

(1982) 01 KL CK 0024
In the High Court Of Kerala
Case No : O.P. No. 1482 of 1978

Radhakrishnan Nair

APPELLANT

Vs

K.S.R.T.C. and Others

RESPONDENT

Date of Decision : 11-01-1982

Acts Referred:

Kerala Shops and Commercial Establishment Act, 1960 — Section 7
Minimum Wages Act, 1948 — Section 14
Motor Transport Workers Act, 1961 — Section 13, 26, 37

Citation : (1982) 01 KL CK 0024

Hon'ble Judges : Sukumaran, J

Bench : Single Bench

Advocate : M.N. Sukumaran Nair and K.K. Dinesan, for the Appellant; K. George Mathew and Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Sukumaran, J.—The controversy in this writ petition centres round the formula to be applied for the calculation of overtime wages of the ministerial staff of the 1st Respondent, Kerala State Road Transport Corporation (for short "the Corporation"). The question is of general importance and of far-reaching financial implications, and affects a large Section of the employees of the Corporation, though the order impugned in the writ petition concerns only an individual and involves only a meagre sum.

2. As is well-known the Corporation employs a large number of workmen, belonging to various categories. The ministerial Section of its workers, probably meaning white-collared among them, forms a distinct category. The proliferation of trade unions is reflected in this category and in this Corporation too. The unions espoused the demands of the ministerial staff. A charter of demands was presented. Conciliation talks ensued. And ultimately the disputes were happily settled. The memorandum of settlement, Ext. R-1, took in various matters. One such matter related to working hours. The working hours had been reduced and

fixed as from "10 a.m. to 5 p.m. with existing lunch interval". Apparently, the lunch interval is one hour. The resultant position, therefore, is that the working time of the ministerial staff is fixed as seven hours.

3. The statutes which govern the hours of work of similar workers, namely, the Kerala Shops and Commercial Establishments Act and the Motor Transport Workers Act, inter alia, provide for the working hours of employees. There, working hours are fixed as eight. Thus what had been gained as a result of the settlement of dispute under Ext. R-1 is a distinct advantage in the reduction of the working hours. This is an advantage or benefit which the workmen are entitled to enjoy and retain the statutes permitting such preservation of more advantageous terms obtained out of collective bargain. It is not in dispute that this Section of the workmen are paid overtime wages whenever they are obliged to work for a longer period than seven hours a day. It is rightly so. Though a statutory right under the Shops and Commercial Establishments Act and the Motor Transport Workers Act to claim overtime wages can ordinarily arise only if they work beyond eight hours a day, or forty-eight hours a week, the ministerial staff of the Corporation are entitled to overtime wages, even when the hours of work do not exceed the daily or weekly hours of work stipulated under the statute, in view of the reduction in the working hours as a result of the settlement Ext. R-1. This position is indicated in paragraph 3 of the counter-affidavit dated 17th July 1978 of the Respondent Corporation:

The staff of the K.S.R.T. Corporation are engaged in overtime duty, out of their normal duty hours, whenever such a necessity occurs. At times the ministerial staff are also engaged on an overtime basis to clear off arrears of work. For the purpose of reckoning overtime allowance, the extra hours of work put in over and above the normal are taken into consideration.

4. As regards the normal hours of work of the ministerial staff, the position is clarified in Ext. P-1 memorandum issued by the Chief Accounts Officer of the Corporation. In paragraph 2 thereof it is explicitly stated as follows: "A man-day is 7hrs for the purposes of overtime duty as the work is done by the ministerial staff" (emphasis supplied). It has also not been disputed by the counsel for the corporation that a member of the ministerial staff will be entitled to overtime if he works eight hours a day, though under the statutory scheme the normal hours of work is fixed as eight hours.

5. The Petitioner had attended to some overtime work in the year 1977. Initially the overtime allowance was calculated treating the man-day as eight hours. The Kerala State Transport Staff Union sought a revision of the calculation. The Assistant Transport Officer, Chengannur who was the concerned officer to effect the payment, found the stand of the staff union as reasonable. He accordingly directed calculation of overtime allowance of the ministerial staff treating a man-day as seven hours from August 1977 onwards. This is evident from Ext.P-2, office order, dated 14th October 1977 of the Assistant Transport Officer. After the payment had been so effected, the claim is seen to have been verified by the

Chief Accounts Officer. He thought that the calculation was erroneous. According to him, under the existing rules "the formula fixed for deriving the overtime wages of an hour should have been:

$2(\text{Pay} + \text{D.A.} + \text{Variable D.A.}) \times \frac{\text{No. of days of the month}}{8}$? 8. This was not the formula employed by the Assistant Transport Officer while passing the order Ext. P-2. Expressed in the form of a formula, the basis of a calculation adopted by the Assistant 2 $(\text{Pay} + \text{D.A.} + \text{Variable D.A.}) \times \frac{\text{NO. of days of the month}}{7}$. Transport Officer was:

In view of the conclusions so reached by the Chief Accounts Officer the District Transport Officer was directed to recover the alleged excess amount paid to the staff, by altering the overtime formula. The memorandum of the Chief Accounts Officer is Ext. P-3 dated 28th December 1977. The staff union apparently resisted the move. It sought a reconsideration of the proposal of the Chief Accounts Officer, by a written request of 19th January 1978. The District Transport Officer is seen to have forwarded the request of the Staff Union dated 19th January 1978 to the Chief Accounts Officer. He, however, stuck to his stand and gave a peremptory direction that the calculation of overtime allowance should be strictly on the basis of the formula referred to in Ext. P-3. This communication is dated 18th April 1978 and produced as Ext. P-4 by the Petitioner. The writ petition was filed shortly thereafter challenging the legality of the stand taken in Exts. P-3 and P-4.

6. The Petitioner contends that the formula referred to in Ext. P-3 is not in tune with the provisions of the Motor Transport Workers Act read with the reduction of the working hours under Ext. P-1 from eight hours to seven hours and that such a formula and the direction to apply that formula are contrary to the provisions contained in the Act and consequently liable to be declared as illegal and invalid. The formula being invalid the further directions in Exts. P-3 and P-4 are also liable to be declared as illegal, according to the Petitioner.

7. Counsel for the Respondents submitted that the formula referred to in Ext. P-3 was legal and the direction contained in Exts. P-3 and P-4 was, therefore, lawful. He also submitted that barring the Petitioner, no other employee or Section of employees had put forward such a claim relating to the computation of the overtime wages. Presumably, the attempt of counsel for the corporation was to show that the absence of any agitation or protest from the large Sections of the ministerial staff whose causes are espoused with vehemence and vigour by the vociferous trade unions is indicative of the legality of the corporation's action and the unsustainable nature of the stand of the staff union.

8. I must straight away dismiss the latter contention. The fact that other workers or other unions have not chosen to contest the legality of the particular action, does not necessarily lead to the conclusion that the action is legal and just. As has been correctly observed by Megarry, J. in *John v. Rees*, (1970) 1 Ch. 345 at 371 actions are decided by reference to justice according to law and not by

counting heads". The same sentiment is echoed in the East. Stephanson, J. of the Australian High Court observed:

The novelty of the application is itself no insuperable obstacle to its success.

See *Reg v. Collins Exp. A.C.T.U.-Solo Enterprises Pt. Ltd.* 50 Australian Law Journal Report 471 at 472 And Lord Wright was right (I venture to think with great respect) when he stated:

Just as there is not one law for the rich and one for the poor, so there is not one law for cases which involve small amounts of money or issues of comparatively small importance and another law for those which do involve major and graver issues.

See (1936) 1 Ch. 343 at P. 355. The fact that other workmen or unions have not advanced such a claim, does not lead to the conclusion that the claim is totally untenable.

9. Mr. Dinesan, appearing for the Petitioner put forward his contentions with coherence and logic and buttressed his arguments by reference to numerous judicial decisions although rendered under different statutory backgrounds. Deference to counsel's industry and research may necessitate a reference to those decisions in the judgment but I felt that it would be sufficient to bear in mind the principles discernible from those decisions in modulating my approach and attitude to the question arising for decision. (And such has been the attitude of the Supreme Court in *Dig Vijay Mills*, case AIR 1980 S.C. 1944 referred to in greater detail later).

10. In order to appreciate the contention so put forward by the Petitioner, it is necessary to extract the relevant provisions of the Act. The hours of work as stated earlier, in respect of ministerial workers are regulated u/s 7 of the Kerala Shops and Commercial Establishments Act, 1960 and Section 26 of the Motor Transport Workers Act, 1961. Section 13 of the Act is in the following terms:

No adult motor transport worker shall be required or allowed to work for more than eight hours in any day and forty-eight hours in any week:

Provided that where any such motor transport worker is engaged in the running of any motor transport service on such long distance routes, or on such festive and other occasions as may be notified in the prescribed manner by the prescribed authority, the employer may, with the approval of such authority, require or allow such motor transport worker to work for more than eight hours in any day or forty-eight hours in any week but in no case for more than ten hours in a day and fifty-four hours in a week, as the case may be:

Provided further that in the case of a breakdown or dislocation of a motor transport service or interruption of traffic or act of God, the employer may, subject to such conditions and limitations as may be prescribed, require or allow any such motor transport worker to work for more than eight hours in any day or

more than forty-eight hours in any week.

As stated earlier, this stipulation regarding hours of work is susceptible of variation, variation only if it be to the advantage of the workers. The preservation of such benefit of varied terms is statutorily recognised u/s 37. That Section reads as follows:

37. Effect of laws and agreements inconsistent with this Act.--(1) The provisions of this Act shall have effect notwithstanding any thing consistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the commencement of this Act:

Provided that where under any such award, agreement, contract of service or otherwise a motor transport worker is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act, the motor transport worker shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he receives benefits in respect of other matters under this Act.

(2) Nothing contained in this Act shall be construed as precluding any motor transport worker from entering into an agreement with an employer for granting him rights or privileges in respect of any matter which are more favourable to him than those to which he would be entitled under this Act.

11. I may indicate here that though initially the Petitioner contended that the benefit of reduced number of working hours was a benefit which the ministerial workers obtained prior to the implementation of the Motor Transport Workers Act, 1961 and as such the better benefits so derived could not be abridged by the corporation, as such abridgment had been totally prohibited u/s 13 of the Act, that contention need not be considered, as it is unavailable in view of the fact that Ext.R-1 relating to the reduction in working hours of the ministerial staff was effective only from 21st June 1967, and consequently was subsequent to the Implementation of the Motor Transport Workers Act. In other words, the benefit of the reduced working hours was not one which was available anterior to the coming into force of the Act. It cannot therefore be a pre-enactment benefit which could be continued on the basis of Section 37 of the Act. The only contention urged finally was that Section 37 of the Act preserved and protected certain types of benefits available anterior to, as well as those arising subsequent to, the coming into force of the Act. If such a benefit under an award, settlement etc. had been granted, though subsequent to the coming into force of the Act, the benefit under such award or settlement came within the protective provision of the proviso to Section 37. If that be so, the working hours made mention of in the statute (viz. the eight hours in Section 13) get supplanted by the more beneficial terms arising from the settlement and protected under the proviso to Section 37. This substitution of the working hours (namely the substitution of eight hours by seven) according to the Petitioner should be applied while calculating the overtime wages as stipulated u/s 26 of the Act. Even if there be

some ambiguity on the scope of the statutory provisions, the construction should lean in favour of the labour as suggested by the sapient observations of the Supreme Court:

In Industrial Law, interpreted and applied in the perspective of Part IV of the Constitution, the benefit of reasonable doubt on law and facts, if there be such doubt, must go to the weaker Section, labour.

(vide K.C.P. Employees' Association, Madras v. The Management of K.C.P. Ltd. and Ors. etc. AIR 1978 S.C. 474 at P. 475)

12. The case of the Corporation on this aspect is better expressed in the words in the counter-affidavit itself:

The normal duty hours is 8 hours according to Section 7 of the Shops and Commercial Establishments Act, as well as Section 26 of the Motor Transport Workers Act. These provisions apply to the ministerial staff also. The formula for calculating overtime allowance is as follows:

$2 (\text{Pay} + \text{D.A.} + \text{Variable D.A.}) \times \text{No. of hours of work} \div \text{No. of days in the month} \times 8$

The formula was arrived at on the assumption that the normal man-day consists of 8 hours of work. It is so according to the provision of the relevant statutes.

As regards the reference to seven hours working day in Ext. P-I, the explanation is offered in paragraph 4 of the counter-affidavit in the following terms:

It (Ext. P-I) only gave directions regarding the normal duty hours of the office staff, and did not in any way alter the formula for calculation of overtime allowances. In fact, there is no mention in Ext. P-I of calculation of overtime allowance. Specific directions were issued in this matter as per Ext. P-3. In this connection, reference may be had to Section 7 of the Shops and Commercial Establishments Act, 1960, which provides that when an employee works for more than 8 hours in a day or for more than 48 hours in any week, he shall, in respect of such overtime work be entitled to wages at the rate of twice the ordinary rate of wages. The same is the provision in the Motor Transport Workers Act, 1961, also. The formula for calculation of overtime allowance is evolved in fact, with reference to the provision of the concerned statutes.

(emphasis supplied)

Again the same idea is reiterated in paragraph 5 of the counter-affidavit in the following words:

The fact is that Ext. P-1 order was intended only to state the office hours of the ministerial staff attached to the K.S.R.T.C., and not for the purpose of calculating overtime allowance payable to the ministerial staff.

(emphasis supplied).

13. The question is whether the stand taken by the Corporation in applying the

formula referred to in Ext. P-3 and explained in the counter-affidavit as detailed above, is correct.

14. While accepting the fact that a man-day is of only seven hours" duration and that it has been so fixed under Ext. P-1, the Corporation apparently takes the stand that such fixation of hours of work under Ext. R-1 settlement, dated 21st June 1967 and reiteration thereof in" Ext. P-1, have absolutely nothing to do with the calculation of the overtime wages u/s 14 of the Minimum Wages Act read with Section 26 of the Act. According to me, this stand of the Corporation is not tenable. It is not as though fixation of hours of work does not have impact on other statutory provisions. Whether the Corporation should have agreed to such reduction of working hours when the statute did not oblige it do so is an entirely different matter. Perhaps to purchase industrial peace, or perhaps to ensure a greater efficiency in the discharge of the duties of the employees, or for other relevant considerations, it had thought it fit, as early as in 1967, to reduce the working hours to seven, although the statute provided for eight hours" duty. However, one need not be unnecessarily concerned about this office staff"s alleged annexation of large scale service benefits contributing to poor productivity in industry. It appears to be a global phenomenon and prevalent in even industrially advanced countries like America as is evident from the following passage in Tom Forester"s book "The Microelectronics Revolution" reading:

While productivity in American industry had increased by eighty-three percent in the 1960s office productivity had crept up at just four percent per annum. Poor productivity in the offices of the service sector was seen as a major reason for the failure of advanced industrial societies to sustain economic growth (p. xv).

(emphasis supplied)

The Corporation having so agreed to the reduction of the working hours, cannot shirk the consequences directly flowing from such fixation of hours of work. A conjoint reading of Section 13 and Section 37 of the Act, is to substitute, as I said earlier, the eight hours of work referred to in Section 13 by seven hours as visualised under Ext. R-1 agreement and safeguarded under the proviso to Section 37. What had been initially a matter of agreement (under Ext. R-1) obtained a statutory favour by its having been brought within the protective provision of the proviso to Section 37. The seven hours" working day became a statutorily recognised condition of services as a result of the inter-reaction of Ext. R-1, Section 13 and Section 37 of the Act. That being so, when by a statutory fiction as it were, the working hours of the ministerial staff got transmuted to seven, the statutory fiction should be permitted to have its full play and sway. It is well settled that in such circumstances, the court should not permit its imagination to be boggled when it comes to the question of giving full force and effect to the deeming provision.

15. The formula in this background for the computation of the overtime wages bearing in mind the ingredients of Section 14 of the Minimum Wages Act, 1948

(which in term attracts Section 26 of the Act), has necessarily to be what had been referred to in Ext. P-2 by the Assistant Transport Officer.

16. I am supported in this approach, by the observations of the Supreme Court while tackling a similar problem, in the decision in *Digvijay Woollen Mills Ltd. Vs. Shri. Mahendra Prataprai Buch*, In arriving at an average, the actualities of the situation cannot be ignored. Thus while a month, under the ordinary connotation of the term and under the General Clauses Act, is to consist of 30 days, the "economic reality" in any factory is:

A worker gets full month's wages not by remaining on duty for all the 30 days within a month but by remaining on work and doing duty for only 26 days.

A recognition of such economic reality and application of it in the computation of gratuity under the scheme of Payment of Gratuity Act, 1972 obtained the approval of the Supreme Court in the *Digvijay Woollen Mills Ltd. Vs. Shri. Mahendra Prataprai Buch*, decision referred to above. In the present case, the economic and legal reality is that the normal working time is only seven hours a day, though working hours up to eight are normally permitted by the statutes. To refuse to recognise that reality in the computation of overtime wages, according to me, is to do violence to the statutory provisions.

17. In evolving the formula for the calculation of overtime wages, the Corporation cannot rigidly adhere to the words "eight hours" occurring in Section 13, by interpreting that Section too literally. That Section has necessarily to be read harmoniously with Section 37. It may also be noted that the Corporation itself does not stick on to such a literal construction of "eight hours" in Section 13, while granting overtime; as stated earlier, when a member of the staff works in excess of seven hours (though not in excess of the eight hours referred to in Section 13) the Corporation itself pays overtime wages to such an employee. Only in the matter of the formula, it ignores the fact that the normal time of duty for the ministerial staff is seven hours. Such an attitude and approach, according to me, is not sanctioned by the statutory scheme.

18. Counsel for the Respondent-Corporation submitted that the application of the formula as referred to in Ext. P-3 will involve huge financial implications and will salt away substantial sums from its frail purse and therefore should not be approved by this Court, particularly having regard to the fact that other employees and other unions have not thought it fit to raise such a claim. As regards the latter limb of the submission, I have already expressed my views earlier. When once, on a proper interpretation of the provisions of the agreement Ext. R-1 and those of the enactment, particularly Sections 13, 26 and 37 of the Act I have come to the conclusion that the Petitioner's contention relating to the formula for the calculation of the overtime wages is correct, I must necessarily uphold it. As stated earlier, it was the Corporation which had agreed for the reduction in the hours of work under Ext. R-1, though the statute was not that liberal. The Corporation having so made its bed it must lie on it, even if it later

turns out to be a procrustean bed.

19. In the light of the aforesaid discussion and conclusion, I declare that the correct formula for the computation of overtime wages for the ministerial staff of the Respondent-Corporation is the one referred to in Ext. P-2 and that the direction contained in Exts P-3 and P-4, which is at variance with Ext. P-2, is vitiated by a patent error of law. Exts P-3 and P-4, to the extent they direct recomputation of the overtime wages on the basis of the formula mentioned therein and the directive for the recovery from the Petitioner's emoluments on that basis, are also vitiated by legal errors and devoid of statutory authority and they are accordingly quashed. The Original Petition is allowed in the manner indicated above but without any order as to costs.