BOMBAY HIGH COURT

Shivraj Fine Art Litho Works

Vs.

Regional Director, Maharashtra

Civil Reference No. 4 of 1969

(M. Chandurkar and B. Masodkar, JJ.)

05.04.1973

JUDGMENT

M. Chandurkar, J.

1. This is a reference made by the Employees' Insurance Court, Nagpur, under Section 81 of the Employees' State Insurance Act, 1948 (34 of 1948), hereinafter referred to as the Insurance Act. The question referred is as follows :

> "Whether the term "wages" as defined under Section 2(22) of the Employees' State Insurance Act, 1948 includes all the payments made for overtime work and, if so, is the employer's special contribution payable on such an amount ?"

1,787/- on account of employer's special contribution in respect of the remuneration paid to the workers who had worked overtime. The Insurance Inspector had found that during the period July, 1966 of June, 1967, a sum, of ₹ 71,466.53/- was paid on account of overtime work to the employees in the employment of the employer and, according to the Inspector, the employer's special contribution at the rate of 21/2 per cent was liable to be paid by the employer. The ground on which the liability to pay this amount of ₹ 1,787/- was disputed was that the payments made to the employees did not fall within the definition of "wages" as defined in Section 2(22) of the Insurance Act, and therefore the said liability could not be enforced against the employer. The State Insurance court, however, took the view that payment on account of overtime work was not intended to be included within the definition of 'wages'; but since it found that the question was purely one of law and was of considerable importance, it was desirable, according to the Court to have an authoritative pronouncement from this Court. That is how the reference came to be made.

2. The arguments before us have mainly turned on the definition of "wages" which is to be found in Section 2(22) of the Insurance Act, which is as follows :

> "(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 any payment to an employee in respect of any period of authorized 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 of 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 Shri Shankar Anand what is covered by the first part of the definition of 'wages' is only the basic wages which are paid to the employee, which meant, according to him the normal wages, which in the instant case were fixed under the provisions of the Minimum Wages Act, 1948. According to him, the first part of the definition does not cover payment which is made to an employee when he works for a period longer than the one prescribed under either the Minimum Wages Act or the Factories Act because that work according to the learned counsel, is not in pursuance of any contract of employment between the employer and the employee. Before we consider this argument it is necessary to refer to another relevant provision which is to be found in Chapter VA of the Insurance Act under which the liability for the employer's special contribution is being enforced. This provision is to be found in Section 73A which is as follows :

> "73A. (1) For so long as the provisions of this Chapter are in force, every principal employer shall, notwithstanding anything contained in this Act, pay to the Corporation a special contribution (hereinafter referred to as the employer's special contribution) at the rate specified under sub-s. (3).
> (2) The employer's special contribution shall, in the case of a factory or establishment situate in any area in which the provisions of both Chapters IV and V are in force be in lieu of the employer's contribution payable under Chapter IV.
> (3) The employer's special contribution shall consist of such percentage, not exceeding five 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 :
> Provided that before fixing or varying any such percentage the Central Government shall give by like notification not less than two months' notice of its intention so to do and shall in such notification specify the percentage which it proposes to fix or, as the case may be, the extent to which the percentage already fixed is to be varied.
> Provided further that the employer's special contribution in the case of factories or

establishments situate in any area in which the provisions of both Chapters IV and V are in force shall be fixed at a rate higher than that in the case of factories or establishments situate in any area in which the provisions of the said Chapters are not in force.

(4) The employer's special contribution shall fall due as soon as the liability of the employer to pay wages accrues, but may be paid to the Corporation at such intervals, within such time and in such manner as the Central Government may, by notification in the Official Gazette, specify. Any such notification may provide for the grant of a rebate for prompt payment of such contribution.

Explanation - 'Total Wage bill' in this section means the total wages which have accrued due to employees in a factory or establishment in respect of such wage periods as may be specified for the purposes of this section by the Central Government by notification in the Official Gazette."

It is not in dispute that in the area in which the factory of the employer is situated, i.e., at Nagpur, the provisions of Chapters IV and V of the Insurance Act, are in force, but by virtue of the transitory provisions in Chapter VA in lieu of the employer's contribution payable under Section 39 of the Insurance Act, the contribution which is now payable is the employer's special contribution as required by Section 73A of the said Act.

3. We might at this stage also refer to two other relevant provision which make it obligatory on the employer to pay wages for overtime work. The primary provision is to be found in Section 59 of the Factories Act, 1948, which is as follows :

"59. Extra wages for overtime - (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.

(2) Where any workers in a factory are paid on a piece rate basis, the State Government, in consultation with the employer concerned, and the representatives of the workers shall, for the purposes of this section, fix time rates as nearly as possible equivalent to the average rate of those workers, and the rates so fixed shall be deemed to be the ordinary rate of wages of those workers.

(3) For the purposes of this section "ordinary rate of wages" means the basic wages plus such allowances, including the cash equivalent of the advantage accruing through the concessional sale to workers of foodgrains and other articles, as the worker is for the time being entitled to, but does not include bonus.

(4) x x x

(5) x x x

Then there is the provision in Section 14 of the Minimum Wages Act, which is as follows :

"14. Overtime. - (1) where an employee, whose minimum rate of wages is fixed under this Act by the hour, by the day or by such a longer wage-period as may be prescribed,

works on any day in excess of the number of hours constituting a normal working day, the employer shall pay him for every hour or for part of an hour so worked in excess at the overtime rate fixed under this Act or under any law of the appropriate Government for the time being in force, whichever is higher.

(2) Nothing in this Act shall prejudice the operation of the provisions of Section 59 of the Factories Act, 1948 (63 of 1948), in any case where those provisions are applicable."

It is also not in dispute that the minimum rates of wages as fixed under the provisions of the Minimum Wages Act, 1948 are in force in the industry which is rune by the employer. Now the provisions of Section 59 of the Factories Act will show that in case an employee or a worker works in a factory for more than nine hours in a day or more than fort-eight hours in week, he is entitled to additional wages in respect of his overtime work. The rate at which these additional wages are to be paid are also prescribed by Section 59 as twice his ordinary rate of wages. Section 59 makes it very clear that the amounts which are paid to a worker who works for more than the prescribed period, are also wages which are paid in addition to the wages to which he is entitled for having worked for the normal working day. It also fixes the rate at which these additional wages are to be paid. Under the Factories Act the word "wages" has not been defined. But it is obvious that where a worker works in a factory for more than nine hours in a day or for more than forty-eight hours in a week, he is paid additional remuneration at a rate which is twice the ordinary rate of wages. The obligation to pay these additional wages for overtime work is fastened on the employer not only by the Factories Act; but in a case where the wages are fixed under the provisions of the Minimum Wages Act, such an obligation is fastened on him by Section 14 which we have quoted above. Sub-section (2) of Section 14 makes it clear that nothing in the Minimum Wages Act is to prejudice the operation of the provisions of Section 59 of the Factories Act in a case where the provisions thereof are applicable. This means that the liability to pay overtime wages must continue under the provisions of the Factories Act itself; but in a case where the minimum rate of wages is fixed under the provisions of the Minimum Wages Act, the rate of wages for the purposes of calculating wages for overtime work, which will have to be taken into consideration, will be the one which is fixed under the provisions of provisions of Section 14 thereof. Under Section 14 of the Minimum Wages Act it is provided that in a case where a minimum rate of wages is fixed under the Act by the hours by the day or by such a longer Wage-period as may be prescribed and an employee works on any day in excess of the number of hours constituting a normal working day, the employer shall pay the employee for every hour or part of an hour so worked in excess at the overtime rate fixed under the Minimum Wages Act or under any law of the appropriate Government for the time being in force whichever is higher Section 14 thus firstly refers to a minimum rate of wages and then while providing for a payment for overtime work it refers to an overtime rate, which obviously means overtime rate of wages, though the words "of wages" are not to be found in Section 14 because even Section 14 makes it clear that what is being paid for overtime work is also "Wages" the only distinction being that while payment for the normal working day is made at the minimum rate of wages, payment for work done for a period in excess of the normal working day will have to be

made at the overtime rate of wages fixed under the Act or under the orders of the Government. The provisions of Section 14 of Minimum Wages Act and Section 59 of the Factories Act, therefore, do not leave any room for doubt that when a worker is paid remuneration for having worked overtime. That remuneration clearly partakes of the nature of wages which are paid to him. Their nature cannot be, in our view, anything different from the wages which he gets as the remuneration for work done.

4. Now the question is whether such remuneration, which is received by the employee and to which he is entitled either under provisions of the Factories Act or under the Provisions of the Minimum Wages Act, is in any way excluded by the definition of "Wages" in Section 2(22) of the Insurance Act and whether it is to be left out of consideration when the total wages bill contemplated by Section 73A of the Insurance Act is to be computed The definition of "wages" in Section 2(22) of the Insurance Act is in three parts. In the first part, wages are defined to mean all remuneration paid or payable in cash to the employee if the terms of the contract of employment express or implied, were fulfilled., The second part is the inclusive part of the definition and certain payments which would probably otherwise not have been included in the normal meaning of the term "Wages" have been included by the Legislature, such as payment to any employee in respect of any period of authorized leave, lockout strike which is not illegal or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months. The third part of the definition expressly leaves out certain items from being included in the definition of "wages". We are really, in this case, concerned with only the first part of the definition. As we have already pointed out above, there is a 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 our view, be covered by the first part of the definition of "Wages", whenever such remuneration is paid in cash by the employer. There cannot be any dispute, even for the purposes of the definition in Section 2(22) of the Insurance Act that the payment which is made to the employee for overtime work is 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.

5. What is, however, contended by Shri Shankar Anand on behalf of employer is that where monthly rated worker, and it is not disputed that so far as the present case is concerned the employees concerned are all monthly rated employees, is asked to work overtime, that is not done in pursuance of any contract of employment and, therefore, one of the important ingredients of Section 2(22) is not satisfied. 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 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 one the employer's establishment beyond the normal working day. If such working beyond the normal working day is de hors the period of work during the normal working day, then the additional period during which the employee is being asked a 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 Section 59 of the Factories Act or Section 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 or employment which is being extended by the parties so far as the period of work is concerned. The definition of "wages" in Section 2(22) of the Insurance Act takes in all remuneration which is paid to an employee in cash, if the terms of the contract of employment, express or implied, were fulfilled. It is not the case of the employer, nor is it found as a fact by the Insurance Court, that in respect of the employees who were concerned, in the instant case so far as employer's special contribution was concerned, the contract of employment was not fulfilled at all. On the other hand the fact that the employees have earned the overtime payments which have already been made to them, clearly shows that the contract of employment was fulfilled. 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".

6. We are supported in the view which we are taking by the provisions of Section 73A also. Sub-section (3) of Section 73A provides for a mode of computation of the employer's special contribution as "such percentage, not exceeding five per cent of the total wage bill of the employer". In the instant case, the percentage contribution admittedly is 2 1\2 per cent. The explanation to that section defines what is total wage bill. The explanation says that total wage bill in Section 73A means, the total wages which have accrued due to employees in a factory or establishment in respect of such wage periods as may be specified for the purposes of this section by the Central Government by notification in the official Gazette. No notification as contemplated by the explanation to Section 73A has been pointed out to us nor does it appear that any such notification has been issued by the Central Government specifying the wage period contemplated by the explanation. We must, therefore, assume that the contribution is payable with reference to the total wages bill whatever it may be. Having regard to Section 59 of the Factories Act and Section 14 of the Minimum Wages Act it is clear that so far as the employees in the factory of the present employer are concerned, the total wages, which must be deemed to have accrued due to the employees, will clearly include overtime wages to which they were entitled either under Section 59 of the Factories Act or Section 14 of the Minimum Wages Act.

The total wage bill, therefore, even in the case of the present employer, for the relevant period must, for the purposes of Section 73A, include the amount of ₹ 71,466.53/-, which figures have not been disputed at any stage. Therefore, reading the definition of "wages" and the provisions of Section 73A, it is clear to us that the total wage bill for the purpose of Section 73A will clearly include wages for overtime work paid by the employer. In the view which we have taken, the first part of the question referred is answered in the affirmative and the second part is also answered in the affirmative. We, however, make no order as to costs of this reference.

Reference answered accordingly.