
(1993) 09 OHC CK 0013
In the Orissa High Court
Case No : Misc. Appeal No. 438 of 1990

Regional Director, ESIC

APPELLANT

Vs

P.B. Gupta

RESPONDENT

Date of Decision : 14-09-1993

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(22)

Citation : (1993) 76 CLT 893 : (1994) 68 FLR 666 : (1994) 2 LLJ 19

Hon'ble Judges : G.B. Patnaik, J

Bench : Single Bench

Advocate : J.K. Tripathy and S.N. Misra, for the Appellant; Govind Das, K.K. Jena and J.N. Das, for the Respondent

Final Decision : Dismissed

Judgement

G.B. Patnaik, J.—The short question that arises for consideration in this appeal is whether "over-time allowance" paid to employees would be included in the definition of "wages" in Section 2(22) of the Employees' State Insurance Act, 1948, for the purpose of the employer's contribution on the same. On this question there is a sharp cleavage of opinion between the High Courts of India, the Calcutta, Karnataka and Rajasthan High Courts having taken the view that the said payment would not be included in the definition of "wages", whereas the Andhra Pradesh, Bombay, Kerala and Delhi High Courts having taken the view that the said payment would be included in the definition of "wages". There has been no authoritative pronouncement of the Supreme Court on the question though there has been some observation in some incidental matters and so far as this Court is concerned, there has been no decision at all and, therefore, it is necessary to have an in-depth examination of the point in issue.

2. The respondent is the employer engaged in manufacture of paper and paper board. He received a notice from the appellant calling upon him to pay the contribution and the respondent furnished a reply indicating the detailed particulars of payments on which contribution has been paid as well as the

particulars of payments on which contribution has not been paid on the ground that payments made for over-time work do not come within the definition of "wages" as defined in Section 2(22) of the Employees' State Insurance Act (hereinafter referred to as the "Act"). The stand of the respondent was that over-time payments made to the employees cannot be included in the definition of "wages" for the purpose of contribution. The appellant, however, intimated the respondent that over-time payments come within the definition of "wages" and as such contribution is payable on such overtime payments. The respondent, therefore, filed an application before the E.S.I. Court for declaration that he was not liable to pay contribution in respect of the payments made to his employees for over-time work as the same cannot be included in the definition of "wages"

3. The appellant took the stand before the E.S.I. Court that the Act being a beneficial legislation for the workmen and over-time payment being an additional remuneration paid at intervals not exceeding two months, the same has to be included in the definition of "wages" and, therefore, the respondent is liable to pay the demand in question.

4. The E.S.I. Court after analysing the provisions of the Act and noticing different decisions placed before it came to the conclusion that overtime payments are not "wages" under the E.S.I. Act and accordingly allowed the application filed by the present respondent and held that the said respondent was not liable to pay the demand made by the Regional Director of the Employees' State Insurance Corporation. Challenging the said decision, the present appeal has been filed by the said Regional Director invoking the jurisdiction of this Court u/s 82 of the Act.

5. Mr. Mishra appearing for the appellant contends that the expression "wages" in Section 2(22) of the Act having been defined to mean "all remuneration paid or payable" and the overtime payment being one such remuneration, there is no justification to give a restricted meaning to the expression, particularly when the legislation is a beneficial legislation intended to confer benefits on the employees.

Mr. Das, the learned Senior Counsel appearing for the respondent, on the other hand, contends that over-time payment not being a remuneration which an employee can claim as of right flowing from the terms of the contract of employment, and the said payment being dependent upon the exigencies of the administration as well as the willingness of the employee to work over-time, the same does not come within the definition of "wages" in Section 2(22) of the Act and the decision of the E.S.I. Court is unassailable.

6. The correctness, of the rival contentions depends upon an interpretation of the expression "wages" as defined in Section 2(22) of the Act and for better appreciation of the point in issue, the said provision is extracted hereinbelow in extenso:-

"2. Definitions. In this Act, unless there is anything repugnant in the subject or context,-

XXXX XXXX XXXX

(22) "Wages" means 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 authorised 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 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."

The definition of the expression "wages" in Section 2(22) of the Act consists of three parts, first part of which is an exhaustive definition by using the expression "means"; the second part is an inclusive part thereby conveying that but for the inclusion, the payments covered by the second part would not come ordinarily within the first part; and the third part consists of the exclusion part. It is an ordinary rule of interpretation of statutes that where the words "means" or "means and includes" are used in the statute, it affords an exhaustive explanation of the meaning which, for the purposes of the Act, must inevitably attach to those words or expression. The word "includes" is generally used in a definition clause to enlarge the meaning of the words or phrases occurring in the body of the statute and where it is so used, the words and phrases must be considered as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. It is to be borne in mind that it is unsafe to seek the meaning of the words used in an Act from the definition clause of other statutes, particularly when the Legislatures have given a meaning to the expression in the statute which requires an interpretation. An inclusive definition is, no doubt, a well recognised device to enlarge the meaning of the words defined, and, therefore, it may not be appropriate to put a restrictive interpretation upon the terms of a wider denotation, but it should not be interpreted so widely so as to over-reach the objects for which the Act was passed.

7. In the case of S.K. Gupta and Another Vs. K.P. Jain and Another, , their Lordships of the Supreme Court observed:-

"The frame of any definition more often than not is capable of being made flexible but the precision and certainty in law requires that it should not be made loose but should be kept tight as far as possible. Resort to dictionary meaning is not required where definition clause exists. Where in a definition section of a

statute a word is defined to mean a certain thing, wherever that word is used in that statute, it shall mean what is stated in the definition unless the context otherwise requires. But where the definition is an inclusive one, the word not only bears its ordinary, popular and natural sense whenever that would be applicable but it also bears its extended statutory meaning. At any rate, such expansive definition should be so construed as not cutting down the enacting provisions of an Act unless the phrase is absolutely clear in having opposite effect..."

(quoted from headnote)

Bearing in mind the aforesaid principles of interpretation, if the definition of "wages" as given in Section 2(22) of the Act is examined, it will be clear that within the first part only remuneration paid or payable in cash to an employee if the terms of contract of employment, express or implied, were fulfilled, will come within the said part. Obviously, any remuneration or any payment made towards over-time will not come within that part on a plain, ordinary meaning being given. The second part which is an inclusive part speaks of payment to an employee in respect of any period of leave, lock-out, strike which is not illegal, or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months.

According to Mr. Misra, the learned counsel for the appellant, the payment made for overtime work would come within the second part being an additional remuneration not referable to leave, lock-out, strike etcetera and the second part being an inclusive one, an extended meaning should be given, whereas according to Mr. Das, the learned counsel appearing for the respondent, the employee not being under any statutory obligation for any such additional work beyond the usual or normal work, and the scheme of over-time work being somewhat optional and there is no compulsion for the same and there being no certainty about such payment, if the said payment is included in the definition of "wages" then the statute itself would be unworkable on the ground of uncertainty and, therefore, howsoever wide meaning be given to the expression taking into account the fact that it is an inclusive definition, it would never include payments made for over- time. The main thrust of the rival submissions, therefore, is whether such payment made to an employee for over-time work would come within the second part of the definition. It is to be noticed that this payment does not come within the third part which excludes certain categories of payments.

8. At this stage it would be appropriate to notice some of the case laws cited at the Bar. One of the earliest cases is the case of Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation, wherein the question that came up for consideration was whether under the scheme initiated by the management to pay Inam, if production exceeded certain targets, payments made to the employees would come within the definition of "wages" in Section 2(22) of the Act? The Supreme Court held that since such payment was not under a term of contract of employment and it was an incentive payment if

certain conditions were fulfilled by the workmen and the said payment was not enforceable as one of the terms of contract of employment, whether implied or expressed, the said payment though is a remuneration could not come within the ambit of "wages" as defined in Section 2(22) of the Act.

The next decision is the decision of a learned Single Judge of Calcutta High Court in the case of *Bengal Potteries v. E.S.I. Corporation*, W.B. 1973 LIC 1328 (Cal.) where Justice Sabyasachi Mukharji, J. (as he then was) considered the question whether payment of bonus could be included within the definition of "wages" defined in Section 2(22) of the Act. The learned Judge held that the terms of employment not having indicated for payment of any incentive bonus and the said bonus having been paid under a scheme evolved by the employer, the payments made thereunder cannot be regarded as "remuneration" paid as part of the terms of the employment and, therefore, cannot be included within the definition of "wages" as defined in Section 2(22) of the Act.

This question, however, was considered by a Full Bench of the Andhra Pradesh High Court, but their Lordships of the Andhra Pradesh High Court differing with the view expressed by Mukharji, J. in *Bengal Potteries*" case (supra) held that incentive bonus would be "wages" within the meaning of Section 2(22) of the Act. I shall discuss in detail the judgment of the Andhra Pradesh High Court which has taken the opposite view at a later stage.

The decision of Mukharji, J. In *Bengal Potteries*" case was upheld by a Division Bench of the Calcutta High Court in appeal and the decision of the Division Bench has been reported in 1978 LIC 793 (Cal.) (*Regional Director, W.B. Region, E.S.I.C. and Ors. v. Bengal Potteries Ltd.*) and the Division Bench of the Calcutta High Court though noticed the Full Bench decision of the Andhra Pradesh High Court reported in *Employees' State Insurance Corporation, Hyderabad Vs. Andhra Pradesh Paper Mills Ltd., Rajahmundry*, taking the opposite view, yet did not agree with the views expressed by the Andhra Pradesh High Court. The Division Bench held that 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. It was further held that an employee has a right to his wages, but the said employee under the incentive scheme is not entitled, as a matter of right, to get incentive bonus. It may be noticed that in *Bengal Potteries*" case (supra) the question of over-time payment was not under consideration, but what was under consideration was whether payment made as incentive bonus under the scheme would come within the definition of "wages".

The question of over-time payment whether would come within the definition of "wages" u/s 2(22) of the Act directly came up for consideration in the case of *Hindustan Motors Ltd. v. E.S.I. Corporation and Ors.* 1979 L.I.C. 852 (Cal.). The learned Judges of the Calcutta High Court after elaborate discussion of the law on the subject held thus:-

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

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 the 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 be dangerous to rely upon the provisions of other statutes for the interpretation of the term "wages".

In paragraph-15 of the judgment, the learned Judges held:-

"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 - but 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. So the remuneration for such overtime work cannot again be included in the definition of "wage" itself...."

This question again came up directly for consideration before a Division Bench of the Karnataka High Court in the case of Hind Art Press, Mangalore Vs. E.S.I. Corporation and Another, . The learned Judges of the Karnataka High Court came to the conclusion that though special allowance as well as midday meal allowance could fall within the definition of the word "wages", but over-time wages could not be treated as "wages" for the purposes of contribution under the E.S.I. Act. In coming to the aforesaid conclusion, the learned Judges have noticed the fact that there is no requirement for payment of overtime work provided under the E.S.I. Act which provides a definition to the word "wages", but it is because of the provisions of the Factories Act a workman is allowed to work overtime and get payment therefor. Their Lordships have further observed that even under the Factories Act, no workman can be compelled to work overtime. It is only when the workman agrees if offered by the management and does the work beyond the working hours, then to certain remuneration he is entitled. It is neither obligatory for any workman to work overtime nor the management can compel any worker to work overtime. Therefore, such overtime work cannot be regarded as either an express or implied term of contract of employment. The learned Judges also relied upon the decision of the Supreme Court in the case of Regional Director, Employees' State Insurance Corporation and Another Vs. Bata Shoe

Company (P) Ltd., even though in the said Supreme Court case, the question of overtime payment was not strictly in issue.

In the case of *Regional Director, Employees' State Insurance Corporation and Anr. v. Bata Shoe Co. (P) Ltd.*, (supra) the question for consideration was whether the bonus paid to the employees could at all be included within the definition of "wages" as contained in Section 2(22) of the Act. The apex Court agreeing with the view expressed by the Patna High Court in its judgment reported in 1976 L.I.C. 12 (Pat.) (*The Regional Director, Employees' State Insurance Corporation, Patna v. Bata Shoe Co. Ltd. and Anr.*), came to hold that since the payment in question is in the nature of ex gratia payment and is paid as a gesture of goodwill on the part of the employer, the same cannot be included within the definition of "wages".

The next decision is that of a learned Single Judge of the Rajasthan High Court in the case of *National Engineering Industries v. The Employees State Insurance Corporation* 1991 (62) F.L.R. 277, wherein the question of overtime payment directly came up for consideration. The learned Judge relying upon the Bench decision of the Calcutta High Court in *Hindustan Motor Ltd.* case (supra) as well as the decision of the Karnataka High Court in *Hind Art Press* case, referred to supra, and after analysing the provisions of the Act came to hold that the payment for overtime work is not a part of the contract and varies from time to time depending on as to how much overtime one works. Then it is not regular. One may do overtime work for some days in a month, then may not get chance to do overtime work for two months and again work for some days. This being the position the payments made for overtime work could not be included in the definition of "wages" in Section 2(22) of the Act. The learned Judge in the said case considered the definition of "employee" in Section 2(9) of the Act and noticing Clause (iii)(b) to the said section observed that the Legislature being conscious of the concept of overtime excluded the remuneration which an employee gets for overtime work paid by the employer for determining whether he is an employee under the Act or not and by giving a harmonious construction to the legislation in question came to hold that the expression "wages" would not include payments made for overtime work.

9. Let me now notice the contrary view expressed by the Andhra Pradesh, Delhi and Bombay High Courts. In the case of *Employees' State Insurance Corporation, Hyderabad Vs. Andhra Pradesh Paper Mills Ltd., Rajahmundry*, a Full Bench of the Andhra Pradesh High Court considered the question whether incentive bonus as well as house rent allowance paid by the employer to the employees would constitute "wages" within the meaning of Section 2(22) of the Act. Analysing Section 2(22) of the Act and holding that it consists of 4 parts, the learned Judges were of the opinion that since incentive bonus does not fall within the exclusive part under Clauses (a) to (d) and since it is an additional remuneration paid month by month, it would come under the third part of the definition. So far as the house rent allowance is concerned, the learned Judges

came to hold that as the same is paid every month and it formed a part of the contract of employment, therefore, it must be held to be a part of the wages within the ambit of Section 2(22) of the Act. In other words, the learned Judges of the Andhra Pradesh High Court have given a wide meaning to the expression "any other remuneration" occurring in Section 2(22) of the Act and apart from those remunerations which are excluded under the clauses have held all other remuneration to be a part of the "wages". This reasoning of the learned Judges is contrary to the rules of interpretation of statutes as discussed by me earlier, and does not take into consideration about the rights of the parties as well as the uncertainties to get the additional remuneration in question. That apart, this is not a direct authority on the question of over-time wages.

In the case of *The Birla Cotton Spg. & Wvg. Mills Ltd. v. Employees' State Insurance Corporation* 1977 L.I.C. 119 (Delhi), a learned Single Judge of the Delhi High Court considered the question of payment made for overtime work. The learned Judge on construction of Section 2(22) of the Act held that there is nothing in the language of Sub-section (22) of Section 2 to exclude the application of wages to remuneration for overtime work and the expression "all remuneration paid or payable" is wide enough to include remuneration for overtime work. The learned Judge has no doubt held that such payment must arise out of the terms of employment, whether expressed or implied, but according to the learned Judge, performing overtime work is an implied term of contract of employment. I really fail to understand how overtime work can be held to be implied term of contract of employment. As has been stated earlier, the concept of overtime work or payment for the same is derived from the provisions of the Factories Act and it is undisputed that neither the employer can force an employee to do overtime nor an employee can claim as of right to work overtime and claim remuneration for the same. It is a question of volition and payment for such overtime work is dependent upon certain fortuitous circumstances. That being the position, I am unable to agree with the views expressed by the learned Single Judge of Delhi High Court that remuneration for overtime work arises out of the terms of contract of employment. If it is held not to be a term of contract of employment, then obviously it cannot form a part of "wages" within the meaning of Section 2(22) of the Act.

The Bombay High Court in the case of *M.G. Works P. Ltd. v. E.S.I.C.* 1976 L.I.C. 514 (Bom.) construed Section 2(22) of the Act and held that the expression "additional remuneration" referred to in the second part of the definition is actually qualified by the condition attached thereto, namely, the same must be paid at intervals not exceeding two months. In other words, any additional remuneration if paid at intervals not exceeding two months was construed to be a part of the wages. In my considered opinion, the learned Judges of the Bombay High Court have thoroughly misconstrued the provisions and have not followed the rules of interpretation of statutes as discussed by me earlier.

10. In the aforesaid premises, I am in respectful agreement with the views

expressed by the High Courts of Calcutta, Rajasthan and Karnataka where the question whether remuneration for overtime work comes within the definition of "wages" in Section 2(22) of the Act had come up for consideration and I am in respectful disagreement with the views expressed by the Andhra Pradesh, Bombay and Delhi High Courts. In my considered opinion, the remuneration paid to an employee on account of overtime work does not come within any part of the definition clause of "wages" in Section 2(22) of the Act, and therefore, that remuneration cannot be taken into account for determining the liability of the employer to pay the dues of the Corporation. I, therefore, do not find any illegality with the order passed by the E.S.I. Court.

11. This Miscellaneous Appeal accordingly fails and is dismissed, but in the circumstances, there will be no order as to costs.