Privy Council Appeal No. 8 of 1987

L.S.P. Limited *Appellant*

v.

Oodeynarain Surjoo *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JANUARY 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD GRIFFITHS
LORD ACKNER
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

*[Delivered by **Lord Lowry**]*

This is an appeal by the appellant, L.S.P. Limited, which is an export enterprise operating in the export processing zone of Mauritius, from a judgment of the Supreme Court of Mauritius (Acting Senior Puisne Judge R. Lallah and Judge Espitalier-Noel) allowing the appeal of the respondent, who was at all material times a factory worker employed at diamond-cutting by the appellant on a piece-rate basis, from the judgment of the Industrial Court of Mauritius, which had dismissed his plaint, and ordering his employer, the present appellant, to pay him the sum of Rs.198.50. This represented 15.5 per cent of the respondent's piece-rate earnings (Rs.1276.02) for the month of July, 1981 to which the respondent claimed to be entitled by way of a statutory increase under the terms of the Additional Remuneration Act 1981.

The claims of four other plaintiffs, who were fellow employees of the respondent, will be ruled by the result of the present proceedings which, as their Lordships have been informed, are also a test case for piece-rate workers generally in the export processing zone.

The Industrial Court held that the 15.5 per cent statutory increase sought by the respondent did not apply to piece-rate earnings, but the Supreme Court held that it did. Whether the statutory increase so

applied was, accordingly, the question for decision in this appeal and its resolution depended on the meaning and effect of a number of statutory provisions which, with the valuable assistance of counsel, their Lordships have considered.

The Export Processing Zones Act ("the 1970 Act") was passed in 1970, with the long title:-

> "An Act to provide for the setting up of export processing zones, for the issue of certificates to export enterprises, for the operation of such enterprises and for various reliefs and exemptions to be granted to them, and for matters connected therewith or incidental thereto."

It empowered the Minister, "with the object of attracting, promoting or increasing the manufacture of export products", to declare any area of land or any factory to be an export processing zone and to issue a certificate to any company proposing to manufacture export products, which would make the company an "export enterprise" and confer on it reliefs in respect of income tax and import duty as well as restricting its business to the export product mentioned in its certificate. Section 14 contained employment and labour provisions designed, as it would appear, to promote efficiency and economy and to secure a degree of uniformity in the terms of employment. Section 17 empowered the Minister to:-

> "make such regulations as he deems necessary for carrying into effect the provisions of this Act and for prescribing anything that is or may be required to be prescribed."

In fact the regulations relevant to the case under consideration were made under section 96 of the Industrial Relations Act 1973. The first was the Export Enterprises Remuneration Order 1975 ("the principal Order"). Paragraph 3(1) read as follows:-

> "Subject to the other provisions of this paragraph and to paragraph 5, every worker shall be remunerated at the rates specified in the First Schedule and shall be governed by the conditions of employment specified in the Second Schedule."

Paragraph 5 provided:-

> "Nothing in this Order shall-
>
> (a) prevent an employer from paying a worker remuneration at a rate higher than that specified in the First Schedule or from providing him with conditions of employment more favourable than those specified in the Second Schedule;

(b) authorise an employer to reduce a worker's remuneration or to alter his conditions of employment so as to make them less favourable."

The First Schedule contained a list of occupations and corresponding monthly or weekly wages, and the Second Schedule set out the working conditions at length.

An Order of 1976 amended paragraph 3(1) of the principal Order by deleting the words "be remunerated at the rates specified in the First Schedule" and replacing them by the words "be paid, in lieu of his integrated wage or salary, a wage or salary in accordance with the First Schedule". The Remuneration (Amendment) 1977 Order ("the 1977 Order") introduced piece-work by adding a new paragraph to the Second Schedule to the principal Order:-

" 9. Piece-Rate Work

(1) Subject to subparagraph (2), a worker may be required to perform piece-work by his employer at such rates to be agreed upon between them, which shall not be less than a sum exceeding the relevant rate specified in the First Schedule by ten per cent.

(2) Where a worker is required to perform piece-work on a public holiday he shall be remunerated at a rate which shall not be less than a sum exceeding that to which he would be entitled under paragraph 2(1) by ten per cent."

The elliptical wording of paragraph 9(1) must mean (and was agreed by the parties to mean) that the weekly or monthly amount payable to a piece-rate worker must be equal to or greater than the pay of a wage earner in the corresponding category, for example, that of a male factory worker over 18. The 1977 amendment Order substituted a further new First Schedule.

The 1979 amendment Order inserted in the principal Order a new paragraph 3(2) as follows:-

"The wage or salary specified in the First Schedule shall be inclusive of the special wage increase granted under the Special Wage Increase Act 1977."

The 1979 Order also substituted a new and more elaborate First Schedule.

There are two further relevant remuneration amendment orders, but their Lordships would first refer to the Additional Remuneration Acts of 1980 (which was passed on 30 June, 1980 and came into force on 1st July, 1980) ("the 1980 Act") and 1981 (which was passed

on 23rd June, 1981 and came into force on 1st July, 1981) ("the 1981 Act"). These Acts provided for increases in the remuneration of all employees in Mauritius. They did not form part of the code consisting of the 1970 Act and the Export Enterprises Remuneration Orders and their operation was, accordingly, not confined to the export processing zone. The 1980 Act introduced the definitions of "appropriate additional remuneration" and "basic wage or salary" and the 1981 Act, which is the relevant enactment for present purposes, followed the same pattern. Section 2 contained the following definitions:-

> '"appointed day' means the 1st July, 1981;
>
> 'appropriate additional remuneration', in relation to an employee, means the appropriate amount determined in accordance with, or specified in, the second column of the Second Schedule corresponding to the basic wage or salary payable to the employee and specified in the first column of that Schedule;
>
> 'basic wage or salary' -
>
> (i) means -
>
> (A) in relation to an employee who is remunerated on a piece-rate basis or who is employed on task work the amount payable in respect of his work and prescribed in any other enactment or agreed upon in his contract of service: provided that, in the case of any employee employed on task work, the task normally allotted to him before the appointed day shall not be increased;
>
> (B) in relation to an employee in respect of whom no basic wage or salary is prescribed in any other enactment or agreed upon in his contract of service, the total amount, by whatever name called, which would have been earned by him as from the appointed day;
>
> (C) in every other case, the total amount, by whatever name called, prescribed in any other enactment or agreed upon in his contract of service and which would have been payable to him as from the appointed day;
>
> (ii) does not include any allowance, commission or other benefit given to an employee in addition to his basic wage or salary or which is not in the nature of a wage or salary;

'employee' includes -

(a) a public officer;

(b) a person who is employed by a local authority or a body specified in the First Schedule;

(c) a person who works or has worked under a full-time or part-time contract of service or apprenticeship, whether the contract is expressed or implied or is oral or in writing, and whether the person is paid daily, weekly, monthly or otherwise."

Section 3(1) of the 1981 Act provides:-

"As from the appointed day, every employer shall pay to every employee in his employment, in addition to the basic wage or salary payable to the employee, the appropriate additional remuneration."

Sections 9 and 10 provide:-

"9. This Act shall cease to apply in relation to any category of employees who are governed by a Remuneration Order where the Order is amended after the commencement of this Act to specifically include the increase provided by this Act.

10. The Additional Remuneration Act 1980 shall cease to apply to any category of employees who are governed by a Remuneration Order and the Remuneration Order was amended after the commencement of that Act to specifically include the increase provided by that Act."

The definition of appropriate additional remuneration in section 2 refers to the Second Schedule (in the reprint of the 1981 Act called the First Schedule) which was as follows:-

" SECOND SCHEDULE
(Section 2)
PART I

Employees whose remuneration is governed by The Sugar Industry (Agricultural Workers) Remuneration Order 1974 and the Sugar Industry (Non-Agricultural Workers) Remuneration Order 1974 -

(a) In respect of employees whose basic wage or salary does not exceed Rs 1500 monthly -

(i) in respect of women ... 20 per cent of the basic wage or salary (rounded up to the next 25 cents)

(ii) in respect of men ... 18 per cent of the basic wage or salary (rounded up to the next 25 cents)

(b) In respect of employees whose basic wage or salary exceeds Rs 1500 monthly, the appropriate rate specified in Part II of this Schedule.

PART II
OTHER EMPLOYEES

Basic Wage or Salary

In respect of employees who earn up to Rs 550 per month or who are remunerated on a piece-rate basis	15.5% rounded up to the next 25 cents
Above 550 up to 600 per month ...	Rs 89
Above 600 up to 650 per month ...	Rs 97
Above 650 up to 700 per month ...	Rs 105
Above 700 up to 750 per month ...	Rs 113
Above 750 up to 800 per month ...	Rs 120
Above 800 up to 850 per month ...	Rs 128
Above 850 up to 900 per month ...	Rs 136
Above 900 up to 950 per month ...	Rs 143
Above 950 up to 1000 per month ...	Rs 151
Above 1000 up to 1100 per month ...	Rs 163
Above 1100 up to 1200 per month ...	Rs 178
Above 1200 up to 1300 per month ...	Rs 194
Above 1300 up to 1400 per month ...	Rs 209
Above 1400 up to 1500 per month ...	Rs 225
Above 1500 up to 3600 per month ...	Rs 240
Above 3600 up to 4000 per month ...	Rs 250
Above 4000 up to 5000 per month ...	Rs 275
Above 5000 up to 6000 per month ...	Rs 300
Above 6000	Rs 325"

In order to complete the picture, it is now necessary to refer to the two further Remuneration Amendment Orders. The first (No. 145 of 1981) was made on 24th June, 1981 and was, by paragraph 4, deemed to have come into operation on 1st July, 1980. Paragraph 3 provided:-

"The principal Order is amended -

(a) by deleting subparagraph (2) of paragraph 3 and replacing it by the following subparagraph -

(2) The wage or salary specified in the First Schedule includes the appropriate additional remuneration granted by the Additional Remuneration Act 1980.

(b) by deleting the First Schedule and replacing it by the Schedule to this Order."

It should be noted that the monthly wage of a Chief Clerk in his first year was given in column 2 of the substituted First Schedule as Rs.1,012 and that the weekly wage of a male factory worker over 18 was given as Rs.124.23.

The second of these orders (No. 262 of 1981) was made on 6th October, 1981 and was, by paragraph 4, deemed to have come into operation on 1st July, 1981. Paragraph 3 amended the principal Order in two relevant respects:

"(a) in paragraph 3(2) by deleting the figure '1980' and replacing it by the figure '1981';

(b) by deleting the First Schedule and replacing it by the Schedule to this Order."

It should further be noted that the monthly wage of a Chief Clerk in his first year was given in column 2 of the newly substituted First Schedule as RS.1175 and that the weekly wage of a male factory worker over 18 was given as Rs. 143.50.

Against this statutory background the appellant advanced the contention, which had been accepted by the Industrial Court, that the appropriate increase for the respondent was not related to his piece-rate earnings but was 15.5 per cent of the guaranteed minimum wage, being a sum which exceeded by ten per cent the wage (Rs. 124.23 per week) of a male factory worker over 18. Such an increase would have yielded a weekly wage of Rs. 157.83 which, when appropriately multiplied, would have worked out at much lower monthly earnings than those of the respondent for July, 1981.

The provision to be construed is section 3(1) of the 1981 Act:-

"As from the appointed day, every employer shall pay to every employee in his employment, in addition to the basic wage or salary payable to the employee, the appropriate additional remuneration."

On its face this provision imposes a universal and unqualified obligation. If the required definitions are imported from section 2 and the words of those definitions which their Lordships consider to be inapplicable are omitted, the sub-section means that, as from 1st July 1981 (the appointed day), every employer was obliged to pay to each of his employees remunerated on a piece-rate basis, in addition to the amount payable in respect of his work and agreed upon in his contract of service (his basic wage), the appropriate amount determined in accordance with the

second column of [Part II of] the Second Schedule corresponding to the basic wage payable to the employee and specified in the first column of [that Part of] that Schedule. (The words in square brackets above were omitted by a subsequent amendment.)

The first column of the Second Schedule to the 1981 Act is headed "Basic Wage or Salary" and the first entry below the heading is "In respect of employees who earn up to Rs. 550 per month or who are remunerated on a piece-rate basis". This entry is followed by a graduated scale of monthly earnings, as already set out above, with a figure in the second column opposite each pay bracket in the scale. For example, the figure Rs. 163 is set opposite the bracket "Above 1000 up to 1100 per month".

In their Lordships' opinion, the words "or specified in" in the definition of appropriate additional remuneration are inapplicable because no amount of additional remuneration is specified in the second column of the Second Schedule in relation to piece-rate workers, but the appropriate amount of increase for piece-rate workers can be "determined in accordance with" that column by resorting to the figure of 15.5 per cent in that column which is set against the entry "In respect of employees who earn up to Rs. 550 per month or who are remunerated on a piece-rate basis" in the first column.

Similarly the basic wage for piece-rate workers is not "the amount payable in respect of his work and prescribed in any other enactment", but it is "the amount payable in respect of his work and agreed upon in his contract of service". Admittedly, what is agreed upon in the case of a piece-rate worker is, strictly speaking, the rate of pay and not the amount, but (1) it should be noted that the relevant part of the definition of basic wage or salary (section 2(i)(A)) is dealing only with piece-rates and task work (which is akin to piece-rate work) and (2), as their Lordships have already observed, paragraph 9(1) of the Second Schedule to the principal Order furnishes a similar example of the indiscriminate use of expressions like "rates" and "amount" as if they were interchangeable, by providing that agreed piece-work rates "shall not be less than a sum exceeding the relevant rate specified in the First Schedule by ten per cent". Therefore, in the view of their Lordships, the use of the word "amount" in the definition in section 2(i)(A) does not at all prevent the basic wage of a piece-rate worker from being the actual amount payable in respect of his work, as the words used expressly convey. Their Lordships would also point to the definition introduced by paragraph 3 of the 1977 Order into paragraph 2 of the principal Order:-

'"earnings', in relation to a worker -

(a) means basic wages; and

(b) includes -

(i) wages for work done in excess of a normal day's work or on a public holiday;

(ii) remuneration paid under paragraphs 5, 6 and 9 of the Second Schedule."

The reference to paragraph 9 in this definition shows that in the principal Order the expression "earnings" includes remuneration at piece-rates.

Finally, the agreed rates for a piece-rate worker have relevance, as a base from which to calculate the appropriate increase, where (and only where) those agreed rates produce earnings in excess of the guaranteed minimum: therefore it would have been pointless for the legislature, when defining the basic wage, to include in the definition of "basic wage or salary" an amount which was based on agreed rates, unless the legislature also contemplated that "appropriate additional remuneration" might fall to be added to an amount of earnings which exceeded the guaranteed minimum.

It is also instructive to note Mr. Collendavelloo's reference on behalf of the respondent in the Supreme Court to the Special Wage Increase Act 1979, which did not mention piece-rate workers and which spoke only of increases "specified in" the Schedule, in contrast to the 1980 and 1981 Acts, which did mention piece-rate workers and spoke of increases of the appropriate amount "determined in accordance with or specified in" the Schedule. This change of language, accompanying the enlargement of the subject-matter to include piece-rate workers, fits in exactly with their Lordships' view expressed above.

Their Lordships have analysed the statutory provisions and given their conclusions before setting out the appellant's arguments and the reasoning of the courts below in order that the erroneous basis of those arguments and of the Industrial Court's judgment might the more easily appear. In the Industrial Court, as shown in the judgment, the appellant contended "that the various rates ought not to be increased since the basic wages of the workers have been increased by the relevant margin provided by the Act" and that the respondent's basic wage was the guaranteed minimum, namely, a factory worker's prescribed minimum wage plus ten per cent. The learned magistrate accepted these contentions and concluded his judgment by saying:-

> " It is my view therefore that, whereas the Act affects the computation of the basic salary as I have outlined above, it does not affect the rate agreed upon between the parties for piece-work.
>
> The plaint is accordingly dismissed with costs."

Their Lordships would respectfully point out that the fallacy in the Industrial Court's reasoning was to regard the guaranteed minimum wage of the piece-rate worker as his "basic wage". This error can be committed only by disregarding the definition (nowhere mentioned in the learned Magistrate's judgment) of "basic wage or salary" in relation to piece-rate workers in section 2 of the 1981 Act.

On the respondent's appeal the Supreme Court's judgment adverted to the confusion which had led to the adoption by the Court below of the guaranteed minimum as the "basic wage" and continued:-

> "The question also arises whether, at any rate with regard to workers remunerated at piece-rates, the term 'basic salary' is not a term of art in the light of the definition specially given to it in the Additional Remuneration Act of 1981."

The Court, however, gave countenance to the idea that any upward movement in the guaranteed minimum was bound to be reflected in the rate per piece. After quoting the definition of basic wage or salary in section 2, the Court then concluded that that definition applied equally to the guaranteed minimum wage and to the agreed amount payable (by reference to piece-rates) in respect of work done. This conclusion, with which their Lordships agree, is followed by an explanation to which, as expressed by the Court, their Lordships feel unable to subscribe:-

> "This is so because, first, as we have seen when examining the first point in this judgment, the prescribed minimum salary (that is, the base) is the governing factor that determines piece-rates and any increase in the base is bound to be reflected by an equivalent increase in the piece- rates; and, secondly, where piece-rates are otherwise agreed as amounts payable to a worker, those rates are subject to the statutory increases superseding the agreement of the parties."

The judgment concluded:-

> "For the above reasons, the appeal is allowed. For the judgment of the trial court we substitute a judgment ordering the respondent to pay the amount claimed with costs.
>
> The respondent to pay the costs of this appeal."

In paragraph 5 of its printed case on this appeal the appellant continued to attribute to the respondent the argument that the effect of the 1981 Act was to oblige the appellant to pay him an increase of 15.5 per cent per piece over the piece-rates agreed by the parties for the different types of work in which the respondent engaged. And in paragraph 6 of the case the appellant laid stress on the Supreme Court's view, already noted, that the piece-rates were bound to rise with any increase in the guaranteed minimum wage and were themselves subject to the 15.5 per cent increase provided for by the 1981 Act. The appellant then in paragraph 7 described the issue in the appeal as whether the effect of section 3(1) was to increase the minimum weekly wage payable to the respondent by 15.5 per cent without affecting the agreed piece-rates or was, "as the respondent contends", also to increase the piece-rate payable to the respondent by that percentage.

Their Lordships would observe that the true alternative to the appellant's case was that relied on by the respondent and his fellow plaintiffs in paragraph 3 of their plaint, whereby they claimed Rs. 882.50, being 15.5 per cent of their earnings for the month of July 1981 amounting in all to Rs. 5664.98 and set out in annexure A to the plaint. The respondent's earnings were Rs. 1276.02 and his claim was for Rs. 198.50, and the learned Magistrate's judgment commences with the statement that these figures "are agreed by all parties concerned to have been rightly computed". When one recalls that the 15.5 per cent increase is to be rounded up to the next 25 cents, a calculation reveals that, if the respondent had been relying on a 15.5 per cent increase (suitably rounded up) on each of the piece-rates tabled in annexure A, he would have been claiming to receive Rs. 1650, an increase of Rs. 374 (or 29.3 per cent) over Rs. 1276, the amount he was actually paid. But in fact he claimed, as their Lordships would have expected on their reading of the 1981 Act, Rs. 198.50, that is, 15.5 per cent of his total earnings for the month, without any recourse to the different piece-rates.

The appellant, however, continued on the same tack, maintaining that percentage increases on the different piece-rates were the real alternative to its own solution and presenting its argument in a new paragraph which by leave it added to its printed case. Increases calculated by this method yield absurdly favourable results for the employee, but the obvious fallacy of relying on the method as a *reductio ad absurdum* is that a piece-rate cannot be "the amount payable" nor is it a wage or salary (which must be weekly or monthly, depending on the contract of employment). Nor is it logical for the appellant to describe the application of the percentage to the total monthly earnings as "a departure from what was contractually agreed, i.e., the piece-rate". It is, on the contrary, an application of

the percentage to the amount payable, which has resulted from work done at the agreed rates. Nor does the respondent's case suffer because the added remuneration was to be paid "as from the appointed day". This merely requires the 15.5 percentage to be applied to the earnings as from 1st July 1981 when they have been ascertained.

Their Lordships have been greatly assisted towards their conclusion by the lucid argument of Sir Hamid Moollan Q.C. He reminded their Lordships that the words in paragraph 9(1) of the Second Schedule to the principal Order, "which shall not be less than a sum etc.", do not describe a specific amount and that at the beginning of a month it was impossible to say what a piece-rate worker's earnings for that month would be: one cannot "specifically include" in a schedule that which remains to be determined. He also pointed out that the expression "basic wage or salary" in the Additional Remuneration Acts was not the same thing as the guaranteed minimum wage under the Remuneration Amendment Orders, but was the base or starting point from which to calculate appropriate increases. The Remuneration Amendment Orders 145/1981 and 262/1981 reproduced the effect of the tables in the Schedules to the 1980 and 1981 Acts; for example, a Chief Clerk's initial earnings are increased from Rs. 1012 to Rs. 1175 because the appropriate increase for a worker earning from Rs. 1000 to Rs. 1100 was Rs. 163; and a factory worker's weekly earnings are increased from Rs. 124.23 to Rs. 143.50 because, as a worker receiving not more than Rs. 550 per month, his increase is 15.5 per cent, but his new wage can be worked out exactly by reference to his former wage and the increase can be "specifically included" in the Schedule to the Order, whereupon the 1981 Act ceased to apply to him.

Sir Hamid Moollan made two other cogent points:

(1) The respondent's interpretation of a piece-rate worker's basic wage in section 2(i)(A) was strikingly confirmed by reference to the definitions in section 2(i)(B) and (C);

(2) Section 10 of the 1981 Act, which their Lordships have set out above, shows how the scheme of disapplication of an Additional Remuneration Act works when a new Remuneration Order is made.

The appellant, if defeated on its main submission, fell back on the alternative argument that on 6th October 1981, when Remuneration Amendment Order 262/1981 was made, the 1981 Act had ceased by virtue of section 9 to apply to the respondent. The section reads:-

> "This Act shall cease to apply in relation to any category of employees who are governed by a Remuneration Order and the Order is amended after the commencement of this Act to specifically include the increase provided by this Act."

(One must read in after the word "and" words such as "in relation to whom".)

It is true that the respondent belonged to a category of employees governed by the principal Order and that that order was amended on 6th October 1981 after the commencement of the 1981 Act on 1st July 1981; and the appellant submitted that the Order was amended to specifically include the increase provided for the respondent by the 1981 Act.

But the alternative argument is really the main argument put in a different way and depends on the assumed rightness of the main argument in order to prevail.

Their Lordships therefore reject the alternative argument on the simple ground that Order 262/1981 did not "specifically include" the 15.5 per cent increase provided by the 1981 Act for the respondent. No new basic wage or increase could be less specifically included than one which was not even mentioned in Order 262/1981 and which could be ascertained only by applying the percentage given in the Act to an amount not yet determined.

Accordingly, for the reasons given in this judgment, their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed and the judgment of the Supreme Court affirmed.

The appellant must pay the respondent's costs of this appeal.