Kerala High Court
Kerala High Court
V.E.Jossie, Mcm(Ae), Nay vs The Flag Officers Commanding In ... on 12 July, 2011
IN THE HIGH COURT OF KERALA AT ERNAKULAM

OP (CAT).No. 2154 of 2011(Z)

1. V.E.JOSSIE, MCM(AE), NAY

... Petitioner

2. K.VIJAYAKUMAR, USL MO(K), NAVAL BASE,

3. B.VASUDEVAN UNNI, A/M-1,

4. SASIDHARAN NAIR, SECRETARY,

5. K.BALAKRISHNAN, GENERAL SECRETARY,

Vs

1. THE FLAG OFFICERS COMMANDING IN CHIEF

... Respondent

2. UNION OF INDIA,

For Petitioner :SRI.N.N.SUGUNAPALAN (SR.)

For Respondent :SRI.P.PARAMESWARAN NAIR,ASG OF INDIA The Hon'ble MR. Justice C.N.RAMACHANDRAN NAIR The Hon'ble MR. Justice P.S.GOPINATHAN

Dated :12/07/2011

O R D E R

"C.R."

C.N. RAMACHANDRAN NAIR &

P.S. GOPINATHAN, JJ.

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O.P. (CAT) 2154 OF 2011

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DATED THIS, THE 12TH DAY OF JULY, 2011.

J U D G M E N T

C.N. Ramachandran Nair, J.

This original petition is filed challenging the order of the Central administrative Tribunal (CAT), Ernakulam Bench, upholding the orders issued by the respondents to discontinue overtime wages was was being paid on House Rent Allowance (HRA), City Compensatory Allowance (CCA), Transport Allowance (TA), Small Family Norm Allowance (SFA) etc. We have heard Senior Counsel Sri. N.N. Sugunapalan, appearing for the petitioner and have also gone through the orders of the CAT, impugned in the original petition.

2. Petitioners are civilian employees or union representatives of such employees, employed in the Naval Establishment at Kochi. They have been getting extra wages for over-time work under Section 59(1) of the Factories Act, 1948, which is at twice the ordinary rates of wages. For payment of overtime wages in terms of Section 59(2) of the Act, respondents have been reckoning the above four items of compensatory allowances as forming part of ordinary rate of wages. However, based on O.P. (CAT) 2154/2011 2

the instructions issued by the Ministry of Defence, the first respondent's office issued order dated 23.7.2009 stating that the employees are not entitled to overtime wages on the four items of compensatory allowances namely, House Rent Allowance, Travelling Allowance, Small Family Norm Allowance and City Compensatory Allowance. Later, follow up orders were issued vide Ext.P5 directing recovery of excess overtime wages paid from July, onwards. It is against these orders, the petitioners approached the Tribunal, which, following an order in the same subject issued by the Madras Bench of the Tribunal, dismissed the applications, against which this original petition is filed.

3. The only question to be considered is whether the four items of allowances referred to above form part of "ordinary rate of wages" as referred to in Section 59 of the Factories Act. Section 59(1) and (2) of the Factories Act reads 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.

(2) For the purposes of sub-section (1),

"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 O.P. (CAT) 2154/2011 3

other articles, as the worker is for the time being entitled to, but does not include a bonus and wages for overtime work."

4. Senior Counsel Sri. N.N. Sugunapalan, appearing for the petitioners contended that without any contest, the employees were paid overtime wages including the above four items of compensatory allowances as part of ordinary wages, which is also referred to in the order of the CAT wherein they referred to the scheme of payment of overtime wages by the Railways including the type of allowances referred to above. After hearing the counsel for the petitioners and on going through the Tribunal's order, we are of the view that Section 59(2) does not authorise payment of extra wages for overtime work including the four items referred above. What is clear from sub-section (1) of Section 59 is that in respect of overtime work, a worker is entitled to wages at the rate of twice his ordinary rate of wages. Sub-section (2) does not define the allowance that should be included along with the basic wages to constitute ordinary wages. In our view, the ordinary rate of wages referred to in the sub-section do not convey any special meaning to it except the literary meaning, which is the pay and allowances paid for the worker. Obviously, allowances like DA form part of wages. Besides ordinary rate of wages, employees are given compensatory allowances and also allowances which are in the form of

incentives. These O.P. (CAT) 2154/2011 4

allowances are not uniformly payable to each and every employee engaged for work and on the other hand, these allowances are varying for different employees and eligibility depends on the location of employment. For example, an employee provided with quarters for free accommodation will not be entitled to HRA whereas an employee residing in his own house may be entitled to HRA. Similarly, CCA would depend the city where the person is employed and here again, allowances vary depending upon the grade of the city. Transport allowance should be varying and is essentially compensatory in nature which is to meet the cost incurred in reaching the work place. So far as the Small Family Allowance is concerned, it is an incentive to the family with less number of children. Therefore, what is clear from the nature of these allowances is that all such allowances are either compensatory on account of the extra cost incurred by the employee by virtue of his stay in a city or transportation charge incurred by him or in the nature of incentive for limiting family size with limited number of children. While these allowances are varying for same type of employees stationed in different cities, the basic wages paid for the same grade of employees is one and the same. We are, therefore, of the view that the ordinary rate of wages referred to in sub-section (2) does not take in compensatory and incentive allowances referred above. In fact, unless the O.P. (CAT) 2154/2011 5

standard rate of wages is understood as not including the above incentives, the rate of overtime wages also will keep on varying for different employees of the same grade in different stations. Section 59(2) does not visualise such a discrimination among employees. In order to have uniform rate of overtime wages payable to the same category of employees, the original rate of wages also should be the same, which includes only salary and allowances for the work. Obviously, compensatory allowances and allowances in the nature of incentives are not covered under Section 59(2) of the Act. So much so, we do not find any ground to deviate from the view taken by the Tribunal.

5. Senior counsel contended that the action of the respondents in recalling the benefits through the impugned orders is a violation of Section 9A of the Industrial Disputes Act, 1947. What is stated in Section 9A is that employers should not recover the benefits covered by Schedule 4 of the Act without notice to the employees. However, what we find in this case is that the respondents were only making a correction of the mistake they have committed by giving overtime wages on inadmissible allowances which is a violation of Section 59(2) of the Act. Section 9A of the Industrial Disputes Act refers to the steps that an officer should take before withdrawal of eligible benefits otherwise enjoyed by the employees which includes O.P. (CAT) 2154/2011 6

allowances. Notice u/s. 9A need be issued only if the overtime allowance withdrawn was on eligible rate of wages. A mistake can always be corrected at any time and in this case, what is done is correction with future effect. The inadmissible benefits granted to the employees after July, 2009 only is proposed to be recovered. So much so, we do not find any violation of Section 9A of the Industrial Disputes Act because respondents have not taken any decision adverse to the terms of employment including eligibility for OTA. We therefore, do not find any merit in this contention also.

In view of the findings above, we dismiss the original petition. C.N. RAMACHANDRAN NAIR,

(JUDGE).

P.S. GOPINATHAN,

(JUDGE)

knc/-