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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 306 OF 2014

Mumbai Port Trust .. Petitioners

Vs.

1. Mumbai Port Trust Dock and General Employees Union

2. Transport and Dock Workers Union .. Respondents

Mr.S.K.Talsania, Senior Advocate i/b Motiwalla & Co., Advocate for the Petitioners.
Mr.Rajesh Gehani a/w Mr.M.M.Agavekar, Advocate for Respondent No.1.
Mr.S.N.Deshpande, Advocate for Respondent No.2.

CORAM : R.G.KETKAR, J.
RESERVED ON : 19th JANUARY, 2015
PRONOUNCED ON : 28th JANUARY, 2015

P.C. :

. Heard Mr.S.K.Talsania, learned Senior Counsel for the petitioners, Mr.Rajesh Gehani, learned Counsel for respondent No.1 and Mr.S.N.Deshpande, learned Counsel for the respondent No.2 at length.

2. By this petition under Articles 226 & 227 of the Constitution of India, the petitioners have challenged the judgment and award dated 15/11/2011 passed by the learned Presiding Officer, Central Government Industrial Tribunal – II, Mumbai (for short

'Tribunal') in Reference No. CGIT- 2/103 of 2001. By that order, the Tribunal allowed the reference and held that the dispute raised by the respondents herein - second party unions in respect of calculating leave encashment and overtime wages with House Rent Allowance (H.R.A) and Port Allowances is justified. The change made by the petitioners herein in calculating the amount of leave encashment and overtime wages without considering H.R.A. and Port Allowances is illegal and void.

3. Rule. The learned Counsel for respective respondents waive services. In view of the order dated 21/03/2014 as also at the request and by consent of the parties, rule is made returnable forthwith and the petition is taken up for final hearing. The relevant and material facts, that are necessary for the disposal of the present petition, briefly stated are as under :

4. The petitioners are a Major Port Trusts within the meaning of the Major Port Trusts Act, 1963. Respondents No. 1 & 2 are the trade unions within the meaning of the Trade Unions Act, 1926 and represent the workmen employed with the petitioners. The scheme for encashment of earned leave during the service was formulated by the Government of India vide its communication dated 12/12/1978. Vide Resolution No. 44 of 1979, the said scheme was adopted and incorporated by the petitioner into the service conditions of the workmen with effect from 13/02/1979. As per that scheme, the

amount admissible on leave encashment was to be equivalent to the pay and allowances for which the employee would have been eligible had he actually gone on leave. As the leave salary of an employee included H.R.A. and also in view of communication dated 12/12/1978 issued by the Government of India which did not provide for any exclusion of H.R.A, the petitioners were including the H.R.A component while computing the quantum of leave encashment . It is the case of the petitioners that the inclusion of H.R.A component while computing quantum of leave encashment was clearly erroneous. The H.R.A was paid as and by way of compensation to only those employees who were not provided staff quarters by the petitioners. The same was not paid in lieu of the work done by the employee. Thus, merely, because the workman did not use his paid leaves, but instead encashed them, did not imply that he must get a higher quantum of compensation for residential accommodation.

5. It is the case of the petitioners that in order to rectify the error, the Government of India, vide its communication dated 07th/10th May, 1993 directed the Port Trusts that the HRA component should not be included for computing the quantum of leave encashment. Vide order dated 01/12/1995, the Government of India, once again called upon the petitioners to discontinue practice of including H.R.A in computing the quantum of leave encashment. The petitioners issued notice dated 21/03/1998 under section 9–A of the Industrial

Disputes Act, 1947 (for short 'Act') informing the workmen about the change that was to be brought about with effect from 13/04/1998 i.e. at the end of the statutory period.

6. The Government of India, Ministry of Labour and Employment, in exercise of the powers conferred by clause (d) of sub-section (1) and sub-section 2(A) of section 10 of the Act referred to following industrial dispute to the Tribunal for adjudication.

> "Whether the industrial dispute relating to Leave Encashment, House Rent Allowance and Port Allowance raised by the All India Port & Dock Workers Federation against the management of Mumbai Port Trust justified ? If so, to what relief the workmen are entitled to?"

7. In support of this petition, Mr.Talsania submitted that in the scheme for encashment of earned leave during service formulated by the Government of India vide its communication dated 12/12/1978 laid down the principles which will govern only earned leave. In pursuance thereof, the petitioners adopted the scheme and incorporated into the service conditions of the workmen with effect from 13/02/1979. By communication dated $07^{th}/10^{th}$ May, 1993 Government of India directed to all Major Port Trusts/ Dock Labour boards to include pay, DA, special DA, fixed DA and variable DA while encashing leave. In other words, H.R.A and City Compensatory Allowance (C.C.A.) should not be included for the purpose of the encashment of leave. This decision was reiterated on 01/12/1995 by the Government of India. In view thereof, notice of change of service

conditions under section 9-A of the Act was issued on 21/03/1998 setting out therein that henceforth H.R.A will not be included for the purpose of encashment of earned leave while in service in respect of all Class III and Class IV employees who have joined services prior to 01/12/1995.

8. He submitted that in the Statement of Claims, respondents did not allege that notice of change under section 9-A of the Act was not issued. He submitted that in paragraph 8 of the written statement, it was specifically asserted that since notice of change was issued on 21/03/1998, the recovery was effected through arrears payment with effect from 13/04/1998 i.e. after 21 days from issuing notice of change. He also submitted that the said notice was, however, not produced before the Tribunal as it was nobody's case that the notice was not issued. The fact, however, that remains is the petitioners have issued notice of change on 21/03/1998.

9. He submitted that the Tribunal, however, proceeded to hold that while computing amount of leave encashment along with overtime wages previously H.R.A and Port Allowances were considered as the part of pay of workman concerned. The petitioners did not dispute that there is change in calculating leave encashment and overtime wages. The question, therefore, is whether it amounted to change in service conditions of the employee and whether notice under section 9-A of the Act is necessary. The Tribunal ultimately held

that notice under section 9-A was necessary.

10. Mr.Talsania submitted that since notice of change was issued on 21/03/1998 and the same was not produced before the Tribunal, the findings may be set aside and the parties may be permitted to lead evidence including production of notice of change dated 21/03/1998.

11. He submitted that as far as claim of H.R.A is concerned, in the Statement of Claims, respondents contended that component of H.R.A was always taken into consideration for calculation of overtime wages for all employees attending to the overtime work, whether workman resides in Port Trust residence and whether workmen were eligible for house rent allowances or not. The said benefit of considering the element of H.R.A for the purpose of payment of overtime wages was available to the workmen since the year 1970 which was further confirmed by the management by sanctioning the Resolution No. 495 of 1970. The said Resolution was also based on report of the Central Wage Board for Port and Dock Works at Major Port Trusts Act, 1969. The said benefit is protected under various clauses of settlement. It was further asserted that the benefit cannot be discontinued until and unless the settlement is replaced or the Award is passed by the Tribunal after examining the case of Mumbai Port Trust.

12. Mr.Talsania submitted that the HRA was merged in basic

pay in the wage revision effective from 01/01/1974 and thereafter the H.R.A as an element of wages was re-introduced after a period of 10 years in the settlement effective from 01/01/1984. The respondents Audit Officers raised objections for payment of H.R.A in overtime wages. On critical examination of matter, a view was taken that inclusion of HRA for overtime even for those who were in occupation of Port Trust's quarters was an error resulting into overpayment of overtime wages. In the circumstances, instructions were issued while issuing orders vide settlement dated 02/08/2000 that with effect from 01/01/1998, the element of H.R.A will not be counted for the purpose of payment of overtime wages in those cases where employees are in occupation of Port Trust quarters.

13. He submitted that in paragraph 14, the Tribunal held that H.R.A and Port Allowance were considered as part of pay while calculating overtime wages and amount of leave encashment. It was a practice followed since number of years. Withdrawal of the said practice amounts to withdrawal of concession or privilege as contemplated under Entry No. 8 of 4th Schedule read with section 9-A of the Act i.e. withdrawal of any customary or concession or privilege or change in the usage. The change therein as per the government circular and direction no doubt amount to change in the terms of service conditions. Ultimately, in paragraph 15, the Tribunal held that there is no dispute that for any change in the service conditions of the

workmen, notice under section 9-A of the Act is necessary. The change without notice under section 9-A of the Act is, therefore, bad in law. He submitted that the Tribunal failed to consider the explanation given by the petitioners in paragraphs 9 & 10 of the written statement and therefore, the Tribunal committed error in answering issue in favour of the respondents.

14. Mr.Talsania submitted that as far as the Port Allowance is concerned, it is the case of the respondents that earlier the port and dock workers were in receipt of C.C.A in terms of settlements arrived at between the Port Authorities and 5 Major Federations of port and dock workers. The component of C.C.A was considered as 'pay' for all the purposes including contribution to Provident Fund arrived at the rate for overtime working. The C.C.A was renamed as 'Port Allowances' with effect from 01/01/1998 as per the Memorandum of Settlement dated 02/08/2000. In other words, it is the case of the respondents that C.C.A was renamed as 'Port Allowances.'

15. As against this, it is the case of the petitioners that during the period of earlier settlement, C.C.A was not paid at the Ports at Tuticorin, Kandla, Paradip and Haldia, perhaps because they were not falling within the list of cities classified for entitlement of C.C.A. Had the C.C.A been continued, then the employees at Ports lile Cochin, Mormugoa, New Mangalore, Kandla, Paradip and Haldia would not have got C.C.A even now, as these cities are not covered in the list of

cities classified for the purpose of payment of C.C.A. This establishes that the Port Allowance now introduced is having a character different from the earlier C.C.A and hence it would not have the same treatment as C.C.A in the matter of deduction of Provident Fund and payment of overtime wages. He submitted that the Port Allowance is distinct from C.C.A and does not assume the character of C.C.A which was payable in some ports during the earlier settlement. This fact can be established from the terms 14.1 and 14.2 of the Settlement dated 02/08/2000 in as much as the term 14.1 mentions about Port Allowance to be paid to the employees, whereas the term 14.2 abolishes the payment of C.C.A from 01/01/1998. However, for convenience, the amount paid towards C.C.A during the period from 01/01/1998 to 31/08/2000 was shown as adjusted against Port Allowance, the C.C.A abolished from 01/01/1998. He, therefore, submitted that no case is made out by the respondents for consideration of Port Allowance for deduction of Provident Fund and for payment of overtime wages. He invited my attention to the findings recorded by the Tribunal. He submitted that on one hand, respondents have come with the case that C.C.A was renamed as Port Allowance and on the other hand, the petitioners have come with the case that C.C.A and Port Allowance are different and distinct. The Tribunal, however, did not record any finding in that regard. For all these reasons, he submitted that the impugned order deserves to be set aside.

16. On the other hand, Mr.Gehani supported the impugned order. He submitted that as far as the claim of benefit of leave encashment is concerned, admittedly, the petitioners did not produce notice of change dated 21/03/1998 before the Tribunal. In view thereof, no fault can be found with the findings recorded by the Tribunal against that issue. He invited my attention to clauses 29 & 36 of the Memorandum of Settlement dated 02/08/2000.

17. As far as claim of computation of House Rent Allowance for the purpose of payment of overtime wages is concerned, he submitted that the said benefit was available to the workmen since the year 1970 which fact has been further confirmed by the Management by sanctioning the Resolution No. 495 of 1970. The said Resolution was also based on the report of the Central Wage Board for Port and Dock workers at Major Ports, 1969. The said benefit is further protected under various clauses of the settlement. Thus, the system of considering the element of H.R.A for the purpose of payment of overtime wages to the workmen irrespective of whether the workmen reside in Port Trust residence or not has become a statutory term of employment of the workmen concerned. The said benefit cannot be discontinued until and unless the settlement is replaced or the Award is passed by the Industrial Tribunal after examining the case of the Mumbai Port Trust. He submitted that the said benefit falls under

Item No. 8 of Fourth Schedule read with section 9-A of the Act.

18. As far as the claim of considering the Port Allowance as wages for all purposes is concerned, he submitted that the port and dock workers were in receipt of C.C.A in terms of settlements arrived at between the Port Authorities and 5 major Federations of port and dock workers. The component of C.C.A was considered as "pay" for all the purposes including contribution to Provident Fund arriving at the rate of overtime working. As per the Memorandum of Settlement dated 02/08/2000, C.C.A has been renamed as Port Allowances with effect from 01/01/1998. In fact, it was the contention of the both parties that there will be only change in the name of allowances and Port Allowances shall be treated as pay for all the purposes as done in the case of C.C.A. The said benefit was not curtailed or modified because of renaming all allowances. He submitted that all the three benefits were existing for long time and these were the statutory terms of employment of the workman concerning the present dispute. Those were the part and parcel of the terms of the Memorandum of Settlements arrived at under the provisions of section 12(3) of the Act. For all these reasons, he submitted that no case is made out for interfering with the impugned order.

19. Mr.Deshpande submitted that all the three claims are protected by the settlements. The settlement should be substituted by the settlement or by the award. In other words, he submitted that

where conditions of service are once settled by an award, they could only be altered by contract, settlement and/or by award made in a reference under section 10. The petitioners cannot uni-laterally alter the terms of conditions of the service in accordance with the notice of change dated 21/03/1998 assuming it has come under section 9-A. He submitted that until a new contract or an award replaces the previous one, the former settlement or award will regulate relations between the parties. In support of these submissions, he relied upon following decisions :

i) Haribhau Shinde vs F.H. Lala Industrial Tribunal, Bombay, 1970 LAB I.C. 664.

ii) Life Insurance Corporation of India Vs. D.J.Bahadur, 1981, V-L.L.J 1980.

He, however, fairly stated that this contention was not raised before the Tribunal.

20. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. I will deal with the claims individually.

1) Benefit of Leave Encashment.

In the Statement of Claim, it is the case of the respondents that the benefit of encashment of earned leave based on the pay and allowances including H.R.A has become one of the statutory service conditions of the workmen which cannot be discontinued without termination and/or replacement of Settlement dated 02/08/2000 as per the provisions of law. The petitioners filed written statement. In paragraph 8, it is asserted as follows :

> "But since notice of change was issued only on 21st March 1998 the recovery was effected through arrears payment w.e.f.13th April 1998 i.e. after 21 days from issuing notice of change ."

21. Mr.Talsania submitted that in the Statement of Claim, respondents did not allege that notice of change under section 9-A was not issued. Despite this, in paragraph 8 of the written statement, it was specifically asserted that notice of change was issued on 21/03/1998 and the recovery was effected through arrears payment with effect from 13/04/1998 i.e. after 21 days from issuing notice of change. As the respondents did not dispute the said fact, the petitioner proceeded on the premise that it is an admitted position and therefore, did not produce notice of change. He submitted that the petitioner may be permitted to produce the said notice of change which sets out that henceforth H.R.A will not be included for the purpose of encahsment of earned leave while in service in respect of all Class III and Class IV employees who have jointed services prior to 01/12/1995.

22. The Tribunal has recorded a finding that exclusion of H.R.A for the purpose of encashment of leave amounts to change in service conditions and the same is without issuing notice of change as

contemplated under section 9-A of the Act. Mr.Talsania has invited my attention to the notice of change dated 21/03/1998 which is at Exhibit 'E' page 35 of the writ petition compilation. The respondents have not disputed the fact of issuing such notice. In fact, in paragraph 8 of the written statement, the petitioners have specifically adverted to notice of change issued on 21/03/1998. In view thereof, I am of the opinion that the Tribunal committed error in holding that no notice of change was issued. At the same time, the Tribunal has also not considered the contention advanced on behalf of the respondents that the said benefit is covered by the earlier settlements and therefore, has become one of the statutory service conditions of the workmen which cannot be discontinued without termination and/or replacement of Settlement dated 02/08/2000. The respondents have also contended that this benefit was existing for long time and therefore, became part and parcel of terms of Memorandum of Settlement arrived at under the provisions of section 12(3) of the Act. I am, therefore, of the opinion that insofar as this claim is concerned, the matter will have to be remitted to the Tribunal for deciding it afresh and the petitioner should be permitted to produce notice of change dated 21/03/1998 and the respondents also should be permitted to produce such documents as they deem fit and proper.

2) Computation of House Rent Allowance for the purpose of payment of overtime wages and also for the purpose of calculation of overtime wages of the employees

23. It is the case of the respondents that the said benefit was available to the workmen since the year 1970 which fact has been further confirmed by the Management by sanctioning the Resolution No. 495 of 1970. The said resolution was also based on the report of the Central Wage Board for Port and Dock workers at Major Ports, 1969. The said benefit is further protected under

i) Clause No. 26 of the Settlement dated 04/01/1981 (effective from 01/01/1980 to 31/12/1983);

ii) Clause 23 of the Settlement dated 11/04/1984 (effective from 01/01/1984 to 31/12/1987);

iii) Clause 19 of the Settlement dated 12/06/1989 (effective from 01/01/1988 to 31/12/1992);

iv) Clause 24 of the Settlement dated 06/12/1994 (effective from 01/01/1993 to 31/12/1997);

v) Clause 36 of the Settlement dated 02/08/2000 (effective from 01/01/1998 to 31/12/2006).

24. Even in the petition, the petitioners have asserted in paragraph 3.3.1 as under :

> "The practice of including the HRA component in computation of the Overtime Wages was introduced in the year 1969 pursuant to the Wage Board recommendation which was adopted vide Trustees Resolution No. 495 of 1970."

25. Thus, the practice of including HRA component in computation of overtime wages is vogue since 1969. The system of

considering the element of H.R.A for the purpose of payment of overtime wages to the workmen irrespective of whether the workmen reside in the Port Trust residence or not, therefore, has became a statutory term of employment of the workmen concerned in the present dispute. The said benefit cannot be discontinued until and unless the settlement is replaced or the award is made by the Industrial Tribunal after examining the case. It is also not the case of the petitioner that any notice of change under section 9-A was issued. For all these reasons, I do not think that the Tribunal committed any error in holding that H.R.A was considered as part of pay in calculating overtime wages and the said change is made without issuing notice under section 9-A of the Act. I, therefore, do not find any reason to interfere with the findings recorded as far as this item is concerned.

3) Benefit of considering the Port Allowance as wages for all purposes

26. It is the case of the petitioner that C.C.A is different and distinct from Port Allowance and does not assume the character of C.C.A which was payable in some ports during the earlier settlement. The said fact can be established from the terms 14.1 and 14.2 of the Settlement dated 02/08/2000 in as much as the term 14.1 mentions about Port Allowance to be paid to the employees, whereas the term 14.2 abolishes the payment of C.C.A from 01/01/1998. As against

this, it is the case of the respondents that port and dock workers were in receipt of C.C.A in terms of settlements arrived at between the Port Authorities and 5 Major Federations of port and dock workers. The component of C.C.A was considered as 'pay' for all the purposes including contribution to Provident Fund arrived at the rate for overtime working. The C.C.A has been renamed as 'Port Allowance' with effect from 01/01/1998 as per the Memorandum of Settlement dated 02/08/2000. In fact, it was the contention of both the parties that there will be only change in the name of allowances and said Port Allowances shall be treated as pay for all purposes as was done in the case of C.C.A.

27. Perusal of the impugned order, however, shows that the Tribunal did not deal with this contention at all. The Tribunal should have recorded the finding accepting either the case made out by the petitioner or the case made out by the respondents. The Tribunal did not deal with this contention though it was specifically raised in the Statement of Claim and written statement.

28. In view thereof, in my opinion, findings recorded by the Tribunal insofar as this claim is concerned, are required to be set aside with direction to the Tribunal to decide this claim afresh and in accordance with law.

29. In the light of aforesaid discussion, the petition partly succeeds.

30. The impugned judgment and order in respect of claims i) benefit of leave encashment and ii) in respect of benefit of considering the Port Allowance as wages for all purposes, is quashed and set aside and the matter is remitted to the Tribunal for deciding it afresh.

31. As far as the findings recorded by the Tribunal in respect of computation of House Rent Allowance for the purpose of payment of overtime wages are concerned, the same are maintained.

32. The petitioners are permitted to produce notice of change dated 21/03/1998. The respondents are also permitted to produce documents which according to them are relevant for deciding these 2 items.

33. All the contentions of the parties on merits in respect of these two items are expressly kept open.

34. Rule is partly made absolute in the aforesaid terms. In the circumstances of the case, there shall be no order as to costs.

(R.G.KETKAR, J.)