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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition No.2031 of 2005

Bharat Aluminium Co.Ltd Balco Nagar, Korba (CG)

---- **Petitioner**

Versus

1. Authority Under Minimum Wages Act, 1948 Assistant Labour Commissioner, Premises of the Asstt. Labour Commissioner, Korba, District Korba (CG)
2. Govt. of CG through the Inspector Minimum Wages Act, 1948, O/o Asstt. Labour Commissioner Premises of the Asstt. Labour Commissioner, Korba Distt Korba (CG)
3. The General Secretary, BCPP Non-execution Employees Union, INTUC Jamnipalli, Distt Korba (CG)
4. General Manager, National Thermal Power Corporation (NTPC), Super Thermal Power Plant, Korba (CG)

--- **Respondents**

Writ Petition No.200 of 2006

General Manager, Bharat Aluminium Co. Ltd. Captive Power Plant, Jamni Pali, Korba (CG)

---- **Petitioner**

Versus

1. Authority Under Minimum Wages Act, 1948 Assistant Labour Commissioner, Premises of the Asstt. Labour Commissioner, Korba, District Korba (CG)
2. Govt. of CG through the Inspector Minimum Wages Act, 1948, O/o Asstt. Labour Commissioner Premises of the Asstt. Labour Commissioner, Korba Distt Korba (CG)
3. The General Secretary, BCPP Non-execution Employees Union, INTUC Jamnipalli, Distt Korba (CG)
4. General Manager, National Thermal Power Corporation (NTPC), Super Thermal Power Plant, Korba (CG)

--- **Respondents**

Writ Petition No.7214 of 2006

General Manager, Bharat Aluminium Co. Ltd. Captive Power Plant, Jamni Pali, Korba (CG)

---- **Petitioner**

Versus

1. Authority Under Minimum Wages Act, 1948 Assistant Labour Commissioner, Premises of the Asstt. Labour Commissioner, Korba, District Korba (CG)
2. Govt. of CG through the Inspector Minimum Wages Act, 1948, O/o Asstt. Labour Commissioner Premises of the Asstt. Labour Commissioner, Korba Distt Korba (CG)

3. The General Secretary, BCPP Non-execution Employees Union, INTUC Jamnipalli, Distt Korba (CG)
4. General Manager, National Thermal Power Corporation (NTPC), Super Thermal Power Plant, Korba (CG)

--- Respondents

Writ Petition (L) No.7078 of 2007

General Manager, Bharat Aluminium Co. Ltd. Captive Power Plant, Jamni Pali, Korba (CG)

---- Petitioner

Versus

1. Authority Under Minimum Wages Act, 1948 Assistant Labour Commissioner, Premises of the Asstt. Labour Commissioner, Korba, District Korba (CG)
2. AK Anand, Operator Grade II Quarter No.A/2151, Narmada Vihar, BCPP, Jamnipali, Korba
3. The General Secretary, BCPP Non-execution Employees Union, INTUC Jamnipalli, Distt Korba (CG)
4. General Manager, National Thermal Power Corporation (NTPC), Super Thermal Power Plant, Korba (CG)

--- Respondents

For Petitioners:	Shri Abhishek Sinha, Advocate.
For Respondents No.1&2:	ShriYashwant Singh Thakur, Addl. AG.
For Respondent No.3:	Shri Rajeev Shrivastava, Advocate.
For Respondent No.4:	Dr. NK Shukla, Sr. Advocate along with Shri BD Guru, Advocate.

Hon'ble The Chief Justice
Hon'ble Shri Justice Sanjay Agrawal
Order On Board

Per **Deepak Gupta, Chief Justice**

10/11/2016

1. The short but interesting question which arises for consideration in the Petition is whether the incentive bonus granted to the employees is part of minimum wages or not.

2. The undisputed facts are that the Bharat Aluminium Company Limited (for brevity 'BALCO') has a captive power plant to meet the electricity requirements of its Aluminium Plant. Under an agreement arrived at between the NTPC and BALCO, the NTPC was given management of the captive

power plant. In the meantime, BALCO was privatized and after the private management took over, it terminated the agreement with NTPC. After the agreement between NTPC and BALCO came to an end and BALCO took over the management and operation of the captive power plant, a question arose with regard to the future of those employees who were working in the BALCO captive power plant. The question was whether their services were to be taken over by BALCO or not. This matter has been settled by the Supreme Court and it has been held that NTPC is the employer of the employees.

3. These employees claimed that incentive bonus was payable to them under the incentive scheme formulated by the NTPC for the period when they were working in the BALCO Captive Power Plant. These employees also claimed that the incentive bonus was part of the minimum wages and made a complaint to the authorities concerned and the Inspector under the Minimum Wages Act, 1948 (for brevity 'the Act') made a complaint to the prescribed authority under the Act. The said complaint has been decided by the impugned order wherein the prescribed authority has decided that the incentive payable under the incentive scheme is part and parcel of the minimum wages. It has further held that BALCO is liable to pay the same.

4. To understand the rival contentions of the parties, it would be pertinent to refer to certain provisions of the Act. Under Section 2(h) of the Act, wages have been defined as follows:

> "(h) 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 to a person employed in respect of his employment or of work done in such employment."

5. "Section 3 of the Act empowers the appropriate Government to fix the minimum wages payable to the employees employed under an employer.

Different methods of fixation of minimum wages have been set out in the concerned section. Every employer is duty bound under the law to pay wages not less than the minimum wages fixed under this Act. Here we would like to refer to Section 11(1) of the Act which lays down that the minimum wages payable under this Act shall be paid in cash. Therefore, it is apparent that the minimum wages must be paid in cash and anything which is paid in kind cannot be treated part of minimum wages. Section 12 mandates that when an employee is working in any scheduled employment under Section 5 of the Act, the employer must pay to such an employee a wage not less than the minimum wage fixed by the appropriate authority. Section 12 of the Act reads as follows:-

> "12. Payment of minimum rates of wages.- (1) where in respect of any scheduled employment a notification under Section 5 is in force, the employer shall pay to every employee engaged in a scheduled employment under him wages at a rate not less than the minimum rate of wages fixed by such notification for that class of employees in that employment without any deductions except as may be authorized within such time and subject to such conditions as may be prescribed.
> (2) Nothing contained in this section shall affect the provisions of the Payment of Wages Act, 1936."

6. In the State of Madhya Pradesh, there was an amendment to Section 12 of the Act incorporating Section (1-A). It is not disputed before us that after the formation of the State of Chhattisgarh, sub-Section (1-A) is also applicable in the State of Chhattisgarh. Section (1-A) as incorporated reads as under:-

> "(1-A) where immediately before the issue of a notification under S.5 fixing or revising the minimum rates of wages in respect of any scheduled employment, wages at a rate higher than the rate so fixed or revised, were payable under this Act, or under any law in force, then, notwithstanding anything contained in this Act, wages at such higher rate shall be payable to the employees in such scheduled employment and the wages so payable shall be deemed to be the minimum wages for the purposes of this Act."

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7. The prescribed authority has placed reliance on Section (1-A) to come to the conclusion that the incentive bonus paid to the employees forms part and parcel of the minimum wages. The authority has held that since the incentive was paid to the workman in the previous months, under Section 12 (1-A), the employer was duty bound to pay wages not less than the amount earlier paid and this would include the incentive bonus which forms part of the minimum wages.

8. Aggrieved by this order of the prescribed authority under the Act, BALCO has filed the aforementioned four Writ Petitions. These four Writ Petitions relate to different years. The question of law involved is identical in all these Writ Petitions. Therefore, we dispose of all these Writ Petitions by this common order.

9. We have heard Dr. NK. Shukla, learned Senior Advocate, Shri Abhishek Sinha, Shri Yashwant Thakur and Shri Rajeev Shrivastava for the parties.

10. The first and foremost argument of Shri Sinha, learned Counsel for Balco is that the incentive bonus cannot form part of the minimum wages. His submission is that the incentive bonus is linked to production and incentive varies from employee to employee. Incentive bonus payable also varies amongst different classes of employees under the same establishment when they are working in different sections. According to him, incentive bonus being in the nature of incentive, is directly related to production of power and is not static or fixed and therefore, it cannot form part of the minimum wages. He also raised another issue that it is NTPC and not BALCO which is liable to pay the amount. The validity of Section 12(1-A) of the Act is also challenged but for the purpose of this Petition, we are not deciding the last two contentions because on consideration of the entire facts, we are of the view that incentive bonus is not part of minimum wages

and therefore, it is not necessary to decide the question with regard to the constitutional validity of Section 12(1-A) or even the question whether it is BALCO or NTPC which is liable to pay the incentive bonus.

11. We have made reference to the provisions of the Act and now we may make reference to the scheme providing for such incentives. This scheme is known as NTPC Power Generation Incentive Scheme. The objective of the scheme is to keep the generating station in readiness to deliver ex-bus output expressed as percentage of rated installed capacity. The further objective is to ensure maximum generation of electricity through optimum utilization of installed plant capacity and other allied resources, the reduction of cost per unit of energy generated and reduction in absenteeism. We may make reference to Clause-5.0 of the Scheme which reads as follows:-

> **"5.0** <u>RECOMMENDED FACTORS FOR INCENTIVE PAYMENT</u>
>
> To achieve the twin objectives of availability of plant for generation of power and cost reduction, a multi factor scheme has been designed incorporating the following factors:-
>
> (i) <u>Generation Incentive based on Equivalent Availability Factor %:</u> Payment linked with Equivalent Availability factor (EAF%) will be paid monthly, quarterly and yearly to eligible employees. The EAF% for a station shall be worked out as per formula given below and will include shortfall in generation due to backing down on the instructions of RLDC/REBCEA. The responsibility of obtaining the certificate from the above authorities will be of the concerned Project/Station.
>
> $$\text{EAF(\%))} = \frac{\text{Actual Gen.(MU)+Shortfall in Gen. Due to backing down}}{\text{General (MU) at installed capacity}} \times 100\text{(MU)}$$
>
> (ii) <u>Oil Consumption linked Incentive :-</u> Payment will be made monthly only to the employees directly and exclusively engaged in operation and maintenance of the plant."

12. It would also be relevant to mention that under Clause-6, it is apparent that the incentive is linked to generation and will depend upon the amount of

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electricity generated in relation to the generation capacity of the Plant. The higher the generation the higher the incentive. We may also make reference to Clause-9 of the scheme which classifies employees engaged in the power plant in different categories for the purpose of grant of incentive. Group A employees are those employees who are directly and exclusively engaged in operation and maintenance of the commissioned units. Group B-I employees are all other eligible employees not covered under Group A employees. We are not concerned with Group B-II employees because that category will only be there when a part of the Plant is under operation and another is under construction. However, we may refer to Group B-II employees to show that there are different rates of incentives payable to different different classes of employees. Under Clause-10, Group A employees who are directly relating to the generation of power are entitled to 100% of the incentives as prescribed whereas Group B-I employees are entitled to 75% of the incentives and Group B-II employees are entitled to 60% and those employees who are indirectly relating to Group B-I(a) will only get 50% of the incentive bonus fixed. The incentive payable to the employee who is working in the power generation plant will vary in accordance to the post he is holding and how his post is directly connected with the generation of power. Reference may also be made to Clause-11 which reads as follows:-

> "11.0 Reduction in incentive payments:
> In order to control the cost of generation and improve working and performance of the power station, management in its absolute discretion may introduce from time to time one or more of the following factors for which reductions in incentive rates will be made if the performance is below standard.
> ...."

13. This clearly indicates that there can be reduction in incentive payments if the performance is below the prescribed standard. However, the total reduction on account of all the above factors will not be more than 40% of the

total incentive payable. Clause-12 lays down certain other conditions and Clause 12.1 prescribes that the employee will not be entitled to the incentive payment for the period he is absent from work except when he is going on training in India for a period not more than 15 days or is on casual leave. If he takes any other leave, he is not entitled to incentive bonus for the period of leave. Clause-12.2 reads as follows:-

> "12.2 The amount of incentive earnings will neither be termed as pay not allowance, nor wages. Accordingly, this amount would not count for any service benefits i.e. computation of House Rent Allowance, Compensatory Allowance, cash compensation, encashment of leave, pay fixation, Provident Fund, Pension or Gratuity etc."

14. Emphasis has been laid that the incentive earnings will not be termed as pay nor allowances nor wages. We may not agree with this condition totally because incentive bonus would definitely be in the nature of allowances. It may be a variable allowance but it would be an allowance and may or may not form part of wages and therefore we leave that question open. It is important to refer Clause 12.3 which reads as follows:-

> "12.3 Employees may be transferred from one department /division to another. In such cases their entitlement for incentive will be determined as per the entitlement of the department/division in which they are actually posted."

This Clause provides that employees may be transferred from one department/division to another and in such cases, they are entitled to incentive bonus as per the entitlement of the department/division in which they are actually posted. This clearly indicates that no employee has a right to get minimum sum as incentive bonus. This would depend on the capacity of the Plant, the amount of electricity generated, the standard of cleanliness, timely unloading of wagon, control on auxiliary power consumption, excessive overtime payments and other relevant factors. This will also depend on whether the employee is regularly attending his work or not and in case he is absent from work, he may not be entitled to incentive bonus. Most importantly, if an employee is transferred from one division to the other, the incentive bonus will be payable to him as per the entitlement of the division/department in which he is working. To give an example, if he is on the generation block, he would be entitled to 100% incentive but if he is posted on the factory gate, he may be entitled to only 50% of the incentive bonus. The employer has the power to transfer the employee from one division to another and therefore, no employee can claim that he is entitled to a particular amount as incentive bonus as a matter of right for all times to come. Therefore, we are of the considered view that there is uncertainty in the amount which is payable as incentive bonus and as such this incentive bonus cannot be treated to be part of the minimum wages as defined under the Act.

15. The concept of minimum wages is that the appropriate Government shall fix the minimum wages for a particular category of employee in a particular employment and no employer shall pay wages to his employees less than the rates fixed by the Government. As long as wages are not below the wages prescribed, no employee can complain that he has a right to get incentive bonus as a matter of right. It is for the employer to decide whether to have an incentive bonus scheme or not. It is true that in industries, this is normally done by way of settlement arrived at between the employee and the employer but even so, such an allowance which is by way of incentive cannot be termed to be minimum wages.

16. In this behalf, we may place reliance upon the decision of a Constitution Bench of the Apex Court in AIR 1959 SC 1095 M/s. Titaghur Paper Mills Co. Ltd vs. Their Workmen etc). The issue before the Apex Court was whether the production bonus and profit bonus were part of wages under the Industrial Disputes Act or not Dealing with the issue of production bonus, the Apex Court held in paragraph-9 as follows:-

"9. Before we go into the question of jurisdiction of a tribunal under the Industrial Disputes Act, 1947, (hereinafter called the Act), we should like to consider what production bonus essentially is. The payment of production bonus depends upon production and is in addition to wages. In effect, it is an incentive to higher production and is in the nature of an incentive wage. There are various plans prevalent in other countries for this purpose known as Incentive Wage Plans worked out on various bases, for example Halsey Premium Plan, Bedaux Point Premium Plan, Haynes Manit System and Emerson Efficiency Bonus Plan. The simplest of such plans is the straight piece-rate plan where payment is made according to each piece produced, subject in some cases to a guaranteed minimum wage for so many hours' work. But the straight piece-rate system cannot work where the finished product is the result of the cooperative effort of a large number of workers each doing a small part which contributes to the result. In such cases, production bonus by tonnage produced, as in this case, is given. There is a base or standard above which extra payment is made for extra production in addition to the basic wage. Such a plan typically guarantees time wage up to the time represented by standard performance and gives workers a share in the savings represented by superior performance. But whatever may be the nature of the plan the payment in effect is an extra emolument for extra effort put in by work men over the standard that may be fixed. That is the reason why all these plans are known as Incentive Wage Plans and generally speaking have little to do with profits.

The extra payment depends not on extra profits but on extra production. This extra payment calculated on the basis of extra production is in a case like the present where the payment is made after the annual production is known, in the nature of emoluments paid at the end of the year. Therefore, generally speaking, payment of production bonus is nothing more nor less than a payment of further emoluments depending upon production as an incentive to the workmen to Put in more than the standard performance. Production bonus in this case also is of this nature and is nothing more than additional emolument paid as an incentive for higher production. We shall later consider the argument whether in this case the production bonus is anything other than profit bonus. It is enough to say at this stage that the bonus under the scheme in this case also depends essentially on production and therefore is in the nature of incentive wage."

17. What the Apex Court held was that production bonus depends upon production and is in addition to wages and therefore is in the nature of an incentive wage. It was further held that though production bonus may be in the nature of wages, it is linked to production and would be variable.

18. The law laid down by the Apex Court in the matter of M/s. Titaghur Paper Mills Co. Ltd vs. Their Workmen etc (supra) holds the field till date. Relying upon the above judgment, the Apex Court in AIR 2001 SC 2893 (Rajendra Deva vs. Hari Fertilizers Sahupuri Varanasi) held that incentive bonus cannot be treated as wages because its purpose is to secure better attendance of workmen. The Apex Court in 1991 Supp(2) SCC 465 (Manganese Ore (India) Ltd. vs. Chandilal Saha and Ors) held that the mandatory value of food grains supplied to the workmen could not be treated as part of minimum wages. Though this judgment may not be strictly applicable because it turns around the definition of wages under Section 4 and 11 of the Act but it also indicates that merely because an amount is being paid to the workmen, it does not become part of his minimum wages. The relevant portion of the judgment reads as under:-

> "15. As regards the attendance bonus it was an additional payment made to the workmen as a means of procuring their regular attendance with the ultimate object of increasing production. The bonus was in the nature of extra remuneration for regular attendance. The said bonus was not payable to all the workmen at the time of joining the employment. It was payable to a workman who had put in continuous service for a specified period and who was not a wage. There is a basic difference between incentive bonus and the minimum wage. Every workman is entitled to the minimum wage from the very first day of his joining the employment whereas the bonus has to be earned and it becomes payable "after the event." In the present case the attendance bonus was payable after regular attendance for a specified period and remaining loyal to the management. The scheme of payment of attendance with bonus was thus an incentive to secure regular attendance of the workmen. It was an additional payment made to the workmen as a means of increasing production. In Titaghur Paper Mills Co. Ltd. vs. Its

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> Workmen, this Court held that the payment of production bonus is in the nature of an incentive and is in addition to the wages. We are, therefore, of the view that the attendance bonus is in the nature of an incentive and it cannot be treated as part of the minimum wages fixed under the Act."

19. We are of the view that to constitute minimum wages, the amount payable should be a fixed amount payable as per the notification issued by the appropriate Government or under a settlement arrived at between the parties. In no case, can the minimum wage be less than the amount fixed by the appropriate Government. Thus, minimum wages have to be a fixed amount. There cannot be variable minimum wages from month to month. This would be totally against the principles of Minimum Wages Act. Another aspect of the matter is that the same minimum wages have to be paid to all the employees holding a particular post and there cannot be different minimum wages for different employees. In the present case, if we uphold the order of the prescribed authority under the Minimum Wages Act, the employees holding the same post would be entitled to different minimum wages by granting the benefit of the bonus incentive given to them. Another aspect of the matter which we have already noticed above is that the employees even belonging to same class under the incentive scheme cannot get different wages depending upon how their division/department is concerned with the generation of electricity.

20. We now come to Section 12(1-A) of the Act as incorporated in the State of Chhattisgarh. The authority below has held that prior to making the complaint, the employees had been paid a particular amount of money under the incentive scheme to which they were entitled and this forms part of minimum wages and hence they will be entitled to their incentive bonus for all time to come. We are unable to uphold this finding of the authority for the reasons, which we have already given above. We are in fact of the view that Section (1-A) is not applicable to the facts of this case. The first condition

which must be satisfied before Section (1-A) can be invoked is that the employee or the authority must show that there is a notification issued by the State Government fixing or prescribing a minimum rate of wages. The second condition which must be fulfilled is that it must be proved that the employer prior to issuance of such notification was paying to the employee wages higher than those fixed by the appropriate Government. Only then Section 12(1-A) will come into operation and in that eventuality, the higher wages being paid by the employer shall be treated to be the minimum wages as far as the employees of employer establishment are concerned. We do not understand how this Section could have been invoked to give benefit of the incentive scheme to the employees because the incentive is strictly related to the generation of power, the standard of cleanliness, timely unloading of wagon and many other variable factors which makes the incentive bonus itself variable from employee to employee.

21. To be fair to Mr. Rajeev Shrivastava, we may note that he has relied upon the law laid down by the High Court of Gujarat in Special Civil Application No.150/2006 decided on 19.9.2006 (Lubi Electricals Ltd. vs. A.T. Painter). In this case, the learned Single Judge held that the amount being paid as incentive bonus/wages was part and parcel of the minimum wages. This judgment no doubt on the face of it, supports the case of the employees herein. However, on closer examination of the judgment, we find that this judgment has been rendered in the peculiar facts and circumstances of that case, wherein the Court found that the wages were paid to the employees on three different dates. On 7th of each month, the employees were paid wages in the nature of regular wages and on the 15th and 30th of each month, they were paid some incentives. Further, the High Court of Gujarat found that what was being paid on 7th of each month was much less than the prescribed minimum wages. The Gujarat High Court observed that this method of payment had been followed to get around payment of minimum wages and

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therefore held that the incentive bonus had to be counted to be part of the minimum wages. This judgment therefore will not apply to the facts of the present case. We may also note that the judgment of the Apex Court in (Manganese Ore (India) Ltd. vs. Chandilal Saha and Ors) (supra) has not been noted by the Gujarat High Court.

22. In view of the above, we are clearly of the view that the learned prescribed authority gravely erred in holding that the incentive wage/bonus were part and parcel of the minimum wages. Having held so, we are clearly of the view that if any of the employees is entitled to incentive bonus, he cannot be denied the same. Though this amount may not form part of minimum wages, the employees are entitled to claim incentive bonus as per the incentive scheme of NTPC. If this incentive bonus has not been paid to them as per the scheme, the employees are at liberty to rake up this matter before the authorities either under the Payment of Wages Act or before any other appropriate forum. In case such claim is filed within three months, the same shall not be rejected on the ground of delay. In case such Petition is filed, both NTPC and BALCO shall be at liberty to raise any plea as to who is liable for payment of incentive bonus.

23. In view of above, we allow all the Writ Petitions and quash the impugned order dated 20.4.2005.

Sd/-
The Chief Justice

Sd/-
Sanjay Agarwal
Judge

Priya