CALCUTTA HIGH COURT

Hindusthan Motors Ltd

Vs.

E.S.I. Corporation

A.F.O.O. No. 977 of 1973

(N.C. Mukherji and Sudhindra Mohan Guha, JJ.)

29.03.1979

JUDGMENT

Sudhindra Mohan Guha, J.

1. This appeal is directed against the decision of Shri A.R. Mallick, Judge, Employees' Insurance Court, Calcutta arising out of an application under section 75 of the E.S.I. Act, 1948 filed by M/s. Hindusthan Motors Ltd., for a declaration that no employer's special contribution is payable for the remuneration paid by the applicant and its employees since 28th January, 1968 for the overtime work done by the employees and for certain other declarations. The learned Judge by an order dated 25-1-1975 refused the declaration sought for and held that E.S.I. Corporation was entitled to claim both the employees' contribution and employers' special contribution for the overtime wages paid to the employees drawing upto ₹ 500/-.

2. The case of the appellant is that it has all along been paying both employer's as well as employees' contribution to the Corporation. The definition of 'employee' under the L.S.I. Act, 1948 was amended with effect from 28th January, 1968 by the Amending Act. No. 44 of 1966 whereby a person whose wages (excluding remuneration for overtime work) exceed ₹ 500/- a month was excluded from the definition of employee. Prior to such amendment the remuneration for overtime work was included in wages as defined in Sec. 2(22) of the Act for the purposes of contribution under the E.S.I. Act. As the remuneration paid to employees for overtime work does not come within the definition of 'wages', the petitioner company ceased to recover the contributions of the remuneration paid for overtime work since the date of amendment which came into force with effect from 28th January, 1968. It is the further case of the company that the 'overtime work' by an employee does not come within the contract by and between the company and its employees either expressly or impliedly and as such cannot come within the meaning of definition of 'wages'. In the circumstances, the Corporation is not entitled to claim contribution from either the employer or the employees over any remuneration exceeding ₹ 500/- for determination of which the sum paid for overtime work is to be excluded.

3. According to the Corporation prior to the amendment of the definition of 'employee' a person

whose total remuneration did not in the aggregate exceed ₹ 400/- a month was covered under the Act, but the amendment has largely extended the scope of the coverage as the amended definition of 'employee' includes any person whose remuneration extends upto ₹ 500/- a month. If the Legislature intended to exempt contributions being paid and/or realised for overtime wages, the words "excluding remuneration for overtime work" would not have found place in the amended definition of 'employees' only. There has been no such exclusion by way of amendment in the definition of 'wages'. So the overtime wages would not be excluded from the ambit of 'wages' for the purpose of payment of contribution by the employer and the employees.

4. The Judge overruled the contentions advanced by the company and observed that if 'wages' as defined in Sec. 2(22) of the E.S.I. Act had not included remuneration of overtime work, there could have been no necessity for inserting the words "excluding the remuneration for overtime work" in the relevant portion of the definition of employee. The Judge is also of the view that on the contrary, by specifically providing that for the purpose of coverage the wages of the employees would have to be calculated excluding the remuneration for overtime work, the Legislature intends to enlarge the scope of the coverage of the Act.

5. Such findings of the Judge have been challenged in appeal. Dr. Mukherjee, learned advocate for the appellant, argues that the trial Judge erred in importing in the definition of 'wages' the payments on account of overtime inasmuch as when payments on account of overtime have been excluded from wages which would qualify an employee to become an insured person and receive benefits under the statute. It is contended that payments on account of overtime having once been excluded from wages in Sec. 2(9) cannot be included by the Legislature in the definition of wages in Sec. 2(22) and the Legislature had never intended to have two different meanings of 'wages' in the same statute. It is further contended that overtime work or payment in respect thereof is never a part of the contract of employment in any way nor a statutory obligation of the employee or the employer nor any mode or time for payment is prescribed.

6. Dr. Mukherjee takes us through the provisions of Sec. 39 of the Act which deals with contributions both by the employer and the employees which have to be paid to the Corporation; Section 42 which deals with General provisions as to payment of contribution; Schedule 1, under which the amount of weekly contribution payable in respect of an employee shall be calculated with reference to his average daily wages; S. 73 A (1) and (3) under Chapter VA - mentioning total wages, Sec. 73G. Employees' State Insurance (General) Regulation, 1950, No. 39, various forms prescribed under such Regulations, and argues that the scheme of the Act as found in different provisions of the Act, specifically Chapter IV regarding the payment of contribution and the First Schedule of the Act where the method of calculations for payment of contribution has been specifically provided clearly reveals that the overtime wages cannot form part of the wages under the E.S.I. Act. In support of his arguments he also refers to the objects and Reasons of the Act. It is pointed out that the insurance fund will be mainly derived from employers and employees. The contributions payable in respect of each worker will be based on his average wages and will be payable in the first instance by the employer who will be entitled to recover the employee's share from his wages. One whose average wages are below Re. 1/- will be totally exempt from payment of any share of the contribution, the entire contribution to be paid by the employer.

7. Mr. D. C. Mukherjee, learned advocate for the Respondent takes us through the Preamble of the Act and points out that the Act introduces compulsory insurance scheme under which all persons in insurable employment and the employers of such persons pay contribution in consideration of which they or their dependents become entitled in certain special events to certain benefits. The Act provides for the establishment of the Employees' State Insurance Fund which is to be held and administered by the Corporation. All employees who come under the Act shall be insured and contributions to the Fund shall be made by the employers and the employees. The Corporation is also authorized to receive grants from the Government, public bodies or private persons for the Fund. The Fund is to be extended for payment of various benefits. It is next contended by him that having regard to the objects and reasons for the Act provisions there under should be interpreted in such a way that ensure to the benefit and advantage of the workmen.

8. With this background we now propose to discuss the various case laws referred to by both the parties to arrive at the decision whether the remuneration paid for over-time work should be included within the definition of "Wages". The definition of wages as under Sec. 2(22), mentioned earlier, is quoted below:

> "2(22) 'wages' means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment express or implied, were fulfilled and includes 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, 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."

9. The first part of the definition shows - that in order to come within 'wages' - the payment should be cash remuneration and it should be paid or payable, if the terms of the contract of employment, express or implied, were fulfilled. The terms of the contract of employment can of course be altered by mutual agreement.

10. According to Dr. Mukherjee, remuneration for overtime work cannot be said to be 'wages' because such payments are not made in fulfillment of the terms of the contract of employment. He relies on the decision in the case of *M/s. Braithwaite & Co. (India) Ltd., v. Employees' State Insurance Corporation reported in*[1] In this case the management initiated a scheme for payment of 'Inam' if production exceeded certain targets. The question arose whether the payment of inam comes within the definition of 'wages' in Sec. 2(22) of the Act. The Supreme Court found that the payment of inam did not become a term of the contract of employment for the reasons - (i) that it was not a term of the

[1] AIR 1968 SC 413

original contract of employment (ii) that it was merely an offer to make an incentive payment if certain conditions were fulfilled by the workmen, (iii) that the scheme itself provided for

exemption from payment on grounds for which the employees could not be blamed. It was therefore held that the payment of inam was not enforceable as one of the terms of the contract of employment whether implied or express. The pay though remuneration would not come within the ambit of 'wages' as given in Sec. 2(22). Seeking reliance on this decision it is argued by Dr. Mukherjee that payment for overtime work did not become a term of the contract of employment. It is contended that an employee cannot demand overtime work as a matter of right. But no doubt under the . Factories Act, 1948 a worker working more than 9 hours in a day or more than 48 hours in a week shall in respect of overtime work, be entitled to wages at the rate of double of his ordinary wages. This provision has been made under the statute and it does not arise out of a contract between the employer and the employees. Such provision for overtime work in the Factories Act is only permissive and makes certain acts of employer illegal, if it exceeds the prescribed limit in the said statute. Dr. Mukherjee also argues that it is not right and proper to take the aid of another statute, namely, Factories Act for interpreting 'wages' within the meaning of Sec. 2(22) of the E.S.I. Act.

11. In *Bengal Potteries v. E.S.I. Corporation*[2], Sabyasachi Mukharji, J. of this Court, has held that where in the original terms of employment there was no term for payment of incentive bonus and subsequently payment of such bonus was introduced as a result of an agreement but it was agreed that the bonus was not paid as a part of the term of employment and the employer reserved the right to modify the bonus scheme, the payments made under the scheme cannot be regarded as remuneration paid as part of the terms of employment. Thus the amounts so paid cannot be regarded as 'wages'. Consequently contribution thereon cannot be demanded from the employer.

12. Mr. D. C. Mukherji, points out that the Full Bench of Andhra Pradesh H.C. in *Employees' State Insurance Corporation, Hyderabad v. Andhra Pradesh Paper Mills Ltd*[3]. differed from the decision of the Calcutta High Court and held that incentive bonus could be wages within the third part of wages under Sec. 2(22) of the Act. At p. 26 (of AIR): (At p. 26 of Lab IC) of the report their Lordships stale as follows:

> "In no event incentive bonus can fall within any of clauses (a) to (d) which are excluded from the definition of 'wages' under Sec. 2(22) of the Act..... The word 'other' appearing at the commencement of the third part of the definition of wages under Section 2 (22) indicates that it must be remuneration or additional remuneration other than the remuneration which is referred to in the earlier part of the definition, viz., all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied were fulfilled and incentive bonus in the present scheme is certainly additional remuneration. It must be emphasized that under the third part of the definition of 'wages' it is actual factum of payment which counts because the word used is 'paid' as distinguished from 'paid or payable'. The moment you get any additional remuneration payable under the contract of employment and if this additional remuneration is paid at intervals not exceeding two months, it becomes wages by virtue of the third part of

[2] W. B. 1973 Lab IC 1328 (Cal)

[3](AIR 1978 Andh. Pra. 18)

the -definition of 'wages'."

13. Dr. Mukherjee, argues that in the appeal against the decision of Sabyasachi Mukherjee, J. in *Regional Director W.B. Region. E.S.I.C. v. Bengal Potteries Ltd*[4]. a Division Bench of this Court, S. C. Ghosh and R. N. Pyne, JJ. had occasion to consider the Full Bench decision of Andhra Pradesh High Court in the case of *Andhra Pradesh Paper Mills Ltd. (1978 Lab IC 19)* (supra) and observe that the Full Bench although differed from the judgment of Sabyasachi Mukharji J. they did not give any reason for dissenting from it. Their Lordships of the Division Bench of this Court observe "it is to be noted that their Lordships constituting the Full Bench failed to notice the term "additional" before the expression "remuneration" and the definition of "wages" in the Act. Therefore, the additional remuneration must be for additional work and not for normal or usual work. The scheme, it should be noted, is not a part of the statutory Settlement, but although in consequence thereof has not the character of Statute." It was accordingly held that the payment of incentive bonus which depends on the doing of a certain minimum quantity of normal work cannot be included in the term either in the first part or the third part of the definition of 'wages' under the Act. An employee has a right to his wages, but an employee under the incentive scheme under consideration is not entitled as a matter of right to an incentive bonus. The right depends on the performance of a minimum percentage of normal workload and gradual increase of such performances of work. Further it must be noted that an incentive bonus scheme may be withdrawn or modified in the events mentioned in the scheme itself. It may be withdrawn totally or modified at the option of the employer.

14. Mr. D. C. Mukherjee, with reference to another decision of Andhra Pradesh High Court, in the case of *Regional Director, E.S.I.C., Hyderabad v. Hyderabad Asbestos Cement Products Ltd., Hyderabad*[5], argues that the payment of "Production Bonus" may not be a term of the original contract of employment, but merely because it is not a term of the original contract of employment, it cannot be said that it is not remuneration paid or payable in fulfilment of the terms of contract of employment express or implied.

15. Next branch of Mr. Mukherjee's argument is that the 'wages' should be interpreted not in its narrow sense, but it must receive extensive meaning as in *K. Sambasivaraju v. M.V.S.R. Chandrayya Chetty*[6] It was held that 'Instrument' in Section 2 (14) of Stamp Act must receive extensive meaning - including affidavit falling under expression (b) in Art. 4 - whereby affidavit was found liable to Stamp duty under Art. 4.

16. Next he refers to the decision in the case of *Manager, Harrisons & Crossfield Ltd., Quilon v. Manager, Grade II Local Office, Employees State Insurance Corporation, Quilon*[7], which is not of much assistance for the issue before us, as it is held therein that the definition of 'wages' in Sec. 2.(22) does not afford any guidance to interpret Section 2 (9) of the Act. Of course, it is contended by him that reversely the aid of Sec. 2(9) cannot be sought for interpreting the meaning of wages in Sec. 2(22) of the Act.

17. Reliance is also placed on the decision in the case of *Mohamad Ismail Ansari v. Employees' State Insurance Corporation, Bombay*[7]

[4](1978 Lab IC 793) [6](AIR 1967 Andh Pra 67) [7]((1978) Lab IC 1009) (Bom)
[5](1977 Lab IC 313) [7](AIR 1970 Ker 194)

wherein it is held that the identification of the employee conceived under the Act depends on the calculation of his wages by reference to Sec. 2(22) and not by reference to Sec. 2(a) of the First Schedule. It is therefore contended that no extraneous matters should be taken into consideration for the interpretation of 'wages' in Sec. 2(22) of the Act. But he himself refers to "otherwise" in Explanation IV of paragraph 2 of Schedule I for interpretation of 'wages' and argues that 'wages' for overtime work should not be determined not only on the basis of contract, express or implied, but "otherwise". The word "otherwise" was used for the determination of 'wage period' which means the period in respect of which wages are ordinarily payable whether in terms of the contract of employment, express or implied or otherwise.

18. In our opinion there is no scope for introduction of the word 'otherwise' after the expression "if the term of the contract of employment, express or implied" in the definition of 'wages' in Sec. 2(22) of the Act. It should be noted that he definition of 'wages' is almost the ,ame as that given in the Minimum Wages Act and Payment of Wages Act. The lay off compensation paid to an employee under Sec. 25C of the Industrial Disputes Act, is not 'wages' under the Act.

19. Lastly, Mr. Mukherjee argues that the Bombay High Court has already held that payment made to an employee for overtime work falls within the definition of 'wages' in Sec. 2(22) of the Act. Reliance is placed on the decision in the case of *Shivraj Fine Art Litho Works, Nagpur v. Regional Director, Regional Office, Maharashtra, Bombay*[8] Their Lordships of the Bombay High Court observe that there is statutory obligation on the employer to pay to the employee remuneration for overtime work. Such remuneration which is to be paid by the employer would clearly in their view, be covered by the first part of the definition of 'wages', whenever such remuneration is paid in cash by the employer. The payment which is made to employee for overtime work is, in their view, only in the nature of remuneration which is paid to him for the overtime work which he does apart from the fact that this is made clear by the provisions of Section 59 of the Factories Act. At page 331 of the report their Lordships observe as hereunder:-

> "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 an 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 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

[8](1974 Lab IC 328)

> 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 Sec. 59 of the Factories Act or Sec. 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 furtherance of the original contract of employment which is being extended by the parties so far as the period of work is concerned . ..... when the definition refers to "all remuneration" we see no difference on principle to exclude from the 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'."

20. The definition of 'wages' in Sec. 2(22) of the Act in our view is exhaustive. It is clearly stated what is included and what is excluded in the definition.

21. The term 'wages' as used in most of the Sections of the Act, plainly does not mean potential wages, but wages earned. The expression "remuneration which would if the terms of the contract were fulfilled be payable" in this Section means no more than "remuneration payable on the fulfillment of the contract." To us it appears that the plain meaning of she said expression means no more than the remuneration payable under a contract between the employer and the employees. Under any of the Sections of E.S.I. Act, there is no provision for payment of overtime wages. Such provisions have been made in the Factories Act. The construction and legal import of the definition of 'wages' are to be found by reference to the language used and object and the context of the Act where it occurs and it would he dangerous to rely upon the provisions of other statutes for the interpretation of the term "wages".

22. Clause (b) of sub-section (9) of Section 2 of the Act lays down that any person so employed whose wages (excluding remuneration for overtime work) exceed five hundred rupees per month will not be an employee. So the Legislature in enacting the law was conscious of the conception of overtime work. But while enacting the definition of 'wages' it was silent whether remuneration for overtime work would be included therein. Payment on account of overtime having once .been excluded from wages in Section 2(9), should not be included unless specifically so included by the Legislature in the defination of wages in Section 2(22) of the Act. There would be no reason to hold that the Legislature intended to have two different meanings of "wages" in the same statute. Any attempt to convey two different meanings, in our view, would be repugnant to the purpose of the statute itself.

23. With due respect to their Lordships of the Bombay High Court we cannot be in agreement with them in holding that the concept of overtime work must flow out of the original contract of employment and overtime work at the instance of the employer, is done in furtherance of the original contract of employment. In our opinion the provisions in the Factories Act do not make any contract statutory or otherwise between the employer and employee. Under the Factories Act overtime working is not a regular feature and it fixes no obligation on either party. Again such overtime work is only permissive and makes certain acts of employer illegal, if such employer exceeds the prescribed limit in the said statute. Nor we are of the view that overtime work or payment in respect thereof is part of the contract of employment in any way. Neither the employer nor the employee is under any statutory obligation for any such additional work

beyond the usual or normal work. Overtime work as the very expression implies is something different from normal or usual work. The scheme of overtime work is somewhat optional and there is no compulsion in the scheme. The S. C. in Braithwaite & Co.'s case (AIR 1968 SC 413) laid down that the first part of the term wages included remuneration paid under the terms of the contract of employment express or implied but not voluntary payment by the employer which can be withdrawn or varied at the option of the employer.

24. The same principle was followed by a Division Bench of this Court in the case reported in 1978 Lab IC 793.

25. An employee has a right to his wages, but an employee for overtime work cannot claim as a matter of right additional remuneration for such work, beyond the scheduled hours of work. Such a nature of work does not flow out of the general contract of employment between employer and employees - buts it is something which arises out of an independent arrangement depending on various factors. Moreover the basis for payment of overtime work is the normal 'wages' - because for such work one; would get the double of his wages. Sol the remuneration for such overtime work cannot again be included in the definition of 'wage' itself. For the reasons indicated above we would most respectfully differ from the decision of the Bombay H. C. in the case reported in 1974 Lab IC 328 and hold that remuneration paid for overtime work would not come within the ambit of the definition of 'wages' in Section 2(22) of the Act.

26. In the result the appeal is allowed. The order passed by the Judge, Employees' Insurance Court, Calcutta is set aside. The appellant's application is allowed. It is declared that no special contribution is payable for the remuneration paid since 28th January, 1968 by the appellant Company and its employees for overtime work done by the employees of the appellant Company.

27. We, however, propose to make no order as to costs.

N.C. Mukherji, J.

28. I agree.

Appeal allowed.