

(1961) 10 BOM CK 0018

In the Bombay High Court

Case No : Special Civil Application No. 525 of 1961

K. Shankar Narayan

APPELLANT

Vs

S.S. Thakur and Another

RESPONDENT

Date of Decision : 04-10-1961

Acts Referred:

Factories Act, 1948 — Section 59
Payment of Wages Act, 1936 — Section 2

Citation : AIR 1962 Bom 260 : (1962) 64 BOMLR 135 : (1962) 4 FLR 294 :
(1962) 1 LLJ 464

Hon'ble Judges : Shah, J;Mody, J

Bench : Division Bench

Advocate : P.D. Kamerkar, for the Appellant; R.M Dantawala, Mulla and i.b.
Mulla and Craigie Blunt and Caroe, for the Respondent

Judgement

Mody, J.

(1) This is a petition for an appropriate writ or direction under Article 227 of the Constitution filed by the petitioner challenging the judgment and order dated 18th February 1961, dismissing the petitioner's application passed by the first responder's who is the appropriate authority under the Payment of Wages Act. The petitioner is a workman and employee of the second respondents who are an engineering company. The petitioner is employed in the factory of the second respondents, the second respondents being a public limited company. The working hours of the petitioner as also of the other employees of the second respondent working in the factory of the second respondents are governed by the Indian Factories Act, 1948, Under the Factories Act the ordinary working hours at all relevant times were nine hours per day and forty-eight hours per week. The petitioner and the other employees of the second respondents being dissatisfied with the rates of wages and dearness allowance and certain other conditions of employment made certain demands upon the second respondents on the 21st April 1957. The said demands being collective demands were treated as an industrial dispute and were referred by the then Government of Bombay to

an Industrial Tribunal for adjudication u/s 10(2) of the Industrial Disputes Act, 1947. The Industrial Tribunal made its award on or about 5th February 1959 and the said award was published in the Bombay Government Gazette on the 19th March 1959.

(2) Only two of the demands which were the subject-matter of the said adjudication are relevant in this case. The first demand was for fixing certain grades for the monthly paid staff of certain categories of the second respondents. That demand really was for an increase in the rates of basic wages of the members of the staff falling in those categories. It was demanded that the increased rates should be effective from 1st January 1957. The second of the said demands was for an increased rate of dearness allowance payable to the workmen of the second respondents. By the said award certain increased rates of payment of basic wages in respect of some of the workmen of the said categories of staff mentioned in the first demand were granted. The award also granted certain higher rates of dearness allowance. By paragraph 38 of the award it was further directed that arrears of pay and dearness allowance shall be paid with retrospective effect from 1st April 1958, within the period mentioned in that paragraph. It is therefore, clear that the award which is dated 5th February 1959, and which became effective from the expiry of a month thereafter was given retrospective effect as from 1st April 1958.

(3) The second respondents have implemented the said award. There is no dispute that the second respondents are paying basic wages and dearness allowance as directed by the said award since the date of the said award. Even as regards the retrospective payment ordered by the said award the petitioner as also the other workmen have been paid basic wages and dearness allowance directed by the said award. There is however, only one dispute between the second respondents and the petitioner as also some other workmen, with whom we are not concerned directly in this petition, and that is that according to the petitioner, he is entitled to receive payment of wages for overtime, i.e., for the work done by the petitioner in excess of the ordinary working hours at rate computed on the basis of the said higher rates of basic wages fixed by the award as from 1st April 1958. It is common ground that after the date for the award the second respondents are paying even for overtime on the basis of the said higher rates of basic wages. The second respondents, however, deny that they are liable to pay for overtime for the period prior to the said award at the increased rates of basic wages.

(4) As the second respondents did not pay to the petitioner wages for overtime on the basis of the increased rates mentioned in the award for the period prior to the award, the petitioner filed an application before the parties, the first respondent passed his said judgment and order dated 18th February 1961, dismissing the petitioner's application with costs.

(5) It is common ground that the petitioner would be entitled to payment of extra wages for overtime u/s 59 of the Factories Act, 1948, which was the

relevant legislation governing the same at all relevant times, subsections (1) and (3) of section 59 are relevant and are 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.

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(3) For the purposes of this section "ordinary rate of wages" means has 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 a bonus."

By reason of subsection (1) of section 59 the petitioner would be entitled to be paid wages for overtime at the rate of twice his ordinary rate of wages." The ordinary rate of wages would, in the case of the petitioner, be his basic wages, as it is again common ground that he was not entitled to any other allowance of the nature mentioned in subsection (3) of section 59. The dispute between the parties, therefore, was as to what was the rate of wages of the petitioner on the basis whereof he was to be paid wages for overtime? The petitioner contends that as from 1st April 1958, he should be paid on the basis of the increased rate of basic wages payable to the petitioner under the said award, as the said award awards increased rates of basic wages with retrospective effect from 1st April 1958. The respondents, however, contend on the other hand that the award gives retrospective effect only as regards payment of the basic wages themselves and the dearness allowance but that the increased rates of basic wages have not been specifically mentioned in the award and, therefore, cannot be taken into consideration for the purposes of the calculation of the wages payable to the petitioner for overtime. In other words, it is the contention of the second respondents that as a result of a true construction of the award wages for overtime are payable only on the basis of the actual basic wages which were being paid to its workmen between 1st April 1958, and the date when the said award became effective and came into operation and not at the increased rates of basic wages ordered to be paid by the award with retrospective effect. The first respondent in his judgment and order has upheld the contention of the second respondents and negatived that of the petitioner. Shortly stated, the first respondent has arrived at his said conclusion on three main grounds, the same being, firstly, that the demands made by the workmen of the second respondents which resulted in the said award did not include a specific demand for an increased rate of wages for overtime, although such a specific demand was in fact made in respect of dearness allowance, secondly, that paragraph 38 of the award, which gives retrospective effect, although it specifically mentions dearness allowance, does not mention or mentions dearness allowance, does not mention or even refer to payment of wages for overtime, and thirdly that the

definition of the work "wages" in section 2(vi) of the Payment of Wages Act did not include any remuneration to which the person employed was entitled to in respect of overtime work, but that the said definition was amended by the Payment of Wages (Amendment) Act, 1957, so as to include in "wages" payment for overtime work, that the said amendment became effective only from 1st April 1958, and that when the said demands which ultimately resulted in the said award were made the demand of increase in wages could not be construed to include a demand for increased wages for overtime. In view of the said considerations, the first respondent held that if an increased rate of payment of wages for overtime was intended to be awarded by the said award with retrospective effect, it was necessary that it should have been so specifically directed by the said award and that in the absence of such a specific direction wages for overtime, were not payable on the basis of the increased rates of basic wages awarded by the said award even though the award directed the same to be paid with retrospective effect.

(6) In our opinion, the whole approach of the first respondent in dealing with this contention was misconceived. Wages payable to a workman for the ordinary working hours would be fixed by the terms of the contract between him and his employer, whether such terms be express or implied, with such variations if any therein as may be made by an award or awards made under the Industrial Disputes Act. The same would be the position as regards payment of dearness allowance. The payment of wages for overtime, however, stands on a totally different footing. Those wages are payable by reason of the obligation cast on the employer by a statute, viz. Section 59 of the Factories Act, 1948. What section 59 enjoins is that the employer shall pay to his workmen wages for overtime at the rate of twice his ordinary rate of wages. Because of the provisions of section 59 of the Factories Act it was obligatory open the second respondents to pay to the petitioner wages for overtime at the rate of twice the petitioner's ordinary rate of wages, which would be, in the case of the petitioner, only his basic wages. That was the obligation even during the period commencing from 1st April 1958, till the date when the said award became operative. The simple point, therefore, was to ascertain what was the rate of basic wages of the petitioner at that time. Till the award was made the basic wages of the petitioner were at a lower rate but the award altered the position. It directed that the increased rate of basic wages be paid to the petitioner with retrospective effect, i.e., as from 1st April 1958. The award , therefore, directs and determines that the basic wages of the petitioner even as from 1st April 1958 were the increased rate of basic wages as mentioned in the award. As from 1st April 1958, therefore, by reason of the award the basic wages of the petitioner were the increased rate of basic wages and that is the rate of basic wages which is the basis for calculation as mentioned in subsection (1) of section 59 for payment of wages for overtime. The petitioner was, therefore, entitled to be paid wages for overtime, even from 1st April 1958, till the date when the award became effective at the rate of twice his basis wages, the basic wages

being the increased basic wages as directed by the award . It is, therefore, irrelevant to ascertain, as contended by the second respondents and as in fact done by the first respondent in his judgment, as to whether the original demands made by the employees of the second respondents included a specific demand for an increased rate of payment of wages for overtime or not or whether on a construction of paragraph 38 of the award an increased rate of payment of wages for overtime has or has not been ordered with retrospective effect or not or whether the definition of "wages" in the payment of wages Act as it existed before its said amendment would or would not include payment of wages for overtime. These are irrelevant considerations.

(7) Mr. Kantawala, the learned counsel for the second respondents, contended that even if the correct position be as stated above, the entire provision of paragraph 38 giving retrospective effect as regards both the basic wages and the dearness allowance is bad, illegal and inoperative. Mr. Kantawala contended that the Industrial Tribunal which made the said award had no jurisdiction or power or authority to give retrospective effect to payment of dearness allowance at the increased rate, although, he conceded that it had jurisdiction to give retrospective effect to payment of the increased rate of basic wages. He contended that the provision in paragraph 38 giving retrospective effect to increased rates of basic wages and dearness allowance is not severable and that, therefore, the provision as regards both of them is bad and invalid. He contended that therefore the direction to pay the increased rate of basic wages with retrospective effect is invalid and that the petitioner would be entitled only to twice the rate of his original basic wages for the period 1st April 1958 till the date when the award became effective. It is not necessary to set out and we do not, therefore, set out Mr. Kantawala's contention as regards why the Industrial Tribunal was not competent to give retrospective effect to the payment of the increased rate of dearness allowance. Even if that provision is bad as contended for by Mr. Kantawala and on which we express no opinion as it is unnecessary for us to do so the same is clearly severable from the other direction which gives at the increased rate. As the latter provision is severable it will not be bad even if the said other provision about dearness allowance is bad. The conclusion that we have arrived at earlier would, therefore, not be affected even if Mr. Kantawala's contention about the illegality of giving retrospective effect to the increased rate of dearness allowance was correct.

(8) We, therefore, hold that the petitioner was entitled to be paid wages for overtime at twice the rate of his increased basic wages as determined by the said award. The judgment and order of the first respondent is, therefore, incorrect and cannot be sustained in law. We, therefore, set it aside. We, therefore, send the petitioner's application for payment of wages for overtime back to the Payment of wages authority for being dealt with in accordance with our above decision and observations. There will be no order as to costs.

(9) Petition allowed.