial Employment (Standing Orders) Act, 1946."

And the proviso to this section lays down:

"Nothing contained in this Act shall have effect to derogate from any right which a workman has under the Minimum Wages Act, 1948 or any notification or order issued thereunder or any award for the time being in operation or any contract with the employer."

Attention has been drawn to the definition of "wages" which is to be found in s. 2 (*rr*), and for all practical purposes the definition is identical with the definition under the Employees' State Insurance Act, 1948.

What we have to consider in view of this statutory provision is whether on an employee being laid-off there is still a subsisting contract of employment between the employer and

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the employee, or whether during the period of lay-off the contract of employment, although not necessarily at an end, is not a subsisting and effective contract. If the contract is not suspended and if the mutual obligations between the employer and the employee continue, then the mere fact that the employee is not given work or cannot render services to the employer will not derogate from his right to receive wages from the employer. A subsisting contract of employment results in there being certain obligations upon the employer and also upon the employee and also certain rights as between the employer and the employee. The obligations are that the employer is bound to pay wages and the employee is bound to serve. The rights are that the employer is entitled to claim from the employee that he should render services. The right of the employee is that if he is prepared to serve he would have the right to receive the wages stipulated. But if the contract of employment is suspended, then there is no obligation upon the employee to serve the employer, nor is there a reciprocal obligation upon the employer to pay wages. The question therefore to be decided narrows itself down to this: Whether on the employee being laid-off, the relationship of master and servant continues and the mutual rights and obligations which flow from such relationship also continue ?

The Government Pleader has strongly relied on a judgment of this Court in *Mushran* v. *Patil.*[5] In that case myself and Mr. Justice Bhagwati were dealing with the suspension by the railway authority of one of its employees and the railway authority's contention was that as the employee was suspended he was not entitled to any wages. It was conceded on behalf of the railway authority that it was entitled to call upon the employee to remain at the headquarters notwithstanding the order of suspension and also that he had to report himself to the officer in charge every day until the case that was pending against him was finally decided. It was on these facts that the Court held that notwithstanding the suspension of the employee the contract of employment was a subsisting contract and therefore the liability of the employer to pay to the employee was not discharged. We pointed out in the judgment that it was impossible to accept the contention that although the employer was entitled to call upon the employee to do certain things he did not continue to be in the position of an employer. We also pointed out that in order to determine whether the relationship of master and servant continued it was not necessary that the employee should actually be working or should be rendering services. If he was prepared to render services it was no fault of his if his employer failed to give him work to do. The test was not that the employer should

5. (1951) 53 Bom. L. R. 1009.

give work to the employee or that the employee actually should be rendering services, but the test was that the employee must be under an obligation to serve his master and consequently the employer must be under an obligation to pay wages. It was on those facts that we came to the conclusion that the relationship of master and servant between the railway authority and the employee continued and therefore the railway authority was liable to pay wages to him. At page 1015 we considered an English case, *Bird* v. *British Celanese Ltd.*[6] There, under the contract between the employer and the employee, it was provided that if the employee was guilty of misconduct he could be suspended for a certain period without payment, and in construing that contract Lord Justice Scott at page 341 stated:

> ".....the whole contract is suspended, in the sense that the operation of the mutual obligations of both parties is suspended; the workman ceases to be under any present duty to work, and the employer ceases to be under any consequential duty to pay."

We accepted the test laid down in that judgment and what we emphasised was that the employee must be under a present duty to work and unless he was under such an obligation the employer could not be held to be under a consequential duty to pay. Again at page 1016 we considered another decision of this Court in *Padmakant Motilal* v. *Ahmedabad Municipality,*[7] where the Chief Officer of a Municipality claimed wages from the Municipality during the period of his suspension, and we referred to the remark of the learned Judge that suspension suspends for the time being the relation of master and servant between the parties, and our observation on that remark was that if the relationship of master and servant was suspended then the suspension must involve the suspension of the payment of wages. Therefore, it is clear that if the relationship of master and servant does not exist and even if he is temporarily suspended, that must necessarily result in the obligation of the employer to pay wages also being suspended. On the same page while construing the definition of "wages" we pointed out that the expression "if the terms of the contract of employment, express or implied, were fulfilled" means that there should be a subsisting contract of employment and that the relationship of master and servant should exist and there should be mutual rights and obligations of the parties to the contract existing.

The Government Pleader's contention is that during the period of the lay-off the relationship of master and servant continues between the employer and the employee and for this purpose he relies on the fact that the name of the emp-

6. (1945) 1 K. B. 336.

7. (1942) 44 Bom. L. R. 814.

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loyee is maintained in the muster roll, that he has got to present himself every day at the employer's office, that he is bound to accept alternative employment, and it is only if all these terms are satisfied that he is entitled to compensation. In the first place, the definition of "wages" emphasises the fact that it is remuneration paid or payable to an employee if the terms of the contract of employment, express or implied, were fulfilled. Therefore, it is clear that it is not every payment by the employer which would come within this definition. It must be a payment which should be remuneration, and remuneration must mean that it is payment for services rendered or to be rendered by the employee. It is perfectly true that in fact the employee may not render services and yet the payment made to him would be wages. That would be the case where the employee would be ready and willing to render services, would be under an obligation to render services, and yet he may not do so because the employer for any reason does not give him an opportunity to render those services. But under this definition it is clear that if in fact no services are rendered and if in fact there is no obligation upon the employee to render services, then whatever else the payment by the employer may be it would not be remuneration. Further, under this definition the payment must be made as a result of the terms of the contract being fulfilled, and if the payment is made when the terms of the contract are not fulfilled then clearly the payment would not satisfy this definition.

It is important to note that standing orders have been framed which are determinative of the rights and obligations of the employer and the employee and under these standing order 16 the employer has a right to lay-off or play-off (which is the expression used in the standing order) any employee, and the standing order expressly provides that the employer would not be liable to pay any wages or compensation for the period during which the employee is laid-off or played-off. Standing order 17 goes on to provide:

> "Any operative played off under Order 16 will not be considered as dismissed from service, but as temporarily unemployed, and will not be entitled to wages during such unemployment except to the extent mentioned in Order 16. All operatives played off will be given prior rights to reinstatement on the resumption of normal work, provided they present themselves for work when normal working is resumed."

Therefore, under the contract between the employer and the employee—and the standing order may be looked at as the contract determining the rights of the parties—the employer has been given the express right of temporarily suspending the contract of employment, has also been clearly given the right of not paying any wages to the employee, and the important

right of the employee who has been laid-off is the right to reinstatement on the resumption of normal work. Therefore, apart from the statute it is clear that under this standing order and under this contract, if the employer laid-off the employee, the employee would not be entitled to any wages. Whereas is *Mushran's* case we held that there was no suspension of the contract of employment for the reasons mentioned in that judgment, in the case before us under the standing order it is clear that on the employee being laid-off there would be a suspension of contract of employment and the mutual rights and obligations between the employer and the employee would come to an end for the time being.

The Authority considered these standing orders, but came to the conclusion that as a result of the amendment to the Industrial Disputes Act, to the extent that the standing orders were inconsistent with the Act, the standing orders must be deemed to have been abrogated. In coming to that conclusion the Authority has overlooked the provisions of the proviso to s. 25J. That proviso makes it clear that if an employee has any rights under the contract, those rights cannot be derogated by reason of any provision in the Industrial Disputes Act. Therefore, although the rights of the employer may be cut down or fresh obligation may be imposed upon the employer, as far as the employee is concerned no provision of the Act can be relied upon in order to limit or abridge his rights. If, therefore, the standing orders did not suspend the contract of employment and if the standing orders entitled the employee to claim wages during the period of lay-off, then undoubtedly no provision in the Act could abrogate or abridge that right of the employee.

If the Government Pleader's contention is correct that the result of the lay-off is not to suspend the contract of employment between the employer and the employee, then clearly in view of our judgment in *Mushran's* case the employee would be entitled to claim full wages, notwithstanding what the standing orders provided, for the period during which he is laid-off or played-off, and the conclusion must follow that although under the contract the employee was entitled to full wages under the Industrial Disputes Act what he is entitled to is compensation as provided for under s. 25C. It would also lead to this curious result that the employee need not qualify himself for the payment of compensation by satisfying the conditions laid down, in which case he would be entitled to receive full wages under the standing orders, and it is difficult to understand why any employee should claim this compensation if under the contract he is entitled to full wages. We must, therefore, come to the conclusion that under the standing orders which bind the parties, the employee was not entitl-

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ed to any wages at all and that the relationship of master and servant did not continue during the period of lay-off. Therefore, what the amendment to the Industrial Disputes Act does is to impose a liability upon the employer which was not upon him under the contract, and it gives the employee the limited right of claiming compensation to the extent mentioned in s. 25C.

The provisions of the Act also make it clear that there is no relationship of master and servant during the period when there is a lay-off. The Government Pleader suggested that this relationship continued because the employee was under an obligation to present himself at the office of the employer at stated intervals. That is taking an erroneous view of the provisions of the Act. The employer has no right to dictate to the employee that he shall present himself at his office, nor is there any obligation upon the employee so to do. During the period of the lay-off the employee would be entitled to go and serve another master. The only result of his doing so would be that he would be disentitled to receive compensation. But it is entirely a matter of his option whether he should present himself at the office of his employer and thus claim compensation or earn wages under a different employer and even though he may serve a different employer he would still have the right to be reinstated when the proper occasion arises. Therefore, the situation is clear that during the period of lay-off the employee no longer is the servant or the workman of his employer. That relationship is suspended and that relationship would only be revived when he is reinstated under the terms of the contract. It is true that the contract of employment itself has not come to an end because a certain obligation remains upon the employer and a certain right still is in the employee, the obligation to reinstate and the right to be reinstated. But what we have to consider is whether there was an effective and subsisting contract of employment of master and servant at the material date and the material date is during the period of the lay-off. If during that period the master cannot command his servant to do his work and if the servant is under no obligation to do the work of the master, then it is difficult to understand how a subsisting contract of employment continued during the period of the lay-off.

It has also to be noted that the language used by the Legislature in s. 25C is advisedly compensation and not wages. If the Government Pleader's contention were to be accepted, there was no reason why the Legislature should have used the expression "compensation" and not "wages", because if this amount which is payable by the employer was remuneration for services rendered by the employee or which the employee was under an obligation to render, then this payment would fall within the definition of "wages" and there was no reason why a different expression should have been used by the Legislature in s. 25C.

It is also rather significant to note that the quantum of compensation is to be determined by the measure of the wages paid by the employer to the employee. Therefore, a distinction is made in s. 25C itself between compensation and the measure of payment which is wages. Again, in s. 25E a distinction is made between compensation and wages which the employee would get if he accepted an alternative employment.

The matter may be looked at in a different way. Under the standing orders, as we have already pointed out there was no obligation upon the employer to pay wages. The Government Pleader can only succeed if he satisfies us that although under the contract or the standing orders the employer was not liable to pay wages, a statutory liability is imposed upon the employer to pay wages. Nothing could have been easier for the Legislature than to have provided that during the period of lay-off the employer shall pay wages calculated in a particular manner. The Legislature, on the other hand, is at pains to emphasise the fact that what the employer is paying during the period of lay-off is not wages but compensation. We cannot possibly overlook the distinction between wages and compensation, and when the Legislature advisedly uses one expression rather than the other, we must give to the expression used its proper meaning and connotation.

It was also pointed out by Mr. Palkhivala, and in our opinion rightly, that what the employer pays to his employee by way of compensation for lay-off is not because the employee has fulfilled the contract, but the situation that arises on a lay-off is the very antithesis of the fulfilment of the contract. Not only is the contract not fulfilled, but the contract need not be fulfilled because, as we have pointed out, the employee is under no obligation to carry out any orders of his employer and he is at perfect liberty to employ himself elsewhere.

Mr. Palkhivala relied on a judgment of the Supreme Court in *G. I. P. Railway* v. *Mahadeo Raghoo*,[8]. There, Mr. Justice Sinha, who gave the judgment of the Court, after setting out the definition of "wages" under the Payment of Wages Act, which to the extent material is substantially identical with the definition we have to consider says this:

> "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."

With respect, the learned Judge has confined this definition to services actually rendered. If that definition were to be applied to the facts before us, it is clear that no services have been rendered by the employees who have been laid-off. What is more, not only services have not been rendered, but services could not have been rendered and need not have been rendered by the employees. Therefore, even if we were to give to "wages" the wider meaning which we have suggested should be given, then according to that wider definition the

8. (1955) Labour Law Journal Vol. I, P. 360.

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present case does not fall within the definition of "wages" given both under the Industrial Disputes Act and the Employees' State Insurance Act.

To put the matter very shortly, the question that we have to ask, which supplies a fair test for the determination of the question before us, is—During the period of lay-off was there any present duty upon the employees to work for their master? If there was no such present duty, then the relationship of master and servant did not exist, and it is clear, as we have pointed out, that neither the standing orders nor the Industrial Disputes Act casts any such duty or any such obligation upon the employee during the period of lay-off. The very term "lay-off" assumes and implies that the employer is not in a condition to offer employment to his employee and therefore he terminates his employment temporarily during the continuance of the emergency and while that emergency continues the employee is unemployed.

The result is that we must hold that the lay-off compensation paid to an employee under s. 25C of the Industrial Disputes Act is not wages as defined in the Employees' State Insurance Act, 1948. We answer the question submitted to us in the negative.

With regard to costs, this is a reference made by the Authority under s. 81 of the Employees' State Insurance Act because he felt a doubt as to the decision he had given, and as the matter was of considerable importance he wanted the guidance of the High Court with regard to the question of law involved. Reference under s. 81 is made under very different circumstances from a reference under the Income Tax Act or the Sales Tax Act where the reference is made at the instance of the party and if a party loses naturally that party would be liable to pay the costs. As the parties have nothing to do with this reference and the reference, as we have pointed out, arises solely for the guidance that the Authority wants from the High Court, we do not think that in cases like this any order as to costs should be made. There will, therefore, be no order for costs in this reference.

Answer accordingly.

K. B. S.