

(1961) 10 BOM CK 0026

In the Bombay High Court

Case No : Special Civil Application No. 625 of 1961

Shankar Narayan K.

APPELLANT

Vs

Thakur S.S.

RESPONDENT

Date of Decision : 04-10-1961

Acts Referred:

Factories Act, 1948 — Section 59
Industrial Disputes Act, 1947 — Section 10(2)
Payment of Wages Act, 1936 — Section 2

Citation : (1961) 10 BOM CK 0026

Hon'ble Judges : Shah, J;A.N. Mody, J

Bench : Division Bench

Judgement

Mody, J.—This is a petition for an appropriate writ or direction under Art. 227 of the Constitution, filed by the petitioner challenging the judgment and order, dated 18 February 1961, dismissing the petitioner's application passed by respondent 1 who is the appropriate authority under the Payment of Wages Act. The petitioner is a workman and employee of respondents 2 who are an engineering company. The petitioner is employed in the factory of respondents 2, respondents 2 being a public limited company. The working hours of the petitioner as also of the other employees of respondents 2 working in the factory of respondents 2 are governed by the 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 respondents 2 being dissatisfied with the rates of wages and dearness allowance and certain other conditions of employment made certain demands upon respondents 2 on 21 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 under S. 10(2) of the Industrial Disputes Act, 1947. The industrial tribunal made its award on or about 5 February 1959, and the said award was published in the Bombay Government Gazette on 19 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 respondents 2. 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 said increased rates should be effective from 1 January 1957. The second of the said demands was for an increased rate of dearness allowance payable to the workmen of respondents 2. 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 Para. 38 of the award, it was further directed that arrears of pay and dearness allowance shall be paid with retrospective effect from 1 April 1958, within the period mentioned in that paragraph. It is therefore, clear that the award which is dated 5 February 1959, and which became effective from the expiry of a month thereafter was given retrospective effect as from 1 April 1958.

3. Respondents 2 have implemented the said award. There is no dispute that respondents 2 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 as directed by the said award. There is, however, only one dispute between respondents 2 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 rates computed on the basis of the said higher rates of basic wages fixed by the award as from 1 April 1958. It is common ground that after the date of the award, respondents 2 are paying even for overtime on the basis of the said higher rates of basic wages. Respondents 2, 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 respondents 2 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 respondent 1. After giving due hearing to the parties, respondent 1 passed his said judgment and order, dated 18 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 under S. 59 of the Factories Act, 1948, which was the relevant legislation governing the same at all relevant times. Sub-sections (1) and (3) only of S. 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.

(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 a bonus."

6. By reason of Sub-section (1) of S. 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 Sub-section (3) of S. 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 1 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 increased rates of basic wages with retrospective effect from 1 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 respondents 2 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 1 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. Respondent 1 in his judgment and order has upheld the contention of respondents 2 and negatived that of the petitioner. Shortly stated, respondent 1 has arrived at his said conclusion on three main grounds, the same being, firstly, that the demands made by the workmen of respondents 2 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 Para. 38 of the award, which gives retrospective effect, although it specifically mentions dearness allowance, does not mention or even refer to payment of wages for overtime, and thirdly, that the definition of the word "wages" in S. 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 1 April 1958, and that when the said demands which ultimately resulted in the said award were made, the demand for increase in wages could not be construed to include, a demand for increased wages for overtime. In view of the said

considerations, respondent 1 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.

7. In our opinion, the whole approach of respondent 1 in dealing with this contention was misconceived. Wages payable to a work and 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., S. 59 of the Factories Act, 1948. What S. 59 enjoins is that the employer shall pay to his workman wages for overtime at the rate of twice his ordinary rate of wages. Because of the provisions of S. 59 of the Factories Act, it was obligatory upon respondents 2 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 been during the period commencing from 1 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 1 April 1958. The award, therefore directs and determines that the basic wages of the petitioner even as from 1 April 1958, were the increased rate of basic wages as mentioned in the award. As from 1 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 wages which is the basis for calculation as mentioned in Sub-section (1) of S. 59 for payment of wages for overtime. The petitioner was, therefore, entitled to be paid wages for overtime even from 1 April 1958, till the date when the award became effective at the rate of twice his basic wages, the basic wages being the increased basic wages as directed by the award. It is, therefore, irrelevant to ascertain, as contended by respondents 2 and as in fact done by respondent 1, in his judgment, as to whether the original demands made by the employees of respondents 2 included a specific demand for an increased rate of payment of wages for overtime or not or whether on a construction of Para. 38 of the award, an increased rate of payment of wages for overtime has or has not been ordered with retrospective effective 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.

8. Sri Kantawalla, the learned counsel for respondents 2, contended that even if the correct position be as stated above, the entire provisions of Para. 38 giving retrospective effect as regards both the basic wages and the dearness allowance is bad, illegal and inoperative. Shri Kantawalla 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 Para. 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 1 April 1958, till the date when the award became effective. It is not necessary to set out - and we do not, therefore, set out - Sri Kantawalla'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 Sri Kantawalla - 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 retrospective effect to the payment of basic wages 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 Sri. Kantawalla's contention about the illegality of giving retrospective effect to the increased rate of dearness allowance was correct.

9. 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 respondent 1 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 of 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.