

# CALCUTTA HIGH COURT

A.K. Basu

Vs

I.C.I. (India) Private Limited

(Sabyasachi Mukharji and R Pyne, JJ.)

21.03.1974

## JUDGMENT

### **Sabyasachi Mukharji, J.**

1. Ashim Kumar Basu, the appellant here is employed in the establishment of I.C.I. (India) Private Ltd., the respondent No. 1 herein. The appellant made an application under Section 14 of the West Bengal Shops and Establishments Act, 1963 before the Referee for payment of wage amounting to Rs. 110. 66 alleging the said sum had been unlawfully deducted by the said respondent No. 1. The said application was made on October 21, 1967. The claim related to dues on account of overtime. It appears, that subsequently the appellant filed another application whereby he amended the claim and sought relief only in respect of Rs. 97. 25. The respondent No. 1 disputed the claim of the appellant and on February 6, 1968 the Referee under the aforesaid Act made an order directing payment of Rs. 97. 25 to the appellant under Section 14(3) of the West Bengal Shops and Establishments Act, 1963. The claim of the appellant was on the basis that in respect of overtime work done by him in excess the period of 36 hours a week he was entitled to allowance at the rate of 1 1/2 times the ordinary wages, viz. the salary together with the dearness allowance. The stand of the respondent No. 1 was that in respect of overtime work over 36 hours a week but less than 48 hours a week the appellant was only entitled to be paid overtime allowance at the rate of 1 1/2 times the basic wages, that is to say he was not entitled to be paid overtime on the ordinary wage together with the dearness allowance. This was the main point in dispute between the parties. No specific point was taken in the written statement filed before the Referee questioning the jurisdiction of the Referee to adjudicate upon the dispute pending before him. In course of argument, however, before him it was urged that the dispute related to an industrial dispute between the parties and as such the Referee was not competent to adjudicate upon the dispute. The Referee entertained the objection but overruled it in holding that this was a claim under the Act and he had jurisdiction to decide the matter. On the merits it was contended that in view of the provisions of Section 7(2) of the West Bengal Shops and Establishments Act, 1963 read with Section 13 of the said Act it was not possible for the appellant to claim under the Act any overtime allowance unless and until the appellant established that he had worked beyond

48 hours a week, which was not the case here. It was, therefore, urged that any claim for overtime within the period of 36 hours to 48 hours of the appellant should be based on the contractual rights and liabilities of the parties and could not be the subject-matter of adjudication under the West Bengal Shops and Establishments Act, 1963 and as such Section 13 of the said Act was not applicable. It was contended, further, that there was a statutory overtime contemplated by the scheme of the various provisions of the said Act and it was the statutory overtime in respect of which a claim could be entertained by the Referee in a reference under West Bengal Shops and Establishments Act, 1963. The Referee was unable to accept this contention.

2. Being aggrieved by the aforesaid decision of the Referee on March 15, 1968 the respondent No. 1 moved an application under Article 226 of the Constitution challenging the order dated February 6, 1968 passed by the Referee as mentioned hereinbefore and obtained a rule nisi. The said application came up for hearing before T.K. Basu, J. and by a judgment delivered and an order passed on May 20, 1971 the learned Judge has made the rule nisi absolute and has quashed the order dated February 6, 1968. The learned Judge held that inasmuch as determination of the question before the Referee involved complicated questions of law and fact the Referee under the West Bengal Shops and Establishments Act, 1963 was not competent to entertain the application and adjudicate the dispute. He, accordingly, held that the order of the Referee was without jurisdiction. On the merits, however, the learned Judge came to the conclusion that the appellant was entitled to succeed. According to the learned Judge, in view of the changes made in the provisions of the West Bengal Shops and Establishments Act, 1963 in contra-distinction to the Bengal Shops and Establishments Act, 1940, the allowance, that was payable in respect of overtime had to be judged from ordinary point of view and there was no statutory overtime contemplated in the said Act. This appeal has been preferred against the aforesaid judgment of T.K. Basu, J., dated May 20, 1971. The respondent No. 1 has also filed a cross-objection challenging the findings of the learned Judge on the merits.

3. There are only two points for consideration in this appeal, viz., firstly, whether the appellant was entitled to claim overtime allowances at the rate of  $1\frac{1}{2}$  times the basic wages or at the rate of  $1\frac{1}{2}$  times the ordinary wages, that is to say basic wages together with the dearness allowances and secondly, whether the Referee under the Act had jurisdiction to entertain the application. It is not in dispute that in the establishment of the respondent No. 1 the normal period of work in a week was 36 hours in respect of the employees of the type of the appellant. It is also not in dispute that under the contract and the settlement, which is binding on the parties and to which reference has been made by the Referee in his order, the appellant was entitled only to be paid overtime allowances at the rate of  $1\frac{1}{2}$  times the basic wages, that is to say without taking into consideration the dearness allowance.

4. We are concerned with the rights of the parties under West Bengal Shops and Establishments Act, 1963. It would, therefore, be relevant to refer to certain provisions of the Act. The West Bengal Shops and Establishments Act, 1963 came into force on August 15, 1964. This is an Act to regulate holidays, hours of work, payment of wages and leave of persons employed in the shops and establishments. The statement of objects and reasons stated that the object of the Act was to repeal the Bengal Shops and Establishments Act. 1940 and to introduce in its place a new legislation with the view to eliminate various defects in the existing Act and providing some additional benefits to the employees. It must, however, be emphasised that the Act itself does not provide for any amount of wages to be paid to the workers; that has to be decided in accordance with the other provisions of law. According to the Act wages mean as defined in Payment of Wages Act. 1936. Section 4 of the Act makes some of its provisions non-applicable to certain establishments, shops and persons. Section 5 deals with holidays in shops and establishments, Section 6 deals with hours of work in shops. Section 7 is relevant for our purpose and it would be necessary to set out the relevant provisions of the said section:

7. Hours of work in establishments- (1) In no hotel, restaurant, eating-house or cafe shall the hour of closing be later than eleven o'clock post meridiem;

(2) No person employed in an establishment shall be required or permitted to work in such establishment for more than eight hours and half in any one day or for more than forty-eight hours in any week or after the hour of closing of such establishment:

Provided that a person employed in an establishment may be required or permitted to work overtime in such establishment so, however, that

(i) the total number of hours of his work including overtime work shall not exceed ten hours in any one day, and

(ii) the total number of hours worked overtime by him shall not exceed one hundred and twenty hours in any one year.

(3) No person employed in an establishment shall be required or permitted to work in such establishment for more than six hours in any one day unless he has been allowed an interval for the rest of at least one hour during that day.

(4)...

Sections 8, 9 and 10 deal with special provisions as to the employment of young persons in shops and establishments. Section 11 deals with leave. Section 12 deals with persons employed to be

entitled to wages for a period of privilege leave in case of termination of service. Section 13 deals with wages for overtime work. The relevant provisions of Section 13 of the Act provides as follows:

13. Wages for overtime work.-When any person employed in a shop or an establishment is required or permitted to work overtime in such shop or establishment, the wages payable to such person in respect of such overtime work shall be calculated at the rate of one and one-half times of the ordinary rate of wages payable to him, and such ordinary rate of wages shall be calculated in such manner as may be prescribed:

Provided that this section shall not operate to the prejudice of any higher rate of overtime wages granted under any agreement, award, custom or convention.

Section 14 deals with payment and recovery of wages. Sub-section (1) provides the period by which the wages should be paid; Sub-section (2) provides for an application in case of deduction made from the wages of any person employed in a shop or establishment. Section 15 deals with notice of termination of services. Section 16 deals with registration of shops and establishments. Section 17 deals with shop-keepers and employers maintaining and keeping records and Section 18 deals with persons employed to be furnished with letter of appointment. Section 19 deals with appointment of Inspectors and Section 20 deals with powers of Inspectors. Section 21 deals with penalties and Section 22 deals with procedure and certain other provisions and incidental matters. In this connection it will be also necessary to refer to the provision of Section 24 of the Act which deals with saving of certain rights and privileges. Section 24 of the Act provides as follows:

24. Saving of certain right and privileges.-Nothing in this Act shall affect any right or privilege to which any person employed in any shop or establishment is entitled on the date of the commencement of this Act under any law for the time being in force or under any contract, custom or usage which is in force on that date, if such right or privilege is more favourable to him than any right or privilege conferred upon him by this Act or granted to him at the time of appointment.

5. We have referred to the provisions of Section 13 where it has been provided that when any person employed in any shop or an establishment is required or permitted to work overtime in such shop or establishment the wages payable to such person in respect of such overtime work shall be calculated at the rate of one and one half times of the ordinary rate of wages payable to him and such ordinary rate of wages shall be calculated in such manner as may be prescribed. That has been prescribed by rules framed under the Act. Rule 39 of the West Bengal Shops and

Establishments Rules, 1964 provides calculation of ordinary rate of wages of overtime; for the purpose of Section 13 the ordinary rates of wages shall be calculated in the manner specified in Schedule IV. Schedule IV to the said Rules gives the table of calculation of ordinary rates of wages and the Note to the said Schedule provides as follows:

Note.-If any shop or establishment the working hours are less than what are prescribed in the Act, the ordinary rate of wages per hour in such shop or establishment shall be determined in the like manner by dividing the daily, weekly and monthly wages by the total number of normal hours of work actually worked per day, week or month as the case may be by the persons employed.

6. Wages as mentioned hereinbefore will mean the same thing as defined according to the Payment of Wages Act, 1936. The expression "wages" under Section 2(v) under the Payment of Wages Act, 1936 includes, inter alia, remuneration payable under any award or settlement between the parties or order of the Court and any remuneration to such a person employed is entitled in respect of overtime work or holiday or any leave period. As mentioned hereinbefore, two contentions require consideration in this case, whether the allowance for the overtime claimed by the appellant can be claimed under the Act or can be computed in accordance with the provisions of Section 13 read with Rule 39 of the West Bengal Shops and Establishments Act, 1963 and secondly, whether the right of the appellant to compensation, if any, for any overtime for any period of work over 36 hours a week but less than 48 hours a week should be computed in accordance with the contractual rights of the parties. On the first question it is necessary to consider whether determination of aforesaid contentions is of such a nature that could not be decided or determined by the Referee or authority under the West Bengal Shops and Establishments Act, 1963. These two contentions are really linked up together. If it is found that the question of the right to get overtime involves a detailed examination of the rights of the parties under the law or if it involves complicated questions either of law and fact then in view of the decisions of the Supreme Court to which we shall hereinafter refer to, the authority under the West Bengal Shops and Establishments Act, 1963 was not competent to entertain this dispute. If on the other hand, it appears that the question of overtime allowance that the appellant is entitled to does not involve either any complicated question of law or fact or does not involve any question of adjudication of rights of the parties to get overtime allowances then in such a case mere computation of overtime allowances would be within the jurisdiction of the authority under the West Bengal Shops and Establishments Act, 1963. The expression "overtime" has not been defined in the Act; but it was contended by counsel for the respondent No. 1 that though overtime had not been defined in the Act, the overtime that was contemplated by the Act and in respect of which rights had been given in the Act could be gathered from the Scheme of the Act

and for this purpose counsel drew our attention to two main provisions of the Act, namely, Section 7 and Section 13. According to counsel for the respondent No. 1 the proviso to Sub-section (2) of Section 7 to which we have referred hereinbefore enlarges the scope of Sub-section (2) of Section 7 and in effect provides that there could not be any overtime which was beyond 120 hours in any one year or 10 hours in one day. If these two sub-clauses of the proviso, according to counsel, were taken into consideration the net effect of the proviso was that the overtime as contemplated by the Act would not be any overtime which was less than 48 hours, a week. In effect, what counsel sought to argue was that the proviso to Sub-section (2) of Section 7 provided an embargo on the overtime in the sense that less than period of overtime the statute would not operate, In support of the contention that a proviso of this nature should be so construed, counsel relied on Craies on Statute Law, 7th Edn. pp. 218 and 219. Counsel further submitted that if that was the effect of Section 7(2), then under Section 13 when it spoke of "wages payable to a person in respect of overtime" it meant in overtime in excess of 48 hours a week because that was the situation that was being contemplated by the statute, and counsel, therefore, urged only in such cases that statutory right had been given of calculating such overtime allowance on the basis of one and one half times of the ordinary rate of wages. Counsel, therefore, urged that in respect of overtime which did not fall within the statute, that is to say, which did not exceed 48 hours a week, the statute did not provide for calculating any overtime allowances. Counsel, urged that such wages, if any, payable under the law should be determined in accordance with the bargain between the parties, as mentioned before the real question, therefore, is whether Section 13 when it speaks; of "wages payable to such person in respect of such overtime" if covered "overtime" as controlled or as contemplated by the proviso to Sub-section (2) of Section 7 of the Act referred to hereinbefore. Counsel submitted that any other construction would lead to hardship because, according to counsel, this was a legislation which was to ensure the rights of the employees in shops and establishments against exploitation of the labour by the employees but such rights were given in terms specified in the statute and if a particular employer had provided terms beneficial to the employees by a contract between the parties it could not have been contemplated that those rights should be enforced along with the rights given by the statute. It is, however, difficult to accept the construction contended for by counsel for the respondent No, 1. As mentioned hereinbefore, overtime is not defined in the statute itself. Section 7 does not provide that when it speaks of "wages payable to such person in respect of such overtime" the overtime contemplated is overtime as controlled or as provided by Section 7(2) proviso of the Act. It would be reading something in the section, if we accept the contention of counsel for the respondent No. 1 on this aspect. Furthermore, in our opinion, it appears that the proviso to Sub-section (2) of Section 7 does not really provide for any statutory overtime as counsel described it. What Sub-section (2) of Section 7 provides in effect is that there should not be overtime beyond a certain period, that is to say, there is a total prohibiting on

overtime beyond a certain period so that people may not be exploited or made to work beyond a certain time on the temptation of earning overtime. It does not provide any ceiling for overtime within this period. As mentioned hereinbefore, as there is no definition of overtime it is permissible to accept the dictionary meaning of overtime to which the Referee has referred. According to the dictionary meaning overtime means extra time, time beyond regular hours of work. In this case it is undisputed that the appellant has worked extra time beyond regular hours of work if by regular hours of work we understand the normal period of work by employees of the type of the appellant in that establishment, therefore, beyond 36 hours of week and within 48 hours a week the appellant, according to the dictionary meaning has worked overtime, he was entitled to get overtime. Indeed, that the appellant is entitled to overtime is not in dispute. That is also how the parties understood the meaning of the word "overtime" as would be apparent from the averments made in paragraph 4 of the petition in this case. The expression "overtime" has also come up for consideration by the Supreme Court. In this connection reference may be made to the decision of the Supreme Court in the case of Indian Oxygen Ltd. v. Their Workmen 1969-I L.L.J. 235, and the observation of the Court at page 311. Reliance was placed on the decision of the Supreme Court in the case of Workmen of Calcutta Electric Supply Corporation Ltd. v. The Calcutta Electric Supply Corporation Ltd. . Therefore on the construction of the Act taken together with the plain meaning of the expression "overtime" we are of the opinion that the appellant was entitled to overtime allowance as claimed by him that is to say, overtime allowance at the rate of one and one half times of the ordinary wages in accordance with the Act. That in our opinion is quite clear as mentioned hereinbefore, from the language used. We may, however, note that this conclusion is supported by the legislative history inasmuch as this Act was passed after repealing West Bengal Shops and Establishments Act, 1940. It would be relevant in this connection to set out Section 13 of the old Act which was in the following terms:

When any person employed in any shop or establishment for public

entertainment

or amusement is required or permitted to work overtime in such shop or establishment in excess of the maximum limit of hours of work specified respectively in Sub-section (2) of Section 7 and Sub-section (1) of Section 10, the wages payable to such person in respect of such overtime work shall be calculated at the rate of one and (one half) times the ordinary rate of wages payable to him, and such ordinary rate of wages shall be calculated in the manner prescribed.

Section 7(2) of the old Act was in the following terms:

No person employed in a shop shall be required or permitted to work in such shop for more than ten hours in any one day and for more than fifty-six hours in any one week and after the hour of

half-past eight. o'clock post meridian.

Good deal of argument was advanced before up on the question as to what extent we can look to the legislative history in construing the provisions of an Act. In the view we have taken as mentioned hereinbefore, it is not necessary, for us to refer to this controversy in detail. It is, however, permissible in our opinion to take note in aid of a conclusion of the fact that there has been a departure In the language used by the Legislature and in this connection reference may be made to the observations appearing at pages 142 and 143 of Craies on Statute Law, 7th Edn. We may also refer to the object of the later legislation which was inter alia, to provide employees with some additional benefits. Reliance in this connection may be placed on *Alembic Chemical Works v.*

*Workmen* 1961-I L.L.J. 328.

7. In this connection we may also refer to Section 24 of the Act. The learned Judge has come to the conclusion that Section 24 of the Act was not decisive of the question. That is true. But Section 24 though not decisive of the question is a relevant pointer of the fact that Section 7(2) does not necessarily provide for any statutory overtime as urged by counsel for the respondent No. 1. For the aforesaid reasons we are in agreement with the learned Judge in so far as he held that overtime allowance, as claimed by the appellant, was proper and the appellant was entitled to overtime allowance at the rate of 1 1/2 times the ordinary rate of wages to be calculated in accordance with the Act.

8. The next question, therefore, arises is whether under Section 14, the Referee had jurisdiction to decide this question. It was contended that the Referee was not expected to decide a question of controversy of this nature. In support of this contention our attention was drawn to the fact that no qualification had been provided for the appointment of the Referee. It was further urged that Section 14 did not confer upon the Referee powers of a civil Court. It was next urged that what was contemplated was mere giving effect to the scheme of the Act and not determination of any right of the parties. Section 14 provides for an appeal from an order of the Referee or the authority under the Act. Section 14 also empowers the Referee to decide whether there was any bona fide error or dispute as to the amount payable. As mentioned hereinbefore in support of this contention reliance was placed on the decision of the Supreme Court in the case of *Payment of Wages Inspector v. B.E.S. and I. Co.* 1969-I L.L.J. 762. The effect of this decision has been considered by various decisions to which our attention was drawn. It was considered by me in a judgment in the case of *Arun Charan Mukherjee and Anr. v. S.N. Deb and Ors.* judgment delivered on February 24, 1972, by Amiya Kumar Mookerji, J. in *Messrs, Carew and Co. Ltd. v. Sailaja Kantt Chatterjee and Anr.* 1972-II L.L.J. 359, in the case of *Gian Chand Isar Dass v. M/s.*

G. Kay (Kay) Industries 1971 (2) Lab. I.C. 1360. By the Mysore High Court in the case of V.K. Govindaswamy v. N. Nanjappa 1973-I L.L.J. 459, as also by the Division Bench of this Court in the case of Shri Kamal Prasanna Ray and Ors. v. Shri Maurice Hyam 77 C.W.N. 64. The Supreme Court in the case of Payment of Wages Inspector v. B.E.S. and I. Co. (supra) was concerned with the jurisdiction of the authority under Section 15(2) of the Payment of Wages Act, 1936. There an application was made under Section 15(2) of the Payment of Wages Act, 1936 claiming compensation under Section 25FF of the Industrial Disputes Act, 1947. The defence taken by the ex-employer was that he was not the person responsible for the payment of compensation and that the right of the workmen was defeated by reason of proviso to Section 25FF being applicable inasmuch as these workmen had continued to be in the employment of the new employer, and that there had been no interruption in their employment, and that the terms and conditions of service given to them by the new employer were in no way less favourable than those they had when the old employer was the employer and that the new employer was responsible for payment of compensation if any retrenchment took place in future. These being the points it was held by the Supreme Court that in view of the scheme of the Payment of Wages Act, 1936 the authority of limited jurisdiction could not have the authority to determine the dispute before him. Here in this case it is not in dispute that the appellant is entitled to overtime; it is not in dispute that what would be the amount calculated either way. What is in dispute is whether it should be calculated either at the rate of 1 1/2 times the ordinary wages or 1 1/2 times the basic wages. This dispute can be resolved by reference to the terms under Section 13, if we do not accept the contention, which we find cannot be accepted, of counsel for the respondent No. 1, on the construction of the Act. This, in our opinion, presents no difficulty.

9. In the aforesaid view of the matter it cannot be said that the Referee had no jurisdiction to decide the dispute referred to him. In the aforesaid view of the matter we are unable to accept the conclusion of the learned Judge in so far as he held that the Referee was not competent to decide the question.

10. Before we conclude, however, we must further take note of the fact that counsel for the respondent No. 1 sought to argue in support of the cross-objection an additional ground. The ground is set out in the letter dated March 7, 1974 which is in the following terms:

that the order of the reference is in any way erroneous and should have been so held by the learned Judge inasmuch as since the definition of Wages in the West Bengal Shops and Establishments Act, 1963 read with the Payment of Wages Act, 1936 includes remuneration for overtime such definition cannot be applied in determining the rate of remuneration for overtime, and accordingly upon a proper construction of Section 13 of the said Act and Rule 39 and Schedule IV of the Rules the ordinary rate of wages should be determined by taking into

consideration only the basic wages and not dearness allowance or any other allowance.

Counsel for the appellant objected to this ground being argued. There is a good deal of substance in the objection. Even if we allow counsel for the respondent No. 1 to urge this point we are unable to accept this contention because of the agreement between the parties and the averments made under paragraphs 3 and 4 of the petition. Furthermore, the Referee has not proceeded in calculating the overtime on the basis of doubly calculating the overtime, that is to say after taking into consideration the overtime allowance and thereafter calculated the overtime allowance. Therefore, this difficulty would really be of mere academic nature. In the aforesaid view of the matter we do not think that this contention has any substance.

11 In the aforesaid view of the matter this appeal is allowed. The order of the learned Judge dated May 20, 1971 is hereby set aside. The judgment of the learned Judge in so far as he held that the Referee had no jurisdiction is also set aside. The judgment of the learned Judge in so far as he held that the appellant was entitled to claim overtime allowance under the new Act is upheld. In the aforesaid view of the matter the cross-objection is dismissed. The application under Article 226 of the Constitution is also dismissed and the rule nisi is discharged. There will be no order as to costs.

12. There will be a stay of operation of this order for a period of four weeks.

R.N. Pyne, J.

13. I agree.