GAHC010017542018

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/517/2018

NUMALIGARH REFINERY LTD.
HAVING ITS REGISTERED OFFICE AT, 122A, G.S.ROAD, CHRISTIANBASTI,
DIST- KAMRUP(M), ASSAM, GHY-5

2: THE MANAGING DIRECTOR
M/S NUMULIGARH REFIUNERY LTD.
G.S.ROAD
CHRISTIANBASTI
DIST- KAMRUP(M)
ASSAM
GHY-5

3: THE SENIOR CHIEF GENERAL MANAGER (HR)
N.R.L.
NUMULIGARH
GOLAGHAT
DIST- GOLAGHAT
PIN- 78569

VERSUS

THE WORKMEN
REP. BY THE GENERAL SECRETARY, PETROLEUM REFINERS UNION,
NUMULIGARH REFINERY, GOLAGHAT

Advocate for the Petitioner : MR. U K NAIR

Advocate for the Respondent : MR. K N CHOUDHURY, SENIOR ADVOCATE

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

JUDGMENT

Date : 08-09-2022

Heard Mr. UK Nair, learned senior counsel assisted by Ms. A Verma, learned counsel for the petitioners. Also heard Mr. KN Choudhury, learned senior counsel assisted by Mr. HK Das, learned counsel for the respondent.

[2] The petitioners (Management) have prayed for setting aside the impugned Award dated 19.07.2017 passed by the Central Government Industrial Tribunal-cum-Labour Court, Guwahati in Reference Case No. 12/2012 and the letter dated 07.09.2017 issued by the Secretary to the Central Government Industrial Tribunal-cum-Labour Court. Though the petitioners have made a challenge to the impugned Award dated 19.07.2017 on 2 (two) grounds, the petitioners have now restricted their challenge to the impugned Award only with respect to paragraph No. 32 of the impugned Award, wherein the learned Tribunal has held that the Special Allowance which is paid to a certain category of workmen in Numaligarh Refinery Limited, should be taken into account, while calculating their overtime wages/ordinary rate of wages. The impugned letter dated 07.09.2017 is the forwarding letter issued by the Secretary to the Central Govt. Industrial Tribunal-cum-Labour Court, forwarding the impugned Award dated 19.07.2017 to the petitioners.

[3] The brief history of the case is that a Tripartite Settlement/Memorandum of Settlement (MoS) dated 11.10.2010 was arrived at between the Numaligarh Refinery Employees Union (hereinafter referred to as the "NREU"), the Numaligarh Refinery Limited (NRL) and the Assistant Labour

Commissioner. The validity of the above Memorandum of Settlement (MoS) was for the period from 01.01.2007 to 31.12.2016. In terms of Clause 10.0 of the MoS, Special Allowance for workmen in "48 hours a week work schedule" were to be paid @ 10% of the basic pay per month w.e.f. 01.01.2007.

[4] The issue to be decided in this case is as to whether the "Special Allowance" should be computed while arriving at the "ordinary rate of wages" of a workman in terms of Section 59(2) of the Factories Act, 1948.

[5] The respondent herein, which is the Minority Employees Union and who were not a signatory to the MoS, have made a claim that the Special Allowance should be calculated while computing the "ordinary rate of wages" of a workman under the Factories Act, 1948, i.e., Special Allowance should be a part of the "ordinary rate of wages".

[6] The said issue was decided by the learned Tribunal in Reference Case No. 12/2012, vide the impugned Award dated 19.07.2017, by holding that Special Allowance, which was to be paid to a certain category of workmen in NRL should be taken into account while calculating their overtime wages, i.e., it should form a part of the "ordinary rate of wages". The relevant paragraph No. 32 of the impugned Award dated 19.07.2017 passed in Reference Case No. 12/2012, is with regard to the interpretation made by the learned Tribunal in relation to Section 59(2) of the 1948 Act, is reproduced below:-

> *"32. The aforesaid provision is crystal clear that all the pay and allowances paid to the employees, except the bonus and overtime allowance, shall form part of "ordinary rate of wages" for the purpose of calculation of overtime. Any agreement or any order contrary to the above cannot be made binding upon the workmen. It is therefore, held that the*

"Special Allowance" which is paid to a certain category of workmen in NRL shall be taken into account in calculating their overtime wages."

[7] The petitioners' counsel submits that a perusal of Section 59(1) and 59(2) of the Factories Act, 1948 (hereinafter referred to as the "1948 Act") clearly shows that a bonus or "wage for overtime work" cannot be included within the meaning of "ordinary rate of wages". The learned senior counsel for the petitioners has also relied upon the judgment of this Court in the case of *Mekhilipara Tea Company Ltd. Vs. Regional Provident Fund Commissioner, Agartala,* reported in *2014 (4) GLT 776,* to show that overtime allowance is not a part of the basic wage/"ordinary rate of wages".

[8] The petitioners' counsel submits that once a settlement has been arrived at between the parties, which was binding on everyone, there was no scope for the learned Tribunal for passing an Award, contrary to the terms of settlement. The petitioners' counsel also submits that subsequent to the MoS, which was enforced till 31.12.2016, a new MoS has been executed between the parties, which would remain in force from 01.01.2017 to 31.12.2026.

[9] Mr. KN Choudhury, learned senior counsel for the respondent, on the other hand submits that Section 59(2) of the 1948 Act permits the inclusion of Special Allowance within the meaning of "ordinary rate of wages" of a worker. He also submits that in view of Section 18(3) of the Industrial Dispute Act, 1947, the MoS executed between the NREU, NRL and Assistant Labour Commissioner on 01.01.2007, is also applicable to the Minority Employees Union (respondent), which is the Petroleum Refineries Union.

[10] I have heard the learned counsels for the parties.

[11] To decide the said issue, Clause 10.0 and 22.0 of the MoS are reproduced below:-

> "*10.0* ***Special Allowance***
>
> *Special Allowance for workmen in 48 hours a week work schedule will be paid @10% of Basic Pay per month w.e.f. 01.01.2007.*
>
> *22.0* ***Overtime***
> *House Rent Allowance (HRA) will not form part of overtime formula and overtime formula shall be notified separately by an administrative order."*

[12] Section 59(1) and 59(2) of the 1948 Act are also reproduced below:-

> "*59(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.*
>
> *59(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 other articles, as the worker is for the time being entitled to, but does not include a bonus and wages for overtime work."*

[13] As can be seen from the above Clause 10.0, workmen who work for 48 hours a week are to be paid an extra 10% of their basic pay per month. Thus, there are workmen, who work 48 hours a week schedule and those workmen, who work less than 48 hours a week. Those who work less than 48 hours a week schedule would get only their basic pay. However, those who are working for 48 hours a week schedule would be getting besides their basic pay, another 10% of their basic pay.

[14] Section 59(1) of the 1948 Act provides that where a worker in a factory works for more than 9 hours in any day or more than 48 hours in any

week, he shall, in respect of overtime worked, be entitled to wages twice his "ordinary rate of wages". Section 59(2) of the 1948 Act states that for the purpose of Section 59(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 and other articles, as the worker is for the time being entitled to, **but does not include a bonus and wages for overtime work**. Thus, a reading Clause 10.0 and Section 59(2), makes it quite apparent that the Special Allowance cannot be included in the "ordinary rate of wages", as the allowance is basically a bonus or wages for overtime work, i.e., the Special Allowance is a separate component from "ordinary rate of wages". There are two sets of workmen, one working less than 48 hours a week schedule and those working more or equivalent to 48 hours a week schedule. The "ordinary rate of wages" for both would be the same. However, the only difference would be that those who work a 48 hours a week schedule would have to be paid an extra 10% of their basic pay as Special Allowance, in terms of Clause 10.0 of the MoS.

[15] Clause 22.0 of the MoS states that House Rent Allowance (HRA) will not form part of the overtime formula and overtime formula shall be notified separately by an administrative order. The petitioners thereafter had issued a "Notice To All Workmen" dated 06.01.2011, which states that the overtime computation would consider basic pay and Dearness Allowance only. However, House Rent Allowance (HRA) and Special Allowance would not form part of the overtime calculation. The contents of the "Notice To All Workmen" dated 06.01.2011 is reproduced below:-

"***NOTICE TO ALL WORKMEN***

In the recently concluded Memorandum of Settlement (MOS) dated 11th October, 2010, signed between Management of Numaligarh Refinery and NREU relating to revision of pay scales and other benefits/facilities of workmen under Clause 22 it is stated that HRA will not form part of the overtime Calculation w.e.f. 26.11.2008 and additionally the overtime formula shall be notified separately by an administrative order by the management.
It is hereby notified to all workmen that the formula for Overtime Computation will consider Basic Pay and Dearness Allowance only, which is as under:-

(a) 48 hours a week category (Six days week) $= \frac{\text{Basic Pay+DA}}{208}$

(a) less than 48 hours a week category (Five days week) $= \frac{\text{Basic Pay + DA}}{1766}$

The House Rent Allowance and Special Allowance will not form part of overtime Calculation w.e.f. 26.11.2008.

All workmen are requested to take note of above and be guided accordingly".

[16] As can be seen from the "Notice To All Workmen" dated 06.01.2011, Special Allowance provided under Clause 10.0 of the MoS would not form part of the overtime calculation, i.e., it would not be a part of the "ordinary rate of wages" as per Section 59(2) of the 1948 Act.

[17] The Apex Court, while considering the concept of the term "basic wages", as embodied in Section 2(b) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, in the case of *Bridge & Roofs Co. Ltd Vs. Union of India & Ors., AIR 1963 SC 1474* has held that overtime allowance, though it is generally in force in all concerns, is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment, but because it may not be earned by all employees of a concern, it is excluded from basic wages.

[18] Paragraph. No. 8 of the judgment of the Apex Court in the case of

Bridge & Roofs Co. Ltd (supra) is reproduced below:-

> "***8.*** *Then we come to CI. (ii). It excludes dearness allowance, house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment. This exception suggests that even though the main part of the definition includes all emoluments which are earned in accordance with the terms of the contract of employment, certain payments which are in fact the price of labour and earned in accordance with the terms of the contract of employment are excluded from the main port of the definition of "basic wages". It is undeniable that the exceptions contained in Clause (ii) refer to payments which are earned by an employee in accordance with the terms of his contract of employment. It was admitted by counsel on both sides before us that it was difficult to find anyone basis for the exceptions contained in the three clauses. It is clear however from Clause (ii) that from the definition of the word "basic wages" certain earnings were excluded, though they must be earned by employees in accordance with the terms of the contract of employment. Having excluded" dearness allowance" from the definition of "basic wages". Section 6 then provides for inclusion of dearness allowance for purposes of contribution. But that is clearly the result of the specific provision in Section 6 which lays down that contribution shall be 6-1/4 per centum of the basic wages, dearness allowance and retaining allowance (if any). We must therefore try to discover some basis for the exclusion in Clause (ii) as also the inclusion of dearness allowance and retaining allowance (for any), in Section 6, it seems that the basis of inclusion in Section 6 and exclusion in Clause (ii) is that whatever is payable in all concern's and is earned by all permanent employees is included for the purpose of contribution under Section 6, but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution. Dearness allowance for example is payable in all concerns either as an addition to basic wages or as a part of consolidated wages where a concern does not have separate dearness allowance and basic are Similarly, retaining allowance is payable to all permanent employees in all seasonal factories like sugar factories and is therefore included in Section 6 but house-rent allowance is not paid, in many concerns and sometimes in the same concern it is paid to some employees but not to others. for the theory is that house-rent is included in the payment of basic wages plus dearness allowance or consolidated wages. Therefore, house-rent allowance which may not be payable to all employees of a concern and which is certainly not paid by all concern is taken out of the definition of "basic wages", even though the basis of payment of house rent allowance where it is paid is the contract of employment.* ***Similarly, overtime allowance though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment; but because it may not be earned by all employees of a concern it is excluded from basic wages".*** *Similarly, commission or any other similar allowance is excluded from the definition of "basic wages" for commission and other allowances are not necessarily to be*

found in all concerns: nor are they necessarily earned by all employees of the same concern, though where they exist they are earned in accordance with the terms of the contract of employment. It, seems therefore that the basis for the exclusion in Clause (ii) of the exceptions in Section 2(b) is that all that is not earned in all concerns or by all employees of concern in excluded from basic wages. To this the exclusion of dearness allowance in Clause (ii) is an exception. But that exception has been corrected by including dearness allowance in Section 6 for the purpose of contribution. Dearness allowance which is an exception in, the definition of "basic wages", is included for the purpose of contribution by Section 6 and the real exceptions therefore in cl. (ii) are the other exceptions beside dearness allowance, which has been included through Section 6."

[19] On considering the judgment of the Apex Court in *Bridge & Roofs Company Limited (supra)*, wherein the concept of the term "basic wages" is dealt with by the Apex Court, this Court is of the view that the said term is relatable to the term "ordinary rate of wages", which is mentioned in Section 59 of the 1948 Act.

[20] In the case of *Muir Mills Co. Ltd., Kanpur Vs. Its Workmen, AIR 1960 SC 985*, the Apex Court held that basic wage never includes the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production. As the bonuses varies from individual to individual according to their efficiency and diligence, the element of variation excludes the additional emoluments from the connotation of basic wages.

[21] In the case of *Manipal Academy of Higher Education Vs. Provident Fund Commissioner, (2008) 5 SCC 428*, the Apex Court while relying upon the *Bridge & Roofs case (supra)* held that overtime allowance may not be earned by all employees of a concerned and as such, could be excluded from basic wages. Paragraph No. 10 of the Apex Court's judgment in *Manipal Academy of Higher Education (supra)* is reproduced below:-

"10. The basic principles as laid down in Bridge Roof's case (supra) on a combined reading of Sections 2(b) and 6 are as follows:

(a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.

(b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wage. By way of example it was held that overtime allowance, though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment but because it may not be earned by all employees of a concern, it is excluded from basic wages.

(c) Conversely, any payment by way of a special incentive or work is not basic wages".

[22] In the case of *Kichha Sugar Company Limited through General Manager Vs. Tarai Chini Mill Majdoor Union, Uttarakhand, (2014) 4 SCC 37*, the Apex Court has held that where overtime is available to all but some avail the opportunity more than others, the amount paid for that cannot be included in the basic wage, as it is not earned by all the employees. Paragraph Nos. 9 & 10 of the Apex Court's judgment in *Kichha Sugar Company Limited through General Manager (supra)* is reproduced below:-

*"**9.** According to http://www.merriam webster.com (Merriam Webster Dictionary) the word 'basic wage' means as follows:*

1. A wage or salary based on the cost of living and used as a standard for calculating rates of pay.

2. A rate of pay for a standard work period exclusive of such additional payments as bonuses and overtime.

***10.** When an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning. In our opinion, those wages which are universally, necessarily and ordinarily paid to all the employees across the board are basic wage. Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot*

be included in the basic wage. As for example, the overtime allowance, though it is generally enforced across the board but not earned by all employees equally. Overtime wages or for that matter, leave encashment may be available to each workman but it may vary from one workman to other. The extra bonus depends upon the extra hour of work done by the workman whereas leave encashment shall depend upon the number of days of leave available to workman. Both are variable. In view of what we have observed above, we are of the opinion that the amount received as leave encashment and overtime wages is not fit to be included for calculating 15% of the Hill Development Allowance".

[23] As can be seen from the judgments of the Apex Court, though Special Allowance herein, which amounts to overtime allowance is in force and could be availed of by all the employees of the petitioner, the same is not earned by all employees. As the universality of the Special Allowance is restricted to only those who work the 48 hours schedule, the same cannot be included in the basic wage/ordinary rate of wages of a workman.

[24] As the Special Allowance is basically an overtime allowance for workmen, who work the 48 hours schedule and which are not paid to other workmen, working less than 48 hours a week schedule, this Court is of the view that the Special Allowance cannot be a part of the component of "ordinary rate of wages", as it is a separate allowance, which is not given to all workmen, but only given to a certain category of workmen, having a nexus to the extra work done.

[25] This Court also finds that the witness of the Management (petitioner) had given evidence to the effect that earlier, the Special Allowance was taken into account in calculating the overtime wages, but was later dropped in calculating the overtime wages. Further, the witness of the Management further states in his cross examination that Special Allowance could not be considered as a part of the "ordinary rate of wages", because this wage was not paid

universally, necessarily and ordinary to all the workmen of the Company, but only to the workmen, who worked 6 days in a week as an incentive. This is clear from paragraph No. 20 of the impugned Award dated 19.07.2017. However, the learned Tribunal appears not to have considered paragraph No. 20 of the impugned Award, while holding that Special Allowance should be taken into account in calculating the overtime wages of workmen.

[26] As this Court is of the view that the Special Allowance provided in Clause 10.5 of the MoS cannot form a component of the "ordinary rate of wages" in terms of Section 59(2) of the 1948 Act, this Court is of the view that the impugned Award of the learned Tribunal to that effect should be set aside.

[27] Accordingly, this Court holds that the Special Allowance, payable to a person who works the 48 hours a week schedule, cannot be a component of the "ordinary rate of wages" of a workmen and the same would have to be paid as a separate allowance.

[28] The writ petition is accordingly allowed to the extent indicated above. Consequently, the impugned Award dated 19.07.2017 is set aside, to the extent indicated above. Send back the case record.

JUDGE

Comparing Assistant