Supreme Court of India
Indian Drugs & Pharamecuticals ... vs Employees State Insurance ... on 6 November, 1996
Bench: K. Ramaswamy, G.B. Pattanaik

PETITIONER:
INDIAN DRUGS & PHARAMECUTICALS LTD. ETC.

Vs.

RESPONDENT:
EMPLOYEES STATE INSURANCE CORPORATION ETC.

DATE OF JUDGMENT: 06/11/1996

BENCH:
K. RAMASWAMY, G.B. PATTANAIK

ACT:

HEADNOTE:

JUDGMENT:

THE 6TH DAY OF NOVEMBER, 1996 Present:

Hon'ble Mr. Justice K. Ramaswamy Hon'ble Mr. Justice G.B. Pattanaik V.V. Vaze, Sr. Adv.., Kailash Vasdev, C.K. Sasi, A.T.M.

Sampath, Kailash Vasdev, C.K. Sasi, Indra Sawhney, Deepak Dewan, C.V.S. Rao and V.J. Francis, Advs. with him for the appearing parties.

O R D E R The following Order of the Court was delivered:

WITH CIVIL APPEAL NOS.2784/80 AND 1087/81 AND WRIT PETITION (C) NO. 1554 OF 1987 O R D E R These appeals are by certificate granted by the Division Bench of the Andhra Pradesh High Court under Article 133 of the Constitution. The question of law of public importance is; whether the overtime wages paid to an employee by the appellants are "wages" within the meaning of Section 2(22) of the Employees State Insurance Act, 1948 (for short, the `Act'). It is not necessary to record the facts in all these cases. Suffice it to state that the facts in C.A. No.2784/80 are sufficient for disposal of the common controversy. Admittedly, the appellants have taken overtime work from their existing employees. The employees had done work during the stipulated working time and thereafter they were asked to perform overtime work which they did and accordingly, the overtime

rate of wages was paid in terms of the agreement between the appellants and the workmen.

Therefore, the question has arisen; whether absence of stipulation for payment of the overtime wages in the original contract of employment, would take away such remuneration paid towards the overtime work from the definition of the word `wages' within the meaning of Section 2(22) of the Act. The said section reads as under:

> "`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-
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> (a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;
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> (b) an, travelling allowance or the value of any travelling concession;
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> (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;

Shri Kailash Vasdev, learned counsel for the appellants in two appeals and Shri Sampath, learned counsel in another appeal representing Agarwal Industries, raised two-fold contention. According to Shri Kailash Vasdev, the Legislature having taken care to exclude the overtime wages from the purview of the definition of "employee" within the meaning of Section 2(9) of the Act and equally having defined the "wages" under Section 2(22) of the Act, necessary intended therefrom is that the Legislature intended to exclude overtime wages from the remuneration paid for overtime work done by the employer. Unless it is part of contract of appointment, it is outside the definition of "wages". Admittedly, there is no contract between the appellants and the workmen to pay the overtime wages. It is not obligatory for the appellants to offer overtime wages nor is it 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 Section 2(22) of the Act. Shri Sampath further elaborated spinning that in the light of statutory operation, unless there is any agreement in writing, it cannot be construed to be an implied contract. Since it is not obligatory for the employees to work, remuneration paid towards overtime work amounts to mutual payment not as part of wages but as remuneration for services rendered outside the contract of employment of the employees. Therefore, it will not come within additional remuneration, if any, paid at intervals not exceeding two months within the meaning of Section 2(22) of the Act. In support thereof, both the learned counsel have placed strong reliance on the judgments of the Calcutta High Court in M/s. Hindustan Motors Ltd. vs. E.S.I. Corporation & Ors. [(1979) LAB. I.C. 852] and Karnataka High Court in Hind Art Press, Mangalore vs. ESI Corporation & Anr. [(1990) LLJ 195].

The question is; whether the view taken by the said High Courts is correct in law and whether the High Court of Andhra Pradesh has committed any error of law in interpreting of the word `wages' under Section 2(22) of the Act? It is seen that Section 2(9) defines "employee" thus:

> "Employee means any person employed for wage in or in connection with the work of a factory or establishment to which this Act applies and-
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> (i) who is directly employed by the principal employer or any work of, or incidental or preliminary to or connected with work of, the factory or establishment, whether such work is done by the employee in this factory or establishment elsewhere; or
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> (ii) who is employed or through an immediate employer on the premises of the factory or establishment or under supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or
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> (iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire his entered into a contract of service;
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> and include any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, of the distribution or sale of the products of the factory or establishment, *[or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment; but does not include-
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> (a) any member of the Indian naval, military or air forces; or
>
> (b) any person so employed whose wages (excluding remuneration for Overtime work) exceed *[such wages as may be prescribed by the Central Government].
>
> Provided that an employee whose wages (exceeding remuneration for overtime work) exceed *[such wages as may be prescribed by the Central Government] at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;

The Legislature while defining "employee" has taken care to see that a person employed for wages in or in connection with the work of a factory or establishment to which the Act applies was covered as employee in one ore the other enumerated items (i) to (iii). In addition, other persons employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials of, or the distribution or sale of the products or, the factory or establishment or any person engaged as an apprentice, not being an

apprentice engaged under the Apprentice Act, 1961 or under the Standing Orders of the establishment, are employees. The exclusionary clauses have been enumerated in clauses (a) and (b) thereof with which we are not concerned. Under the proviso, the employee whose wages excluding remuneration for overtime work exceeds such wages as may be prescribed by the Central Government at any time after and not before the beginning of the contribution period, shall continue to be an employee until the end of that period. It would thus be seen that the Legislature has taken care to bring the employer within the net of beneficial provisions of the Act. Employee whose remuneration does not exceed the prescribed remuneration by the Central Government for a month or any time after the beginning of the contribution period, will be governed by the provisions of the Act. In other words, from the exclusion of the overtime work, in computation of the remuneration to the workmen, it does appear that the Legislature intended not to exclude employee who receives overtime wages from the purview of the Act though he did overtime work and had received remuneration. On the other hand, it would appear that the Legislature recognised the fact of the employer engaging, by contract express or implied, the services of the existing employee for doing overtime work and paying the remuneration. In this behalf, it is relevant to note that the definition of "wages" under Section 2(22) of the Act, the main part of the definition, without taking aid of the inclusive part, would indicate that 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. It would, thus, be seen that if there is any contract of employment express or implied and the terms of contract have been fulfilled, then the remuneration paid for performance of the duty, the employer is obligated to pay remuneration as wages to the employee. Herein, we have to consider whether overtime wages would be part of the wages. It is settled legal position that the word `include' would be given wide interpretation so as to bring within its ambit exhaustively all entries akin to or analogous to the main part of wage, except to the extent the enumerated entities except those expressly excluded by the legislation would be within its sweep. In other words, by employing the inclusive definition, the Legislature intended to bring in, by legal fiction, something within the accepted connotation though not strictly included within its ambit. It is seen that the Legislature has expressly excluded items A to D from the purview of the definition "wages". In other words, the Legislature suggested that all other categories which are not excluded, fall within the inclusive wider definition of `wages'. The Legislature by defining `employee', having had the knowledge of the payment of the remuneration for overtime work done by the employee and having excluded it in Section 2(9), the omission thereof in the definition of Section 2(22) excluding items A to D, would be eloquent and meaningful. Whatever remuneration, paid or payable for overtime work, forms wages under an implied term of the contract. The object thereby is clear that the overtime work done by the employee is an implied contract to do overtime and the remuneration paid therefore does form part of the wages under Section 2(22). Concomitantly, the employer is enjoined to pay the contribution under the Act and should be required to be complied with. This Court in Harihar Polyfibres vs. The regional Director, ESI Corporation [(1985), 1 SCR 712] was to consider whether HRA, Night Shift Allowance, Heat, Gas and Dust allowance, incentive allowance paid by the employer to his employee are wages within the meaning of Section 2(22) of the Act. This Court considered elaborately and had held that the Act is a welfare legislation and the definition of wages is designedly wide. Any ambiguous expression is, of course, bound to receive a beneficent construction at the hands of the Court. Under the definition, whatever remuneration is paid or payable to an employee under the terms of the contract of the employment, express or implied, is

wages, Thus, if remuneration is paid to the employee in terms of the original contract of employment or in terms of a settlement which by necessary implication becomes part of the contract of employment, it is wages. It was also further held that this inclusive part as against the exclusionary part in the definition clearly indicates that the expression wages has been given a very wide meaning. The inclusive part of the definition read along with the exclusionary part in the definition, clearly shows that the inclusive part is not intended to be limited only to the items mentioned therein. Taking into consideration the exclusionary part in the definition and reading the definition as a whole, the inclusive part is only illustrative and tends to express the wide meaning and import of the word `wages' used in the Act. It was held therein that HRA, Night, Shift Allowance, Heat, Gas and Dust allowance, incentive allowance are wages within the meaning of Section 2(22) of the Act. The facts in this case squarely fall within the above ratio laid by this Court. When the admitted position is that an employee has done the overtime work and received or is due to receive remuneration towards the work done for his rendering service, necessarily, it is a wage paid or payable by virtue of the implied contract. 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 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 remuneration received during the working hours and overtime constitute a 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, Nagpur v. Director, Regional Office Maharashtra, Bombay & Ors. [1974 Lab. IC 328) (V 7 C72), by Delhi High Court in E.S.I.C. New Delhi v. Birla Cotton, Spinning & Weaving Mills Ltd., Delhi [1977 II LLJ 420] and by the Andhra Pradesh High Court in M/s. The Hyderabad Allwyn Metal Works Ltd. v. Employees State Insurance Corporation [1981 Lab. IC 457] and the earlier decision referred to are correct in law. The ratio in Braithwaite & Co. (India) Ltd. vs. ESI [1968) 1 SCR 771], 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.

The appeals are dismissed. No costs.

IN WP (C) NO.1554/87 Writ Petition is dismissed as withdrawn.