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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Decided on: 29th May, 2017

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MAC.APP. 1017/2015 & , CM APPL. 32534/2015

THE NEW INDIA ASSURANCE CO LTD.

..... Appellant

Through: Mr. Anshom Jain and Mr. Amol Sinha,
Adv.

Versus

RINKU DEVI & ORS

..... Respondents

Through: Mr. Jitesh Vikram Srivastava, Adv. for
R-1 to R-5 alongwith R-1 and R-3 in person.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. Mr. Ajay Kumar Singh died in a motor vehicle accident on 12.09.2013. His kin were awarded a compensation of Rs.25,85,000/- along with interest at the rate of 9% per annum thereon from the date of filing of the claim petition i.e. 10.12.2013 by the MACT, Saket Courts, New Delhi vide Award dated 09.09.2015.

2. The appellant-insurer has impugned the Award on the ground that addition of future prospects towards loss of dependency is erroneous, especially in the case of the deceased who was not in permanent employment and had been working as a field boy in a private organization for merely six months. The appellant argues that this case does not qualify into any of the exceptions laid down in ***Reshma Kumari & Ors.Vs. Madan Mohan & Anr, (2013) 9 SCO 65***, therefore, the grant of 50% towards future prospects is unjustified.

3. The learned counsel for the parties have been heard.
4. Apropos the calculation of the loss of dependency, the Tribunal reasoned as under:-

“21. To begin with loss of dependence, the Ld. Counsel for the petitioner has invited the attention of the court towards statement of CW3, Proprietor, M/s. Mohan Fashions, HR-234, Pul Prahladpur, New Delhi he has contended that the said witness not only proved the salary of Rs.7,000/- but also overtime, total amounting to Rs. 13,365/- for the month of August-, 2013. Ld. Counsel for petitioner has contended that the deceased was earning close to Rs.15,000/-per month from a salary as well as overtime and that overtime was a regular feature. Ld. Counsel for the petitioner has contended that the petitioner was earning to the tune of Rs. 15,000/- and as would transpire from the documents proved by the witness from the employer, the deceased was doing overtime regularly. A perusal of Ex.CW3/B shows that the deceased was being paid salary of Rs.7,000/- per month and perusal of Ex.CW3/C (colly) shows that the overtime was being regularly paid to the deceased and other employees as incentives. It shows that a sum of Rs.4085/- was paid for the month of May, 2013, 3803/- for the month of July, 2013 and Rs.3921/- for the month of August, 2013. It is the contention of the petitioner side that the overtime/incentives was being paid regularly to all employees and that it should be considered as an element of monthly salary. It is his contention that the overtime is being paid as incentives every month quiet regularly. It is his contention that on the basis of his payment that it can be assumed that he can being paid of Rs. 15000/- on an average.

22. Ld. Counsel for insurance on the other hand has contended that the overtime cannot be treated as part of the salary and that the witness from the employer has also categorically stated that the payment of overtime used to depend upon the work load, and it varied from time to time.

23. I have carefully gone through the statement of the witness from the employer, although it is the statement of the witness that

overtime used to vary and depend upon workload, the witness was not put to direct question as to whether the over time is being paid as a regular feature or not. In the absence of any such evidence and having regard to the Ex.CW3/C, which manifests that overtime was being regularly paid for the last four months, immediately prior 02.09.2013, the contention of Ld. Counsel for insurance does not seem to be acceptable in view of the fact that Ex. CW3/C proves continuity of payment. There is no record suggestive of the fact that overtime was not a regular feature and in the absence of any cogent evidence, to the contrary, it would be unjust and inapt to assume that the overtime was not the regular feature. Considering, however, the fact that the amount of incentives/overtime had been varying even as per Ex.CW3/C, the contention of Ld. Counsel for the petitioner that the deceased was earning to the tune of Rs.15,000/- per month would not be acceptable. Having regard to the variation of incentives/overtime payments, some guesswork in respect of the payments of overtime for the purposes of computation of compensation, can not be ruled out.

24. The Tribunal accordingly assumes that a sum of Rs.3,000/- per month would be a just and fair estimation of the overtime/incentives. As such the monthly income of the deceased come to Rs. 10,000/- per month, inclusive of incentives/overtime.

25. Ld. Counsel for petitioner has contended that the deceased was 32 years old at the time of accident. As per the Ex.PW1/15-voter card, deceased was 32 years old as on 01.01.2013. His date of birth is recorded to be 28.02.1982 in his PAN card/Ex. CWI/10. Accepting the date of birth as recorded in his PAN card to be correct, the age of the deceased comes to 32 years at the time of accident.”

5. The learned counsel for the appellant contends that the aforesaid conclusion is devoid of any reasoning especially apropos the addition of 50% towards loss of future prospects. The Court would note that the deceased earned a basic salary of Rs.7,000/- per month and after adding the overtime paid to him for the previous four-five months, his income was taken at

Rs.10,000/- per month. This being the base figure, 50% for loss of future prospects was added thereon. The employer Shri Shrawan Kumar (CW3) had deposited as under:-

“ I am the proprietor of M/s Mohan Fashions and my office is at HR-234, Pul Prahladpur, New Delhi and a certificate attested by the Sr. Branch Manager, Bank of India, Sector-62, Branch Noida, UP is Ex.CW-3/A and it bears my signatures at Point-A. Deceased, Shri Ajay Singh son of Shri Ram Parvesh was employed in my firm as a Field Boy since March, 2013 till his fatal accident i.e. 12.09.2013. The salary slip of the deceased, Shri Ajay Singh for the month of September, 2013 is filed on record as Ex.CW-1/18 and it bears signatures of my accountant, Shri Rajeev Jain at Point-A. As per our records, the deceased, Shri Ajay Singh was getting a consolidated monthly salary of Rs.7,000/-. Today I have brought the entire Monthly Wage Register as well as Overtime Payment/Incentive made to the employees. Copies of Wage Register for the months of April, 2013 to September, 2013 are collectively exhibited as Ex.CW-3/B and copies of Overtime/Incentive register for the months of May, 2013 to August, 2013 are collectively exhibited as Ex.CW-3/C (OSR).

XXX by Shri Virender Kumar, counsel for R-3/ Insurance Company

It is correct that overtime/incentive was given to the employees only when there was workload and the same was not regularly paid every month and varied every time, depending upon the performance and quantum of the work done by the employees. The consolidated salary of the deceased was Rs.7,000/- per month only. Conveyance charges are paid to the employees as per their actual expenses. No tax is deducted from the salaries of the employees. I am not aware about the exact details but sometime advance payments were taken by the employees against their salaries. The salary was paid between 7th to 10th day of each calendar month. As per our records, date of birth of birth of Shri Ajay Singh was 20.02.1981 and he was a

matriculate. It is incorrect to suggest that the deceased, Shri Ajay Singh was not working in my firm or that the documents filed by me are forged and fabricated. It is incorrect to suggest that I am deposing falsely at the instance of the petitioners for enhancing their claim.

XXX by Shri Manoj Kumar, counsel for R-1 and R-2
Nil.

6. It is often seen that in private employment especially in small organisations, such as proprietorships, wherever the association of employer – employee subsists for some months, a rapport is often established which continues for a lifetime. With the building up of confidence in an employee's ability, integrity and the resultant dependency on him/her, the remuneration too increases. Such employment is as permanent as any other. The deceased would be regarded as having fulfilled this criteria. He was a Field Boy. He could have continued with the organization and his prospects for more earnings would have increased over the years. Therefore, the compensation for loss of future prospects while computing the loss of dependency is justified.

7. The learned counsel for the appellant submits that for the sake of argument, if it is assumed that the deceased was in permanent employment, by the dicta of ***Sarla Verma and others v. Delhi Transport Corporation and another*** 2009 ACJ 1298, he could get only 50% enhancement towards loss of future prospects. Taking the base salary at Rs.7,000/- per month would make the compensation Rs.10,000/- per month and not Rs.15,000/- per month because the additional Rs.3,000/- was towards overtime and working overtime cannot be taken as a permanent feature of employment.

8. Refuting the said arguments, the learned counsel for the respondent submits that the dicta of ***Indian Drugs & Pharmaceuticals Ltd. Etc. Vs. Employees State Insurance Corporation Etc.*** decided on 06.11.1996 by the

Supreme Court, clarifies that whatever a person brings home at the end of the month inclusive of overtime will be treated as wages/salary. In the said case it was held as under:

“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....”

9. Now, the issue arises as to what will be the quantum of the future prospects. The deceased was a matriculate working for base salary of Rs.7,000/- per month. In small private organizations, like the one in which the deceased worked, the scope of hike in salary is limited. In the circumstances, the addition of future prospects is reduced to 35%.

10. Accordingly, the loss of dependency is re-computed as under:

Salary Rs.10,000/- + 35% (loss of future prospects) - $\frac{1}{4}$ (personal expenses) x 12 x 16 (multiplier) = Rs.19,44,000/-). To this the non-pecuniary compensation of Rs.4,25,000/- is added. Hence, the compensation awarded is Rs.23,69,000/- alongwith interest at the rate of 9% per annum from the date of the filing of the claim petition i.e. 10.12.2013 till its realization. After the Award is satisfied in terms of the aforesaid computation, excess amount, if any,

alongwith proportionate interest shall be refunded to the appellant.

11. Since by these appellate proceedings, the appellants compelled the respondents to engage a counsel, spend monies and contest their case, therefore, of the statutory amount deposited by the appellant, Rs.20,000/- will be given to the respondents towards litigation costs and the remaining amount of Rs.5,000/- will be returned to the appellant.

12. The appeal alongwith pending applications stands disposed off in the above terms.

MAY 29, 2017/sb

NAJMI WAZIRI, J.

