ANDHRA PRADESH HIGH COURT

Hyderabad Allwyn Metal Works Ltd

Vs.

Employees State Insurance Corporation

C.M.A. No. 79 of 1979 and 150 of 1980

(Gangadhara Rao and P.A. Chowdary, JJ.)

07.08.1980

JUDGMENT

Gangadhara Rao, J.

1. The question for our consideration in these two appeals is whether overtime allowance is not 'wages' within the meaning of S. 2 (22) of the Employees' State Insurance Act, 1948?

2. In C.M.A. No. 79 of 1979, the appellant is the Hyderabad Allwyn Metal Works Limited, Hyderabad. It is a Company manufacturing refrigerators, bus-bodies, and military appliances. It is covered by the provisions of the Employees State Insurance Act 1948 (hereinafter referred to as 'the Act'). The appellant was paying both the employer's and Employee's contribution to the respondent, The Employees' State Insurance Corporation Hyderabad (hereinafter referred to as 'the Corporation'). While so, the Insurance Inspector visited the factory on some days in Nov. and Dec. 1974 and inspected the records. He found that the appellant was not including the overtime allowance paid to its employees for calculating the rate of contribution payable under the Act. Therefore, the Corporation wrote a letter on 7th Apr. 1975, calling upon the appellant to pay contribution on overtime allowance paid to its employees retrospectively for the period from 1st Aug. 1973 to 31st July, 1974. The appellant represented that overtime allowance paid to its employees was not wages within the meaning of the Act. Nevertheless, by its letter dated 10th Nov. 1976 the Corporation called upon the appellant to pay a sum of ₹ 1,12,601-79 by way of contribution on the payment of overtime allowance and interest thereon on ad hoc basis. Questioning that notice, the appellant filed a petition under S. 75 in the Employees' State Insurance Court at Hyderabad, contending that over time allowance paid to its employees was not wages within the meaning of S. 2 (22) of the Act, and no contribution need be paid on such allowance and the demand to pay contribution by the Corporation on such allowance was illegal. The Employees' Insurance Court, following the decisions of Bombay and Delhi High Courts held that overtime allowance was wages. Questioning that order, the appellant has filed C.M.A. No. 79 of 1979.

3. In C.M.A. No. 150 of 1980 the Employees' State Insurance Corporation is the appellant. The

respondent is the Indian Drugs and Phrmaceuticals Limited, Hyderabad. It is a Government Undertaking dealing in the manufacture and sale of drugs. Most of the employees are covered by the Employees' State Insurance Scheme. It was paying contribution of the employers and employees on the basis of the weekly wages. On 3rd' July 1978 the appellant-Corporation issued a notice to the respondent-Company to pay ₹ 8,331/- towards contribution for the period from 31st Dec. 1969 to 30th Sept. 1970 on the overtime allowance paid to its employees and also stipends paid to the apprentices. Question in that notice, the respondent-Company filed a petition under Section 75 of the Act before the Employees' Insurance Court at Hyderabad. The Court held that the stipend paid to the apprentices could not be treated as wages and the apprentices could not be considered as employees under the Act, and therefore, the demand of the Corporation for contribution on the stipend amounts paid to the apprentices was not valid. On the question whether the overtime allowance was wages within the meaning of S. 2 (22) of the Act, relying upon a decision of the Calcutta High Court and also the provisions. of the Act, the Insurance Court held that overtime allowance was not wades within the meaning of the Act and, therefore, the respondent-Company was not liable to pay contribution on that amount. In the result, the petition was allowed. Questioning that order, the Corporation has filed C.M.A. No. 150 of 1980.

4. The question that falls for our consideration in these two appeals is, whether the overtime allowance paid to the employees by the two Companies are wages within the meaning of the Act? In order to decide this question it is necessary to refer to the relevant provisions of the Act.

S. 2 (22) of the Act defines 'wages' as follows:

"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 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, 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."

According to the first part of this definition, there should be a contract. It can be express or implied. On the fulfilment of the terms of that contract, all remuneration paid or payable in cash to an employee is 'wages'. According to the second pars, any payment to an employee in respect of any period of authorised leave, lock-out. "like, which is not illegal or lay-off, is wage,. According to the third part, other additional remuneration, if any paid at intervals not exceeding two months is also wages. Then sums that are not to be included in the wages are mentioned in the fourth part. The definition does not exclude overtime wages in the fourth part. It is not also argued that it is additional remuneration paid at intervals not exceeding two months. Obviously, it does not fall under the second part of the definition.

5. So the next question is whether it falls under first part? It means, whether it is remuneration paid or payable in cash to an employee upon the fulfillment of the terms of the contract of employment, express or implied. In the case on hand, the overtime allowance was in fact paid. Remuneration is payment made for the work done. It was also paid in cash. Thus, it is remuneration paid in cash to an employee.

6. But, it is submitted by the learned counsel for both the companies that there is no contract of employment express or implied, in the matter of payment of overtime wages, for the employer may or may not ask the employee to do work overtime, and similarly, the employee may or may not do overtime work. It is admitted by the learned counsel for both the parties that in the original agreement between the employer and employees there is no term regarding the overtime work and payment of overtime wages.

7. But overtime work is done by an employee who is already. employed and who has already done work during the stipulated working hours. It is only when he works after the stipulated working hours it is said that he has done work overtime, and under S. 59 of the Factories Act, 1948, when a worker works overtime, he is to be paid wages at the rate twice his ordinary rate of wages. The factories Act does not define the word 'wages'. It only stipulates the amount that should be paid for overtime. If a worker is not already working in a factory there is no question of his working overtime or payment of overtime wages for him. A new worker employed to work beyond the stipulated working hours does not work overtime. He will be like any other worker who will be paid the usual wages. Therefore, when we say that an employee has worked overtime, it is referrable to and flows from the original contract between the employer and the employee. In addition, when an existing employee is asked by the Management to. work overtime and he does it, it means, that there is an offer and acceptance and consequently, there is an implied contract of employment, for the time being. When once overtime work is given by the Management and it is done by the existing employee and remuneration is paid for that work, it means that it is remuneration paid in cash to an employee on the fulfilment of the terms of an existing and a further implied contract. Therefore, overtime allowance comes within the first part of the definition of 'wages'. If it was the intention of the Legislature to exclude overtime allowance, then they would have specifically excluded it in the fourth part of the definition. It is not as if the Legislature was not aware of the payment of overtime wages when it passed the Act. S. 2 (9) of the act defines 'employee' as meaning, any person employed for wages in or in connection with the work of a factory or establishment to which the Act applies; but it does not include any person so employed whose wages, excluding remuneration for overtime work, exceed one thousand rupees a month. Thus, an employee is a person employed for wages in or in connection with a factory or establishment, but his wages, excluding remuneration for overtime work should not exceed one thousand rupees a month. Thus the Legislature was aware of overtime work and payment of overtime wages when it passed the enactment. It specifically excluded overtime wages when it defined an 'employee'. If it was the intention of the Legislature to exclude remuneration for overtime work from the definition of 'wages', it would have specifically said so in S. 2 (22) of the Act. On the other hand, the definition of the word 'employee' in S. 2 (9) of the Act, shows that if an employee gets wages of rupees less than one thousand a month excluding remuneration for overtime work, he will be covered by the Act. The intention of the Legislature was to cover all such employees by the Act. That is why, perhaps, overtime remuneration was not excluded in the definition of 'wages'.

8. The learned counsel for the Companies, relying upon the First Sch. to the Act, has submitted that it excludes overtime wages. Before we refer to the First Schedule, we should refer to S. 39 of the Act. That section refers to the contribution payable by the employer in respect of.an employee to the Corporation. Sub-sec. (2)of that section says that the contribution shall be paid at the rates specified in the First Sch. Sub-sec. (3) says that a week shall be the unit in respect of which all contributions shall be payable under the Act. Sub-sec. (4) provides that the contributions payable in respect of each week shall ordinarily fall due on the last day of the week. The First Sch. refers to the method of payment of the amount of weekly contribution payable in a contribution period in respect of an employee. Cl. (1) provides that 0 it shall be calculated with reference to the average daily wages during the first wage period in respect of that employee ending in such contribution period. Cl. (2) defines the average daily wages. It says that if overtime wages are paid during that period in terms of the contract of employment express or implied or otherwise, they should also be taken into consideration. If an employee has worked on all the working days in a wage period of a month, the average daily wages will be arrived at by dividing the amount of wages payable to him by 26 if he is monthly rated. That is because he should be compulsorily given four weekly holidays. But, it does not mean that his overtime wages do not become payable to him, if he had worked on all the working days. All that it means is that, if an employee has worked for a month, his regular wages and overtime wages will be taken together and divided by 26 for arriving at his average daily wages. The question of many of the employees going out of the pale of the Act, if their overtime wages are also taken into consideration while computing their wages does not arise for the simple reason that the definition of S. 2 (9) of the Act excludes remuneration for overtime work. It is only when his wages, excluding remuneration for his overtime work does not exceed ₹ 1000/- a month, he will be considered to be an employee under S. 2 (9) of the Act. Therefore, we do not find any contrariety between the First Sch. and the other provisions of the Act. In fact, the First Schedule must be read as part of the Act, and the word 'wages' in the First Schedule must be understood in the light of the definition of 'wages' in S. 2 (22) of the Act and they must be read harmoniously. Thus, on a construction of the provisions of the Act, welcome to the conclusion that 'wages' include overtime wages paid to an employee within the meaning of the Act.

9. Now we will refer to the decisions cited by the learned counsel for both the parties.

10. In *Shivraj F. A. L. Works v. Regional Director Maharashtra*[1] a Division Bench of the Bombay High Court at Nagpur held that payment made to an employee for overtime work falls under S. 2 (22) of the Employees' State Insurance Act, so as to attract the special contribution payable by the employer. In that case, the employer was called upon to pay certain sum as special contribution under S. 73-A of the Act in respect of the remuneration paid by him to the workers who had worked overtime. The special contribution consists of such percentage payable not exceeding 5 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. The learned Judges observed that the provisions of S. 14 of the Minimum Wages Act, and S. 59 of the Factories Act do not leave any room for doubt that when a worker is paid remuneration for having worked overtime, that remuneration clearly partakes of the wages which are paid to him. They held that the remuneration paid for overtime work would be covered by the first part of the definition

[1]1974 Lab I C 328

of 'wages' in S. 2 (22) of the Act. When it was argued on behalf of the employers that where a monthly rated worker was asked to work overtime, that was not done in pursuance of any contract of employment and. therefore, one of the important ingredients of S. 2 (22) is not satisfied. The learned Judges observed:

> "It is difficult for us to accept this contention. Normally, when an employee or a worker works overtime, he does so at the bidding or the behest of the employer who offers an opportunity for doing overtime work and the employee agrees to work for a period in excess of his normal working days. Such an offer by the employer is made to an employee with whom he has a subsisting contract of employment, because unless the employee has a subsisting contract of employment, the concept of overtime work will not follow. The concept of overtime work must necessarily flow in our view out of the original contract of employment and it is difficult to see how it can be held that the moment the period of normal working day is over the contract of employment with the employee comes to an end at least for that day and there is some new arrangement by which the employee continues to work on the employer's establishment beyond the normal working day. If such working beyond the normal working day is dehors the period of work during the normal working day then the additional period during which the employee is being asked to work, will not really be in the nature of overtime work. What has to be taken into consideration is that an employee who has himself gone through his normal working day is being asked by the employer to work for an additional period and that is why he gets a right to the benefit of the provisions of S. 59 of the Factories Act or S. 14 of the Minimum Wages Act. There is no question of any fresh contract of employment being entered into and in our view, when an employee is asked to work beyond the normal working day, it is really done in pursuance of the original contract of employment which is being extended by the parties so far as the period of work is concerned ....."

11. They further observed: "When the definition refers to 'all remuneration', we see no difference on principle to exclude from this definition remuneration paid for additional period or overtime period. In our view by the very terms of the definition payment made on account of the overtime work will be included in the definition of wages."

12. We find considerable force in the reasoning of the learned Judges. In addition, we have also field that whenever an employee works overtime, there is again an implied agreement for the time being between the employer and the employee, in addition to the original agreement. The learned counsel for the Companies tried to distinguish the Bombay decision by stating that it arose under S. 73-A, where the special contribution was payable at such percentage of the total wage bill of the employer and since the total wage bill also includes the overtime wages paid that decision can have no application to the facts of our case. It is true that our case is not payment of special contribution under S. 73-A. But, in principle it makes no difference. In that case, the contention of the employer was that the total wage bill does not include the overtime wages. Therefore, the Court was called upon to consider whether the definition of 'wages' under S. 2 (22) of the Act also takes in overtime wages.

13. In *E.S.I.C. v. Birla C. S. & W. Mills*[2] the Delhi High Court also held that the definition of 'wages' in S. 2 (22) of the Employees' State Insurance Act, includes overtime payments also and as such, the employer was bound to make contribution in respect of the overtime payments. Misra, J. observed that the language of S. 2 (22) is wide enough to include overtime wages and there is nothing contained in the language used or the object and the context of the Act, or its other provisions to exclude the remuneration for overtime work from the wages. He followed the decision of the High Court of Bombay in *Shivraj F. A. L. Works v. Regional Director, Maharashtra, 1974 Lab I C 328 (Bom)* (Supra).

14. In *Mohd. Ismail v. E.S.I. Corporation Rom*[4]. a Division Bench of the Bombay High Court held that "the identification of the employee conceived under the Act depends on the calculation of his wages by reference to S. 2 (22) and not by reference to cl. 2 (a) of the First Schedule. The word 'payable' in S. 2 (22) is not used in contradiction to the word 'paid'. In other words, quantum of wages cannot differ merely because of the same being not paid and allowed to remain unpaid and, therefore, 'payable' due to some reason or the other because of some accident. The quantum of wages calculated artificially in terms of cl. 2 (a) of the First Schedule cannot be described as 'payable'. The figure is artificially calculated merely to determine the quantum of contribution required to be made by the employer and the employees in terms of the relevant section."

15. In *Hindusthan Motors Limited v. E.S.I. Corporation*[5] the Calcutta High Court took a different view. The learned Judges held that the definition of 'wages' in S. 2 (22) of the Act was exhaustive, it clearly stated what was included and what was excluded in the definition, and there was rid-provision in the Act for payment of overtime wages. They did not agree with the view of the Bombay High Court in Shivraj F. A. L. Works'. Regional Director, Maharashtra 1974 Lab I C 328 (Supra). They observed that, an employee for overtime work cannot claim as a matter of right additional remuneration for such work beyond the scheduled hours of work, that such a nature of work does not flow out of the general contract of employment between employer and employee, but it is something which arises out of an independent arrangement depending on various factors. For the reasons already stated by us, we are not able to agree with the view of the Calcutta High Court.

16. The learned counsel for the Companies tried to draw assistance from the decision of the Supreme Court in *Braithwaite & Co. (India) Ltd. v. Employees State Insurance Corporation*[6] In that case the question for consideration was whether the Inam paid to its workmen under the Inam scheme was not wages as defined in the Act. It was argued that the Inam in question was covered by the first part of the definition of 'wages' in S. 2 (22) of the Act. After referring to the scheme, Bhargava, J. observed, that the payment of Inam did not become a term of the contract of employment, it was not amongst the original terms of contract of employment, of the employees, the only offer of the scheme was to make incentive payment if certain conditions were fulfilled by the employees, the employer reserved the right to withdraw the scheme altogether without assigning any reasons, or to revise its conditions at his sole discretion, the payment of Inam was dependent upon the employees exceeding the target output appropriately applicable to him, if the target was not achieved no Inam was to be

[3]1977 (2) Lab L J 420 [5](1979) 54 F J R 484: (1979 Lab I C 852 (Cal)
[4]1978 Lab I C 1009 [6](1967) 33 F J R 247 : (1968 Lab I C 364)

awarded, that the payment of Inam was in no way connected with or part of wages, that it was on these conditions the employees were receiving the Inam and in these circumstances, it has to be

held that the payment of Inam cannot be held to have become a term of the contract of employment. But the facts of our case are different. Doing overtime work and payment of overtime wages is not the same as payment of inam under the scheme as in the Supreme Court case.

17. In the result, we hold that the overtime remuneration paid to the employees is "wages' within the meaning of S. 2 (22) of the Act. Hence we dismiss C. M. A. No. 79 of 1979 and allow C. M. A. No. 150/80. In the circumstances of the case, we direct each party to bear his costs in the two appeals.
Order accordingly.