Calcutta High Court

HON'BLE JUDGE(S): **KRISHNA RAO , J**

CALEDONIAN JUTE AND INDUSTRIES LIMITED V. EMPLOYEES STATE INSURANCE CORPORATION

WPA No. - 8906 of 2001, decided on 08/12/2022

(A) Employees State Insurance Act (34 of 1948) , S.2(22), S.40— Wages - Remuneration paid for overtime work - Overtime wages coming within meaning of S. 2(22) - Thus petitioner being employer covered under Employees' State Insurance Act, 1940 is required to pay contribution on certain payments on account of Over Time Wages - Though Division Bench of Calcutta High Court, held that over time allowance cannot be part and parcel of wages but ultimately Supreme Court set aside order and held that overtime is cover under wages. AIROnline 1996 SC 755-Followed

(Para 19, 22)

(B) Employees State Insurance Act (34 of 1948), S.77(1a)(b)— Commencement of proceedings - Limitation - Inspection was conducted on 08.09.1987 to 11.09.1987 and 06.02.1989 to 09.02.1989 - On basis of inspection report notices were issued which ultimately culminated to Show Cause notice - After Show Cause notices, several litigations were cropped up - Thus claim held to be within limitation.

(Para 23)

Case Referred :	Chronological Paras
AIR 2007 SC 1034 : 2007 AIR SCW 826 : 2007 Lab IC 950	Para No.(21)
AIR 2004 SC 3972 : 2004 AIR SCW 4326 : 2004 Lab IC 3201	Para No.(16)
AIROnline 1996 SC 755 (Foll.)	Para No.(18)
1981 Lab IC 457 (AP)	Para No.(18)
AIROnline 1979 Cal	Para No.(15A)
1977 Lab IC 119 (Del)	Para No.(18)
1974 Lab IC 328 (Bom	Para No.(18)
AIR 1968 SC 413	Para No.(18)
AIR 1967 SC 1643	Para No.(20)

Name of Advocates

Partha Bhanja Choudhury S. K. Singh R. K. Dubey for Petitioner; Subal Maitra Arindam Maitrafor Respondent.

1.**ORDER :-**In both the writ petition subject-matters are similar and accordingly a common orderis passed.

2. The petitioners have filed the instant writ application challenging the orders passed by the Deputy Director, Regional Office, Employees State Insurance Corporation, Calcutta vide No.

C/INS.V/41-3176-12 dated 9th February 2001.

3. The petitioner no.1 is a Company registered under the Indian Companies Act, 1956 and is engaged in manufacturing of Jute Goods and Jute Products. The petitioner Company is covered under the Employees State Insurance Corporation (herein referred to as ESI Corporation) and the Code No. 41-3176-12 is allotted to the ESI Corporation.

4. On 25 May, 1992, the respondent no.1 had issued notice to the petitioner Company and demanded contribution on the overtime payment for the period from August, 1986 to December,1988 amounting to Rs. 3,13,211/-.

5. On 24th March, 2000, the respondent no.1 issued had issued an order and imposed liability of Rs.2,91,075/- plus interest on account of overtime payment for the period from 8/86 to 12/88. Being aggrieved with the said order, the petitioners have preferred writ application before this Court being W.P. No. 685(w) of 2001 and this Court had set aside the order dt. 24th March, 2000 and remanded the matter for fresh consideration as the impugned order was passed without givingan opportunity of hearing to the petitioners.

6. In WPA 8906 of 2001, the respondent no. 1 had issued notice on 16.01.1999 and demanded contribution on one time wage and holiday's wages. Between 4/96 to 9/98 amounting to Rs. 5,33,954/- and the st respondent no. 2 had fixed hearing on 1 March, 1999.

7. In compliance of the order of this Court and after giving an opportunity of hearing to the petitioners, the respondent no. 1 had passed the impugned order in the month of February, 2001.

8. Learned Counsel for the petitioner submits that the impugned order is passed in violation of Section 77(1A)(b) proviso of the Employees State Insurance Act, 1945 as the claim is for the period from 1986 to 1988 but the claim was made in the year 2000. It is further contended that respondent corporation cannot demand overtime wages because at the relevant point of time, overtime was declared to be not a part and parcel of wages by the Division Bench of this Court.

9. Learned Counsel for the petitioner submits that matter was closed in the year 1992 and the same cannot be reopen in the year 2000. It is further contended that the respondent Corporation cannot demand the overtime wages as the relevant point of time, overtime was declared to be not a part and parcel of wages in terms of the order passed by the Hon'ble Division Bench of this Court.

10. Learned Counsel for the petitioner submits that unless and until judgment of

Hon'ble Supreme Court expressly mentioned that it would operate retrospectively the judgment of the Hon'ble Supreme Court cannot be given retrospective effect.

11. Per contra, Learned Counsel for the respondents submits that the Hon'ble Supreme Court hadset aside the order passed by the Hon'ble Division Bench of this Court and held that the payment toward overtime allowance is "wages" within the meaning of Section 2(22) of the ESI Act, 1948.

12. Learned Counsel for the respondents submits that the Judgment passed by the Hon'ble Supreme Court in the case of Drugs and Pharmaceuticals Ltd. is applicable in the instant case.

13. Learned Counsel for the respondent submits that the inspection was conducted on 08.09.1987 to 11.09.1987 and 06.02.1989 to 09.02.1989 and on the basis of the same notices were issued which ultimately culminated to Show Cause notice and thus there is no limitation.

14. Heard the learned counsel for the respective parties and considered the materials on record.

15A. In the instant case the following issues are to be decided :

1. Whether the petitioner being the employer covered under the Employees' State Insurance Act, 1940 is required to pay contribution on certain payments on account of Over Time Wages in accordance with Section 40 the Act of 1948 read with regulation 29 and 31 of the ESI (Gen) Regulation framed therein?

2. Whether in absence of any stipulation for payment of the overtime wages in the original contract the employment, overtime wages would stand excluded from the definition of Wages under Section 2(22) of the Employees State Insurance Act, 1948?

3. Whether the order passed by the Hon'ble Supreme Court having retrospective effect or prospective?

Section 2(22) and Section 40 of The Employees' State Insurance Act, 1948 reads as follows :

"(22) "Wages" means all 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 natureof his employment; or

(d) any gratuity payable on discharge;

40. Principal employer to pay contribution in the first instance.-(1) The principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.

(2) Notwithstanding anything contained in any other enactment but subject to the provision of this Act and the regulations, if any, made thereunder, the principal employer shall, in the case of an employee directly employed by him (not being an exempted employee), be entitled to recoverfrom the employee the employee's contribution by deduction from his wages and not otherwise:

Provided that no such deduction shall be made from any wages other than such as relate to theperiod or part of the period in respect of which the contribution is payable, or in excess of the sum representing the employee's contribution for the period.

(3) Notwithstanding any contract to the contrary, neither the principal employer nor the immediate employer shall be entitled to deduct the employer's contribution from any wages payable to an employee or otherwise to recover it from him.

(4) Any sum deducted by the principal employer from wages under this Act shall be deemed tohave been entrusted to him by the employee for the purpose of paying the contribution in respectof which it was deducted.

(5) The principal employer shall bear the expenses of remitting the contributions to the Corporation. [(1A) Every such application shall be made within a period of three years from thedate on which the cause of action arose. Explanation. For the purpose of this sub-section,

(a) the cause of action in respect of a claim for benefit shall not be deemed to arise unless theinsured person or in the case of dependants' benefit, the dependants of the insured person claims or claim that benefit in accordance with the regulations made in that behalf within a period twelve

months after the claim became due or within such further period as the Employees' Insurance Court may allow on grounds which appear to it to be reasonable;

[(b) the cause of action in respect of a claim by the Corporation for recovering

contributions (including interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time: Provided that no claim shall be made by the Corporation after five years of the period to which the claim relates;

(c) the cause of action in respect of a claim by the principal employer for recovering contributions from an immediate employer shall not be deemed to arise till the date by which the evidence of contributions having been paid is due to be received by the Corporation under the regulations.]]"

15A. The petitioners have relied with the judgment reported in (1979) SCC Online Cal 62 : (AIROnline 1979 Cal 1) (Messrs Hindustan Motors Ltd. v. E.S.I. Corporation and Others) wherein the Hon'ble Division Bench of this Court held that the remuneration paid for overtime work would not come within the definition of Wages in Section 2 (22) of the Act and no special contribution is payable for the remuneration paid for the overtime work done by the employees.

16. The petitioners have further relied upon the judgment reported in (2004) 6 SCC 191 : (**AIR 2004 SC 3972**) (Employees State Insurance Corporation -versus- Hyderabad Race Club) wherein the Hon'ble Supreme Court held that demand under the Act can be enforced only from the year 1987 onwards.

17. As per the petitioners admittedly there is no contract between the petitioner and the respondents to pay the overtime wages. It is not obligatory for the petitioners to offer overtime wages nor it is obligatory for the employees to work overtime. In the absence of such mutual obligations under a contract, it cannot be considered to be wages within the meaning of Section2(22) of the Act of 1948.

18. The similar matter came up for consideration before the Hon'ble Supreme Court in the case of Indian Drugs and Pharmaceuticals Ltd. and Others v. Employees State Insurance Corporation and Ors. reported in (1997) 9 SCC 71 : (**AIROnline 1996 SC 755**) wherein the Hon'ble Supreme Court held that :

"The contract of employment is entered into only at the initial entry into the service. In the course of the employment, as and when the employer finds the need to have work done expeditiously, in addition to the normal work during the course of the working hours, the employer offers to the employee to do overtime work after the working hours. When an employee does overtime work, it amounts to acceptance of the same. There emerges concluded implied contract between the employer and employee. There is no need to write on each occasion separately on the letter of appointment. It becomes an integral part of original or revised

contract of employment from time to time. The employer is obligated to pay wages when the employee does work. This will be, in addition to payment of the wages he receives for normal work. In other words, both the remunerations received during the working hours and overtime constitute composite wages and thereby it is a wage within the meaning of Section 2(22) of the Act. The Calcutta High Court and the Karnataka High Court have applied technical rules of construction, namely, the legislature does not expressly say so and, therefore, remuneration paid for overtime work is not a wage. We think that the approach adopted by these High Courts is clearly unsustainable and illegal. On the other hand, the view expressed by the Bombay High Court in Shivraj Fine Art Litho Works v. Regional Director, Regional Office : (1974 Lab IC 328 (Bom), by the Delhi High Court in ESI Corpn. v. Birla Cotton, Spg. and Wvg. Mills Ltd. (Sic) (Birla Cotton, Spg. and Wvg. Mills Ltd. v ESI Corpn : (1977 Lab IC 119 (Del)) and by the Andhra Pradesh High Court in Hyderabad Allwyn Metal Works Ltd. v. ESI Corpn. : (1981 Lab IC 457 (AP)) and the earlier decisions referred to are correct in law. The ratio in Braithwaite and Co. (India) Ltd. v. ESI Corpn. : (**AIR 1968 SC 413**) is no longer applicable, since it was prior to the amendment of the definition. As a result, it no longer operates as a ratio. Thus, we hold that the view taken by the High Court of Andhra Pradesh is in accordance with law laid down by this Court. We do not find any ground warranting interference."

19. In view of the settled position of law, this Court held that overtime wages is coming within the meaning of Section 2(22) of the Act of 1948 and thus the petitioner being the employer covered under the Employees' State Insurance Act, 1940 is required to pay contribution on certain payments on account of Over Time Wages.

20. In the case reported in **AIR 1967 SC 1643** (L.C. Golaknath and Others v. State of Punjab and Another), the Constitution Bench of the Hon'ble Supreme Court held that :

"51. As this Court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions: (1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest, court of the country, i.e., the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its "earlier decisions" is left to

its discretion to be moulded in accordance with the justice of the cause or matter before it."

21. In the case reported in 2007 (113) FLR 21 : (**AIR 2007 SC 1034**) (P.V. George and Ors. - versus- State of Kerala and Ors.), the Hon'ble Supreme Court held that :

"18. Moreover, the judgment of the Full Bench has attained finality. The special leave petition has been dismissed. The subsequent Division Bench, therefore, could not have said as to whether thelaw declared by the Full Bench would have a prospective operation or not. The law declared by a Court will have retrospective effect if not otherwise stated to be specifically. The Full Bench having not said so, the subsequent Division Bench did not have the jurisdiction in that behalf."

22. In view of the above, it is settled law that the law declared by a Court will have a retrospective effect if not otherwise stated to be specifically. In the instant case, though earlier the Hon'ble Division Bench of this Court held that over time allowance cannot be part and parcel of wages but ultimately the Hon'ble Supreme Court had set aside the order and held that overtime is cover under the wages.

23. The issue raised by the petitioners with regard to limitation, inspection was conducted on 08.09.1987 to 11.09.1987 and 06.02.1989 to 09.02.1989 and on the basis of the inspection report notices were issued which ultimately culminated to Show Cause notice. After the Show Cause notices, several litigations were cropped up and thus this Court finds that claim is within the time prescribed under law.

24. In view of the circumstances, this Court does not find any merit in the writ application.

25. Accordingly, WPA No. 8906 of 2001 and WPA 8907 of 2001 are thus dismissed.

Petition Dismissed