IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 513 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

GAJJAR STEEL INDUSTRIES PVT. LTD.

Versus

REGIONAL DIRECTOR

Appearance:

MR KS NANAVATI for Petitioner

MR SB VAKIL for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 30/04/96

ORAL JUDGEMENT

The applicant in Application (ESI) No. 45 of 1975 is the appellant herein and the opponent of the original Application is the respondent herein. This appeal has been filed by the appellant against the judgment and order passed by the learned Judge of the Employees' Insurance Court, Ahmedabad on 3/1/1979 in the aforesaid original Application, by virtue of the provision contained in sec. 82 of the Employees State Insurance

Act (34 of 1948).

2. The facts of the case may be gathered from the judgment and order of the learned Judge of the Employees' State Insurance Court : The appellant preferred aplication u/s. 77 of the Employees State Insurance Act, 1948, hereinafter referred to as "the Act" before the Court under the Act, hereinafter referred to as "the trial Court" and prayed for the declaration that the amounts paid by the appellant by way of Inam (prize) to its employees cannot be said as wages as defined u/S. 2 (22) of the Act and that the appellant is not liable to pay any of the contributions on such amount and finally that the directions of the respondent to pay contributions in relation to the aforesaid amount would not be legal, just and proper. A consequential relief of the injunction was prayed against the respondent restraining him from recovering the contribution from the appellant in relation to the aforesaid amount. The case of the appellant was that the appellant established a section known as 'moulding section' wherein 35 to 40 employees were employed. Some time back the appellant voluntarily introduced a scheme of payment known as 'Inam' for the workers working in the moulding section. In order to induce the workers of the said section to work diligently with team spirit, the said scheme was introduced. By virtue of the scheme workers who were found working diligently and honestly were paid an ex-gratia amount. The appellant company was the final authority for deciding as to the workers who would be entitled to such ex-gratia amount and the workers would not have right to challenge such decision of the employer. It was also stated that the scheme could be modified, changed or withdrawn by the appellant at any time without giving notice to the workers or without assigning any reason. It was, therefore, contended that the appellant was not liable to pay any contribution in relation to the amounts paid to the workers by way of 'Inam' under the scheme.

3. The application was contested by the respondent. While denying the allegations made in the application, it was asserted that the introduction of the Inam scheme was clearly a product of artificial creation of system of payment known as Inam to the workers. It was also asserted that the alleged ex-gratia payments were being made for a long time and connected with the extra production and the appellant had never withdrawn the scheme even for a month or a fortnight in the lastso many years preceding the application. The terminology 'Inam' was coined to avoid payment thereon under the Act. The

appellant employed 146 workers who were regular workers and they had been paid extra wages under the captioned "ex-gratia payment in every fortnight". Earlier the respondent had taken decision as prayed for by the appellant, but subsequently after considering all the aspects of the scheme it was found that the payments made to the workers would be wages as defined in sec. 2 (22) of the Act. The respondent, therefore, prayed for dismissal of the application.

4. Issues were framed at exh. 20 A as under :-

(1) Whether the applicant proves that the payment by it to its workers under the scheme known as Inam would not amount to wages as defined under Section 2 (22) of the E.S.I. Act ?

(2) Whether the applicant is not liable to pay to the opponent contribution with regard to such payments made by it to its workers under the said Inam scheme ?

The trial Court answered both the issues against the appellant upon appreciation of the evidence adduced before it.

5. The question of law which has been agitated by Mr. Vimal Patel, learned advocate appearing for M/s. Nanavati Associates is that the scheme read as a whole would disclose payment of the nature of ex-gratia payments and such payments would not be covered u/S. 2 (22) of the Act. He placed reliance upon a decision of the Hon'ble Supreme Court in the case of Braithwaite & Company v. E.S.I. Corporation, reported in AIR 1968 SC 413. There also a sort of Inam scheme was under consideration by the Apex Court. Considering the definition as it stood then, the Apex Court held that the incentive payments if certain specified conditions were fulfilled, made to the workers could not amount to wages within the meaning of sec. 2 (22) of the Act. It was held that the payment of Inam, though remuneration, could not be said to have become a term of the contract of employment within the meaning of the definition of 'wages' contained in the aforesaid provision of the Act. The definition of 'wages' contained in sec. 2(22) of the Act, at the relevant point of time may be reproduced from para. 2 of the citation :-

"2. (22) "wages" means all remuneration paid or payable in cash to an employee, if the terms of 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 -

(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."

6. The said definition had undergone a change by statutory amendments as inserted by Act No. 44 of 1966 as bracketted and described under letters 'a' and 'b'. The provision would read as under :-

"(22) "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 a [any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and] other additional remuneration, if any, b [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;

(a) Inserted by Act 44 of 1966, S. 2(10) (28-1-1968).

(b) Substituted for "paid at regular intervals after the last day of the wages period" by the Employees' State Insurance (Amendment) Act, 1951 (LIII of 1951). Section 3 (6-10-1951)."

7. Following submissions made before the trial Court would assume importance in dealing with the submissions made here again :

> "Shri Rangwala has not sought to urge that the amount paid by the applicant under that scheme of the Inam would be ex-gratia payment or will not be remuneration. As evidently the workman is paid for the work he does in his employment and not by way of charity or otherwise or out of philanthropy. Ex. 13 explains in details this oral scheme."

Referring to the decision of the Apex Court in Braithwaite & Company's case (supra) it has been observed by the trial Court that some payments were made, in that case, by way of Inam to the employees under the scheme by the appellant and the features of the scheme indicated that the payment of Inam was not to be the term of contract of employment as the payment of Inam was not as and by way of terms of employment. It was by way of incentive payment if certain specified conditions were fulfilled by the employees and it was dependant on the employees exceeding the target of output, appropriately applicable to him. The trial Court observed that in the case before the Apex Court reliance was placed on the first part of definition of term "wages" u/S. 2 (22) of the Act. The decision rendered by the Apex Court was only restricted to the first part of the definition and to which reliance was placed by the parties before the Apex Court. The Apex Court in its decision made it very clear that the decision was confined to the first part of the definition of term "wages" in sec. 2 (22) of the Act and no reliance was placed on the second part of the definition which used the words "other additional remuneration". It has been observed by the Apex Court that so far as the amount paid as Inam under the scheme was concerned, the same was held to be covered by the word "remuneration" used in the definition of "wages" concurrently by both the Employees' Insurance Court and the High Court. This would indicate that the decisions rendered by the Courts below on the second part of the definition were not challenged before the Honble Supreme Court. Even the correctness of the finding of the Employees' Insurance Court and the High Court on that point were not challenged. Therefore, the trial Court concluded that the payments of the nature included under the scheme in question made to the employees or by way of incentive for better production by the employees would

always mean remuneration as contemplated in the later part of the definition u/S. 2 (22) of the Act.

8. Mr. S.R. Shah, learned counsel appearing for the respondent has canvassed a recent decision of the Apex Court in the case of Wellman (India) Pvt. Ltd. v. E.S.I.C. reported in AIR 1994 SC 1037, where the expression "other additional remuneration" has been considered in para. 6 of the citation as under :-

> The expression "other additional remuneration, if any, paid...." in the second part of definition of wages given in S.2(22) implies that the said remuneration is not payable under any contract of employment, express or implied. This is so because while the first part of the definition refers to remuneration under the contract of employment, the second part does not refer to remuneration under any such contract. Secondly, the definition is inclusive and includes only such payments outside the contract as are mentioned in its second part and none other. Thirdly, the expression "if any, paid" after the words "other additional remuneration" will be inconsistent if the remuneration is payable under the contract of employment since such payment is not dependent on the will of the employer but on the fulfilment of the terms of the contract. Lastly, the second part of the definition includes only such contractual payments as are specifically mentioned therein. Hence the expression "other additional remuneration, if any, paid" not only does not refer to remuneration payable under any contract but refers to such remuneration which is payable at the will of the employer. Every remuneration that is payable under the contract would, therefore, fall under the first part of the definition."

9. Mr. Vimal Patel, learned counsel appearing on behalf of M/s. Nanavati Associates submitted that the facts before the Apex Court in Wellman (India) Pvt. Ltd.'s case (supra) were entirely related to the first part of the definition in as much as the question there was with regard to bonus payable to the employees under the terms of the settlement reached in conciliation under S. 12(3) of the Industrial Disputes Act, 1947. However, when the Apex Court has considered the subsequent part of the definition in para. 6 as excerpted hereinabove there is no question of getting away from it. It would be

pertinent to note from the para. excerpted hereinabove, that every remuneration which is payable under the contract would fall under the first part of the definition, whereas every other additional remuneration would fall under the later part of the definition. Hence, the point of distinction sought to be made by the learned counsel for the appellant cannot be accepted. It would be useful to note that those items of remuneration or contribution which are not to be included in either of the parts of the definition are enumerated in clauses (a) to (d).

10. The result is that the submission made on behalf of the appellant on the interpretation of sec. 2 (22) of the Act as set out hereinabove cannot be accepted.

11. In the result this appeal is dismissed with no order as to cost. Payments made pursuant to the order of this Court shall be verified by the respondent and shall be given effect to in accordance with law.

* * * * *