

Clothing Factory, National Workers' Union, Avadi, Madras

Vs

Union of India by its Secretary and Others

Civil Appeal No. 1929 of 1990

A. M. Ahmadi, M. Fathima Beevi JJ)

20.04.1990

JUDGMENT

AHMADI, J.-

1. Special leave granted.

2. The workmen of the ordnance clothing Factory, Avadi, Madras represented by the petitioner/appellant-Union. The workers of the factory are divided into two categories, namely, (I) day workers and (ii) piece-rated workers. The day workers are paid wages in the times scale of Rs 260-400 on the basis of their actual attendance whereas the piece-rated workers are paid on actual output or production calculated on the basis of time required for making the item by multiplying the same by the hourly rate worked out by dividing the mean of the time scale by monthly working hours e.g. Rs 330 divided by 195 hours = Rs 1.69 (Rs 330 being the mean of the time scale of Rs 260-400 and 195 hours being the total monthly hours).

3. The appellant-Union contends that the daily normal working hours of the workmen are 8 during the week except on Saturdays when the working hours are 4 3/4 only. Thus the total working hours during the week come to 44 3/4 hours. If the piece-rated workers are required to work beyond the aforesaid normal working hours they are entitled to overtime wages under Section 59 of the Factories Act. 1948. That Section, Insofar as is relevant, reads as under:

"59. (1) Where a worker works in a factory for more than nine hours in any day or for more than forty-eight hours in any week, he shall, in respect of overtime work, be entitled to wages at the rate of twice his ordinary rate of wages."

This sub-section postulates payment of extra wages at twice the ordinary rate of wages for those workers of the factory who are required to work for more than 9 hours in a day or for more than 48 hours in a week. The appellant-Union filed a writ Petition No. 2356 of 1985 in the High Court of Madras praying for an appropriate writ or direction to the respondents to pay the piece-rated workers extra or overtime wages at the rate prescribed by Section 59(1) if the total working hours of any workman exceeded 44 3/4 hours in a week. The appellant-Union contended that the piece-rate system was introduced some time in 1963 and since then the piece-rate workers were paid overtime wages accordingly of work done beyond the normal working hours but the same was abruptly discontinued from 1983; so much so that they were even denied the wage at the normal rate for work done beyond 44 3/4 hours and up to 48 hours, i.e. 3 1/4 hours. It is, however, admitted that if the workmen are required to work beyond 48 hours in a week, they are paid extra wages in accordance with Section 59(1) of the Factories Act. Thus the controversy is in respect of the rate at which

piece-rate workers should be paid wages for the work put in between 44  $\frac{3}{4}$  and 48 hours in a week. The workers claim they are entitled to extra wages for these 3  $\frac{1}{4}$  hours at double the normal rate in accordance with Section 59(1) of the Factories Act. In support reliance is placed on the Ministry of Defense letter No. F.8(5)/56/D/Civi.II) dated September 1, 1959 which inter alia provided that in all cases where overtime pay is admissible to civilian personnel, both under the provisions of the Factories Act and Departmental Rules, the overtime pay should be calculated as under:

1. For work in excess of normal working hours and up to 9 hours on any day or 48 hours in a week, overtime will be paid at the rate prescribed in the departmental rules. For calculation of overtime pay should be calculated as under:
2. For work in excess of 9 hours on any day or 48 hours in a week overtime will be paid at the rates prescribed in the Factories Act. For calculating overtime pay under this item total pay including all allowances will be taken into account.

By a subsequent communication dated February 13, 1963 the Ministry clarified that having regard to the revision of piece work rates effected in the ordnance factories co-relating them to the monthly scales of pay sanctioned by the Ministry's letter dated January 16, 1954, the distinction between High Paid and Low Paid piece workers stood abolished and keeping in mind the Ministry's letter dated September 1, 1959, the president was pleased to sanction the following methods of calculation and payment of overtime to piece-rate workers:

(i) Piece workers under P & A Regulations Part 1 1923.

- a. No overtime will be admissible for working overtime in the day shift. But for the purposes of distribution of PW profits, the time wages element in respect of overtime up to 9 hours per day or 48n hours a week will be determined at the rate of P/200 per hour, where 'P' represents the monthly basic pay and dearness pay where admissible.
- b. An extra  $\frac{1}{2}$  hour pay calculated at the hourly rate of 1/200 of the monthly basic pay or the monthly basic pay and dearness pay, where admissible, for every hour of systematic overtime worked on the night shifts in addition to their piece work earnings.

*(I piece workers under the Factories Act*

For each hour of overtime in excess of 9 hours on any day or 48 hours in a week a piece worker will be paid 1/200 of monthly basic pay plus 25 per cent of basic pay plus twice all allowances. In other words, if 'P' represents the monthly basic pay and 'D' stands for all allowances such as dearness allowance, overtime for each hour will be equal to  $P/200 + 1/4/200 + 2D/200$ .

This order was directed to take effect from March 1, 1954. Thereafter, by a corrigendum issued on October 21, 1965, sub-paragraph Ministry's letter of September 1, 1959 was directed to be substituted w.e.f. July 2, 1965 by the following.

"1. For work in excess of normal working hours and up to 9 hours on any day or 48 hours in a week, overtime will be paid at the rate prescribed in the departmental rules. For calculating overtime pay under this item, basic pay, dearness allowance, special pay, personal pay) in the case of re-employed pensioner and city compensatory allowance shall be taken into account. House rent allowance,

conveyance allowance, travelling and daily allowances, permanent travelling allowance, clothing allowance, uniform allowance, washing allowance and children education allowance shall not be include."

But a Circular No. 1823/ LB dated February 2, 1983 it was stated that orders had since been received from the Ordnance Factory Board 'to stop payment of Departmental Overtime when piece workers work beyond normal working hours and up to 9 hours a day or 48 hours a week'. It was further clarified that they would be entitled to piece work earnings only for the period they work extra hours. Thus the payment of departmental overtime for January 1983 in February 1983 was stopped. However, with regard to workmen of the Ordnance Factories and other industrial establishments under the Defence Ministry governed by the Factories Act, it was laid down by the communication dated September 11, 1987 that such workmen shall be entitled to overtime allowances at time rate for work done in excess of prescribed hours and up to 48 hours a week, in accordance with Ministry's O.M. dated June 25, 1983, but it was clarified that the time rate of wages will be calculated with reference to pay in the revised scale w.e.f. the date the worker has been brought on the revised scale introduced from January 1, 1986. In the light of the above, the appellant-Union contends that as the prescribed hours of work were 44  $\frac{3}{4}$  hours per week, the workmen were entitled to overtime wage or allowance for work done beyond 44  $\frac{3}{4}$  hours and up to 48 hours a week at double the ordinary rates, which has been wrongly and illegally discontinued.

4. The case set up by the respondents is that the workers of the petitioner/appellant-Union are mostly doing tailoring work, stitching uniforms, tents, parachutes, covers, etc. in the Ordnance Clothing Factory, a Government of India Undertaking, and are paid wages on piece rate basis. It is submitted that while fixing the piece work rate the labour involved in the production of each article is analyzed in detail and the basic time is determined to which 25 per cent incentive is added and the wage is paid on the basis of time so calculated by taking the arithmetic mean of the scale to which the worker belongs and dividing the same by the figure 195 representing the number of standard hours for a month. Thus if a piece worker completes his job allotted to him he would earn his basic time wage plus an extra 25 per cent as incentive. It is further stated that the payment of overtime wages for the work done beyond the normal working hours of 44  $\frac{3}{4}$  and up to 48 hours in a week is regulated by the Departmental Rules and for the period exceeding 48 hours in a week or 9 hours on a single day is regulated as per the requirements of the Factories Act. According to the respondents the Defence Ministry letter of September 1, 1959 as amended by the corrigendum of October 21, 1965 does not apply to piece workers but their case in regard to the grant of overtime payment is governed by the Defence Ministry letter dated February 13, 1983 as amended by the Corrigendum of January 18, 1970. In fact the former letters apply to day workers who are paid wages on the basis of attendance. Thus according to the respondents piece workers are not entitled to overtime wages at double the rate for work done in excess of 44  $\frac{3}{4}$  hours up to 48 hours in a week because they are entitled to piece work profit in the form of earnings which is included in their wage structure itself to compensate them for the extra working hours up to 48 hours in a week. Yet on account of a mistake such payment in excess of 44  $\frac{3}{4}$  hours up to 48 hours in a week because they are entitled to piece work profit in the form of earnings which is included in their wage structure itself to compensate them for the extra working hours up to 48 hours in a week. Yet on account of a mistake such payment was made till December 1982 but when it came to light the same was discontinued by the circular letter dated February 2, 1983. This discontinuance was challenged in Writ Petition No. 10095 of 1983 in the Madras High Court which was repelled by Mohan, J. by his order dated December 6, 1983. The appeal filed against the decision of Mohan, J. was still pending in the High Court when the proceedings giving rise to this appeal were initiated by this Union. Lastly it is pointed out that according to the terms of Section 59 of the Factories Act, the question of

payment of overtime at double the rate can arise only if the piece worker has worked for more than 9 hours per day or 48 hours per week and not to cases of the present type. The respondents, therefore, pray that the present appeal is not maintainable and deserves to be dismissed.

5. In the rejoinder filed on behalf of the appellant-Union it is contended that the 25 per cent incentive is not to compensate for overtime work beyond 44  $\frac{3}{4}$  hours and up to 48 hours in a week but is a measure to provide for rest intervals, minor mechanical breakdowns, tools sharpening or grinding or hold-ups for want of raw materials, etc. to arrive at the operational time for production of an item. The appellant, therefore, contends that the contention that the letters dated September 1, 1959 and October 12, 1969 applied only to the monthly-rated day workers is misconceived. This is apparent from the subsequent letter dated February 13, 1963 as amended by the Corrigendum of January 18, 1970. Therefore, according to the appellants, the contention that piece work profit is incorporated in the wage structure applicable to piece-rated workers is not correct and clearly manifests that the discontinuance of overtime is based on a wrong understanding of the relevant orders. In support strong reliance is placed on this court's decision in *Union of India v. G. M. Kokil*<sup>1</sup>. Lastly it is contended that the respondents were not justified in abruptly discontinuing the grant of overtime wages on the pretext of a so-called 'mistake' and their action in so doing is clearly high-handed amounting to unfair labour practice not expected from a governmental undertaking. It is also contended that the circular letter of February 2, 1983 is a document of doubtful origin and cannot in any case override the prior orders contained in the letters of the Ministry of Defence earlier referred to. The appellant, therefore, contends that the impugned decision needs to be set aside and the overtime payments which have been unilaterally and arbitrarily discontinued restored.

6. From the above resume it is clear that the controversy is limited to the question of non-payment of overtime wages for work done beyond the normal hours of 44  $\frac{3}{4}$  hours and up to 48 hours in a week i.e. for 3  $\frac{1}{4}$  hours in a week. There is no dispute that the workers are paid overtime wages for work done in excess of 9 hours on any day or 48 hours in any week in accordance with Section 59 of the Factories Act. This section does not provide for overtime wages for work done in excess of the normal working hours and up to 48 hours. In *Kokil case*<sup>1</sup> the point for consideration was whether the employees working in the factory of the Indian Security Press, Nasik, were entitled to overtime wages under Section 59 of the Factories Act read with Section 70 of the Bombay Shops And Establishments Act, 1948, for the work done beyond the normal working hours. According to them their normal working hours were 44 per week, they were required to work in excess thereof but they were paid overtime wages for the extra hours of work at the basic rates though they were entitled to overtime wages at double the normal rate. In that case three contentions were raised, viz. (i) since none of the respondents was a 'worker' under section 2(I) of the Factories Act, their case was not governed by Section 59 of the said Act read with Section 70 of the Bombay Shops and Establishments Act; (ii) assuming the respondents were entitled to claim the benefit of Section 59 read with Section 70 as aforesaid even though none of them was a worker, Section 59 became inapplicable by virtue of Rule 100 made under Section 64 of the Factories Act; and (iii) since none of the respondents was a 'workman' under Section 2(s) of the Industrial Disputes Act, 1947, the application under Section 33-C(2) thereof was not maintainable. This Court, on a true interpretation of Section 70 of the Bombay Shops and Establishments Act, came to the conclusion that the non-obstinate clause found therein made it clear that Section 59 would apply and the same non-obstinate clause kept out the application of Section 64 read with Rule 100. On the third question this court confirmed the labour Court's finding that the respondents were workmen under the Industrial Disputes Act. In this view of the matter this Court held that the employees were entitled to overtime wages under section 59 of the Factories Act.

7. Now under the Presidential order of September 1, 1959 overtime wage was payable 'for work in excess of normal working hours and up to 9 hours on any day or 48 hours in a week' at the rate prescribed in the departmental rules. By the subsequent presidential order of February 13, 1963 the method of calculation and payment of overtime wage to piece workers was outlined. Under these orders the day workers are allowed overtime wages for working beyond normal working hours and up to 48 hours in a week. This is clear from clause (I) of the letter dated February 13, 1983. Even the Manual of cost accounting. (1968) meant for Ordnance and Ordnance and Ordnance Equipment Factories indicates that in the case of piece workers no separate payment for overtime is permissible under the departmental rules for day shift workers but they are entitled to piece work earnings only. That is why in the earlier Writ Petition No. 10095 of 1983 filed in the Madras High Court a contention was based on Article 14 of the constitution that the management was guilty of discrimination inasmuch as day workers of day shifts were entitled to overtime wages whereas piece workers were denied the same. The contention was turned down by Mohan, J. whose decision was challenged in appeal before the High Court which appeal has since been dismissed for default. It is indeed surprising why another Writ petition No. 2356 of 1985 was filed in the same High Court, notwithstanding the pendency of the said appeal, which writ petition on transfer to the Central Administrative Tribunal came to be disposed of by the impugned Judgment and order. In fact it is doubtful if this second writ petition would have been entertained in view of the earlier decision of Mohan, J. rendered several years back soon after the discontinuance of grant of overtime by the circular letter of February 2, 1983 merely because a different union was espousing the cause, since the cause was identical. The decision of this court in *Kokil case*<sup>1</sup> is clearly distinguishable on facts. In that case there was no dispute that if Section 59 of the factories Act applied the workers were entitled to overtime wages for work done beyond the normal hours and up to 48 hours. That would naturally depend on the relevant service rules since Section 59 *stricto sensu* applies to cases of overtime work done beyond 9 hours a day or 48 hours a week. In the present case the grant of overtime wages for the period in excess of the normal working hours of 44  $\frac{3}{4}$  per week an up to 48 hours is governed by the relevant departmental rules and Section 59(1) of the Factories Act comes into play only if a piece worker has worked beyond 9 hours in a day or 48 hours in a week and not otherwise. Further, piece workers are denied overtime wage for these 3  $\frac{1}{4}$  hours of work in a week because this factor is taken care of in the calculation of the piece rate. We are, therefore, of the opinion that the ratio of *Kokil case*<sup>1</sup> has no application to the facts of the present case.

8. For the above reasons we see no merit in this appeal. The appeal, therefore, fails and is dismissed. No order as to costs.

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