
(2018) 09 BOM CK 0080
In the Bombay High Court
Case No : Writ Petition No.4900 Of 2007

Jitendra Anant Mhatre And Ors.

APPELLANT

Vs

Union Of India And Ors.

RESPONDENT

Date of Decision : 26-09-2018

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Factories Act, 1948 — Section 2(l), 2(m), 59, 59(2), 64, 64(1)
Payment of Wages Act, 1936 — Section 1(6)
Maharashtra Factories Rules, 1963 — Rule 100, 100(ii)

Citation : (2018) 09 BOM CK 0080

Hon'ble Judges : A.S. Oka, J;M.S. Sonak, J

Bench : Division Bench

Advocate : A.I.Bhatkar

Final Decision : Disposed Off

Judgement

M.S. SONAK,J

1. HeardÂ learned counsel for the parties.
2. The challenge in thisÂ petitionÂ is to the judgment and order dated 6th December, 2006 made by the Central Administrative Tribunal (CAT)Â dismissing OriginalÂ Application No.446 of 2005 institutedÂ by the petitionersÂ seekingÂ overtime allowance on the basis ofÂ revised pay scale made applicableÂ to them.
3. The petitioners had pleaded that they were initially appointed asÂ Lower Division Clerks and thereafter,Â promoted as Upper Division Clerk at the Naval Armament Depot (Respondent No.6).Â As a part of their duties, the petitioners wereÂ posted/ transferred to the timeÂ keepingÂ section on rotation basis forÂ fixed tenure of three years. Here, the petitioners

were required to work overtime as and when directed by the administration and also observed non-industrial timings. It is the case of the petitioners that while they were posted at the time keeping section, they were invariably required to work in the excess of 48 hours per week or 9 hours per day. As a result, the petitioners had contended that they were entitled to overtime allowance at twice their ordinary rate of wages in terms of Section 59 of the Factories Act 1948, which was clearly applicable.

4. The respondents also do not dispute the entitlement of the petitioners for overtime allowance in terms of Section 59 of the Factories Act. In fact, there is no dispute that such overtime was being paid to the petitioners. However, it is the case of the petitioners that the respondents by misconstruing the office memorandum dated 1st July, 1998 issued by the Ministry of Defence, Government of India have been computing the overtime allowance, on the basis of "Pre-revised scale", even though there had been a revision in the pay scales of the petitioners and the petitioners were entitled to the overtime allowance on the basis of such revised pay scales.

5. The petitioners aggrieved by the denial of overtime allowance on the basis of the revised pay scales made representations to the respondents, which were, however, turned down by the respondents mainly relying upon the office memorandum dated 1st July, 1998. The petitioners then instituted Original Application No.446 of 2005 seeking directions for payment of overtime allowance on the basis of revised pay scales. By the impugned judgment and order dated 6th December, 2006, the Central Administrative Tribunal dismissed their Original Application No.446 of 2005, again relying almost exclusively on clause (iii) of the O.M. dated 1st July, 1998. Hence, the present petition.

6. Mr.A.I.Bhatkar, learned counsel for the petitioners contends that the case of the petitioners was squarely governed by clause (i) of the O.M. dated 1st July, 1998, which had clearly provided that the employees who are "workers" within the meaning of the Factories Act, 1948, are entitled to payment of overtime allowance in terms of Section 59 of the Act on the basis of revised pay scales. Mr.Bhatkar submits that clause (iii) of the O.M. dated 1st July, 1998 applies only to "workers"

who came within the scope of Section 64 of the Factories Act and whose basic pay was more than Rs.1,600 per month in the revised pay scales. Mr. Bhatkar points out that since the petitioners were not at all 'workers' who came within the scope of Section 64 of the Factories Act, 1948, the Central Administrative Tribunal was not at all right in applying clause (iii) of the O.M. dated 1st July, 1998 and on such basis denying relief to the petitioners.

7. Mr. Bhatkar further pointed out that the petitioners in Paragraph Nos. 4.8 and 4.9 of their Original Application No. 446 of 2005 before the Central Administrative Tribunal had made clear averments that employees, identically placed at the Naval Dockyard of the Respondent No. 4 were being paid overtime allowance in terms of Section 59 of the Factories Act, 1948 on the basis of their revised scales. Mr. Bhatkar points out that since there was absolutely no difference between the petitioners and their counter parts at the Naval Dockyard, the denial of overtime allowance to the petitioners on the basis of revised pay scales, amounted to clear discrimination and violation of the constitutional rights under Articles 14 and 16.

8. Despite service, none appears on behalf of the respondents.

9. We have carefully considered the submissions made by Mr. Bhatkar and we have also perused the impugned judgment and order made by the CAT. According to us, for the reasons which we shall indicate hereafter, the impugned judgment and order made by the CAT warrants interference and the petitioners deserve to be granted the relief of overtime allowance on the basis of their revised pay scales.

10. Since the petitioners were working as clerks at the Naval Armament Depot, there can be no dispute that they were 'workers' as defined under Section 2(l) of the Factories Act, 1948. There is also no dispute that the Naval Armament Depot where the petitioners were working, answers the definition of factory under Section 2(m) of the Factories Act, 1948. There is also no dispute that when the petitioners were posted at the time keeping section of the Naval Armament Depot, they were required to work overtime i.e. in excess of 48 hours of the weeks and 9 hours of the day.

OFFICE MEMORANDUM PAYMENT OF OVERTIME ALLOWANCE TO
EMPLOYEES OF DEFENCE INDUSTRIAL

ESTABLISHMENTS

The undersigned is directed to refer to this Ministry's OM Nos.14(1)/86/D(Civ.II) dated 14.01.88 and DO P&T OM No. dated 21/11/97 and

to say that the matter regarding payment of OTA to the employees of Defence Industrial Establishments has been reviewed in

consultation with DO P&T and Ministry of labour taking into account the provisions of the Factories Act, 1948 and the following

clarifications are accordingly being made here:

(i) The employees of Industrial establishment who are "Workers" within the meaning of the Factories Act, 1948, are 59 of the Act on one

basis of the revised pay scales. As already stated in the Ministry of Defence OM No.14(2)/87/D(Civ.II) dated 11.09.87 and OM

No.14(1)/86/D(Civ.II) dated 14.01.88, they are entitled to Overtime Allowance only at the time rate, for the work done between the

prescribed working hours and upto 48 Hours a week.

(ii) Those categories of "Workers" of Industrial Establishments who come within the scope of Section 64 of the Factories Act

covering only those employees who are under the rules framed by the state Govts under section 64(1) of the Factories Act, 1940 or who are

declared to be workers by the Inspector of Factories under Section 64(1) of the Factories Act, are entitled to payment of Overtime

Allowance under Section 59 of the Act, on the basis of revised pay scales but subject to the conditions that their basic pay in the pre-

revised pay scales is not more than Rs.1,600/p.m. notionally determined. They are entitled to OTA at time rate as explained in sub

para (i) above for the work done between the prescribed duty hours and upto 48 hours work in a week.

(iii) Those Categories of "Workers" who come within the scope of Section 64 of the Factories Act and whose basic pay is more than

Rs.1,600/p.m. in the pre-revised scales are eligible for OTA in terms of Ministry of Defence OM No.14(2)/76/D(Civ.II) dated 25.06.1983.

Accordingly, OTA will be paid to them on the basis of old pay scales notionally determined. They will also, be paid OTA for

overtime work done between the prescribed duty hours and upto 48 hours a week only at time rate calculated on the basis of old pay

scales notionally determined. They will be entitled to OTA at double the time rate calculated on the basis of old pay scales, notionally

determined, for work beyond 48 hours under the orders dated 25.06.1983 referred to above. This will not entitle anyone who is not covered by

25.06.1983 orders to claim OTA.

2. Overtime allowance may be paid on the basis of instructions contained in subpara (i), (ii), and (iii) of para 1 above with effect from

01.01.1996 or date from which the pay in revised scale of pay is drawn and past cases regularised accordingly. 3. This issues with the

concurrence of Ministry of Defence (Fin/AG) vide this ID No.547/AG/PB/98 dated 01.07.98 and after consultation with DO P & T vide their

U.O.No.15013/1/98-Estt(AL) dated 03.02.98 and Ministry of Labour vide U.O.No.S. 25025/2/97-ISII dated 23.06.98.

Sd/x x x

(V.A.Chavda)

Under Secretary to the

Government of India.

(emphasis supplied)

14. The case of the petitioners, according to us, is covered by clause (i) of the O.M. dated 1st July, 1998, which was not even adverted

to, by the CAT in the impugned judgment and order. As noted earlier there is absolutely no dispute that the petitioners are

workers within meaning of the Factories Act, 1948 and are therefore, entitled to payment of overtime allowance in terms

of Section 59 of the Factories Act, 1948. Clause (i) of the O.M. dated 1st July, 1998 in terms provides that such overtime in terms of

Section 59 of the Factories Act, 1948 has to be paid On basis of revised pay scales.

15. Clause (iii) of the O.M. dated 1st July, 1998 relied upon by the respondents as well as the CAT applies to only those

categories of workers who come within the scope of Section 64 of the Factories Act and whose basic pay is more than

Rs.1,600/Â per month Â in the preÂrevisedÂ scales.Â ThisÂ meansÂ that for clause (iii)Â to be attracted,Â two conditionsÂ have to be

satisfiedÂ by the categoryÂ of workers:Â?

(a) The workersÂ concernedÂ mustÂ come within the scope of Section 64 of the Factories Act,Â 1948; andÂ

(b) The workersÂ Â concernedÂ must beÂ drawingbasic pay of more than Rs.1,600/Â?Â per month.

16. OnlyÂ if the aforesaidÂ two conditionsÂ wereÂ toÂ be satisfied, can it beÂ said that the workersÂ concernedÂ could be paidÂ the

overtime allowance on the basis ofÂ old pay scalesÂ notionally determinedÂ Â and notÂ on the basis ofÂ the revised pay scales. In the present

case,Â both the respondents as well as the CATÂ have applied clause (iii)Â of the O.M. datedÂ 1st July,Â 1998 to the case of the petitionersÂ

merelyÂ on the basis thatÂ Â the basic payÂ of the petitioners was more than Rs.1,600/ÂÂ per monthÂ in the prerevised pay scales.Â Neither

the respondents nor the CAT have gone intoÂ the question as to whether the petitionersÂ were workersÂ who came within the scope ofÂ Section

64 of the Factories Act, 1948.

17. The record bears out that the petitioners, were notÂ workers who came within the scope ofÂ Section 64 of the Factories Act, 1948. Therefore,

one of the conditionsÂ forÂ applicabilityÂ of clause (iii)Â of the O.M. dated 1st July, 1998Â was notÂ fulfilled and consequentlyÂ clause (iii)Â

of the O.M. dated 1st July, 1998 was not at all attracted to the case of the petitioners.Â Rather, as noted earlier,Â the case of the petitionersÂ was

fully coveredÂ by clause (i) of the O.M. dated 1st July, 1998.

18. SectionÂ 64(1) of the Factories Act, 1948 empowers the State Government to make rules defining the persons who hold positions of supervision

or management or are employed in a confidential position in a factory or empowering the Chief Inspector to declare any person, other than a person

defined by such rules, as a person holding position of supervision or management or employed in a confidential position in a factory if, in the opinion of

the Chief Inspector, such person holds such position or is so employed, and the provisions of this Chapter, other than the provisions of clause (b) of

subÂsection (1) of section 66 and of the proviso to that subÂsection, shall not

apply to any person so defined or declared. Provided that any person so defined or declared shall, where the ordinary rate of wages of such person does not exceed the wage limit specified in sub-section (6) of section 1 of the Payment of Wages Act, 1936, as amended from time to time, be entitled to extra wages in respect of overtime work under section 59.

19. In pursuance of powers vested in the State Government under section 64(1) of the Factories Act, 1948, the State Government has framed Rule 100

in the Maharashtra Factories

Rules, 1963, which reads thus:

Rule 100:

PERSONS DEFINED TO HOLD POSITION OF SUPERVISION OR EMPLOYED IN A CONFIDENTIAL POSITION.

(1) In a factory the following persons shall be deemed to hold position of supervision or management within the meaning of sub-section (1) of section

64, provided they are not required to perform manual labour or clerical work as a regular part of their duties namely:

(i) The Manager, Deputy Manager, Assistant Manager, Production Manager, Works Manager and the General Manager; (ii) Departmental Head,

Assistant Departmental Head, Departmental in-charge or Assistant Departmental in-charge;

(iii) Chief Engineer, Deputy Chief Engineer and Assistant Engineer;

(iv) Chief Chemist, Laboratory in-charge;

(v) Personnel Manager, Personnel Officer;

(vi) Labour Officer, Assistant Labour Officer; (vii) Welfare Officer, Additional Welfare Officer or Assistant Welfare Officer;

(viii) Safety Officer;

(ix) Security Officer;

(x) Foreman, Chageman, Overseer and Supervisor;

(xi) Jobber in Textile Factories;

(xii) Head Store Keeper and Assistant Store Keeper;

(xiii) Boiler Sarang or such Boiler Attendants who are in-charge of a battery of boilers and are only required to do supervisory work;

(xiv) Any other person who in the opinion of the Chief Inspector, holds a position

of supervision or Management and is so declared in writing by him.??

20. Now it is not the case of the respondents that the petitioners were ever holding position of supervision or management or that they were employed in a confidential position in a factory. It is also not the case of the respondents that the petitioners were included in any of the categories set out under Rule 100 (ii) of the Maharashtra Factories Rules, 1963. The petitioners were thus not workers who came within the scope of Section 64 of the Factories Act, 1948. Since this was one of the conditions for clause (iii) of the O.M. dated 1st July, 1998 to apply, clearly, both the respondents as well as the CAT, seriously erred in applying clause (iii) of the O.M. dated 1st July, 1998 to the case of the petitioners and on that basis denying the petitioners overtime allowance on the basis of the revised pay scales.

21. There was no contention raised that Rule 100 of the Maharashtra Factories Rules does not apply to the industrial establishment of the respondents. However, even if we were to proceed on the basis that Rule 100 is inapplicable, there is not the slightest material on record to suggest that the petitioners were workers covered under Section 64 of the Factories Act, 1948. In the absence of any such material, both the respondents as well as the CAT were obviously not right in treating the petitioners as workers covered under the scope of Section 64 of the Factories Act, 1948 and on such basis applying clause (iii) of the O.M. dated 1st July 1998.

22. That apart in Paragraph Nos.4.8 and 4.9 of the original application instituted by the petitioners before the CAT, they have clearly pleaded that clerks like them who have been posted in the time keeping section of the Naval Dockyard or at the office of General Manager, Naval Armament Depot, Mumbai have all been receiving overtime allowance on the basis of their revised pay scales. In the written statement filed on behalf of the respondents on 27th February, 2006 before the CAT there is no denial on this aspect. In fact, in Paragraph Nos.17 and 19 of such written statement, it is expressly admitted that the clerks at the time keeping section in the Naval Dockyard, Mumbai are receiving overtime allowance on the basis of revised pay

scales. There is no basis for distinguishing the cases of the petitioners and the cases of their counter parts at the Naval Dockyard or the Naval Armament Depots, all of which are establishments of the Ministry of Defence, Government of India. This aspect has really not being considered by the CAT in the proper perspective. Award of Overtime allowance to similarly placed clerks in other defence industrial establishment on the basis of their revised pay scale but denial of the same to the petitioners clearly amounts to infringement of the petitioners' right guaranteed by Article 14 of the Constitution of India.

23. For all the aforesaid reasons, we dispose of this petition by following order:

(a) The impugned judgment and order dated 6th December, 2006 made by the Central Administrative Tribunal in Original Application

No.446 of 2005 is hereby set aside.

(b) The respondents are directed to pay to the petitioners overtime allowance on the basis of their revised pay scales for the period they were posted at the time keeping section of the Naval Armament Depot, Karanja, Uran within a period of three months from today

(c) If such dues are not paid within three months from today, then the respondent will have to pay interest thereon at the rate of 6% p.a. from the date such amounts became due and payable to the petitioners, till the date of actual payment.

24. The Rule is accordingly made absolute in the aforesaid terms. However, there shall be no order as to costs.