

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1220 OF 2002

Mumbai Port Trust Flotilla Worker's
Association, 2nd floor, Thackarcy House,
J.N. Heredia Marg, Bellard Estate,
Mumbai – 400 001.

.. Petitioner

V/s.

1. Mumbai Port Trust,
Port Bhavan, Shoorji
Vallabhji Marg, Mumabi – 400 001.

2. The Chairman,
Mumbai Port Trust,
Port Bhavan, Shoorji
Vallabhji Marg, Mumbai – 400 001.

3. Union of India,
through Ministry of Shipping &
Transport, Notice to be served
on Central Government Advocate,
Ayakar Bhavan, Mumbai

.. Respondents

ALONG WITH

WRIT PETITION NO. 2474 OF 2002

Mumbai Port Trust, Dock and
General Employees' Union,
A Trade Union registered under the
Trade Unions Act 1926 and having
its office at Port Trust Kamgar Sadan,
Nawab Tank Road, Mazgaon,
Mumbai 400 010.

.. Petitioner

Vs.

1. Board of Trustees of the Port of Mumbai,
an autonomous body constituted under
the provisions of the Major Port Trusts Act,
1963 and having its registered office
at Port House, Shoorjee Vallabhdas Marg,
Ballard Estate, Mumbai 400 001.

2. Union of India,
Ministry of Labour
New Delhi,
Through the Central
Government Advocate, Mumbai

3. The Assistant Labour
Commissioner – Central – III
Ministry of Labour,
Government of India,
Shram Raksha Bhavan, Sion,
Mumbai – 400 022.

.. Respondents

Mr. Suresh S. Pakale, for the Petitioner in WP/1220/2002.
Mr.Rajesh Gehani a/w Ms.Sujal Vikhare i/b Mr.Mahendra
Agvekar, for Petitioner in WP/2474/2002.
Mr.R.S.Pai, Advocate a/w Mr.Anand Pai & Mr.Manoj Thakur i/b
Mulla & Mulla, for Respondents No.1 & 2 in WP/1220/2002.
Mr.S.K. Talsania, Senior Advocate a/w Ms.Sneha Pandey i/b
Motiwala & Co., for Respondent No.1 in WP/2474/2002.
Mr.Mihir Desai, Senior Advocate a/w Ms.Devyani Kulkarni, for
Intervenor.
Mr.Anil Singh, ASG, a/w Mr.Advait Sethna & Mr.Yash Momaya,
for Union of India.

**CORAM : A.A.SAYED &
M.S.KARNIK, JJ.**

**RESERVED ON : 19th JUNE, 2017
PRONOUNCED ON : 06th JULY, 2017**

JUDGMENT (PER M.S.KARNIK, J) :

1. The issues involved in these two Petitions are common. The challenge in these Petitions is to a notification dated 15/03/2002 issued by the Labour and Employment Adviser thereby directing that the provisions of section 2(h), section 14 of the Minimum Wages Act, 1948 (for short 'MW Act') and Rule 25 of the Minimum Wages (Central) Rules 1950 (for short 'Rules of 1950') shall not be applied to the employees engaged in the scheduled employments in Mumbai Port Trust whose minimum wages were fixed vide gazette notification numbers S.R.O. 335 dated 07/03/1951, S.R.O. 590 dated 29/03/1952 and S.R.O. 3671 dated 29/12/1954 having regard to the conditions stipulated in the notification.

2. The 2nd challenge is to a communication dated 30/05/2002 issued by respondent No.1 – Mumbai Port Trust in

pursuance of the notification dated 15/03/2002. The Respondent No.1-Mumbai Port Trust ('MPT' for short) thereby decided that payment of overtime wages at double the rate of ordinary rate of wages for overtime work for more than 9 hours on any day or more than 48 hours in a week be discontinued from the salary payable for the month of May 2002 in respect of all categories of port employees except those to whom provisions of the Factories Act, 1948 are applicable.

3. The petitioners have thus prayed for quashing of (a) notification dated 15/03/2002; (b) impugned circular dated 30/05/2002 withdrawing the benefit of overtime wages.

4. The petitioner in WP/2474/2002 is a registered trade union under the Trade Unions Act, 1926 and is representing the workmen employed in the establishments of respondent No.1 – Port Trust. According to the petitioners, around 20,000 workmen are affected by the change in the service condition as a result of the impugned orders. The

members of the petitioner-Union in WP No. 1220/02 are mainly employed in the pilotage activities of the respondent No.1 and engaged in the Port operation for berthing and unberthing of the ships and they have been given appointment in the Port Flotilla section of the Port department of respondent No.1.

The brief facts forming the basis of the filing of the Petitions are thus :

5. The Government of India Ministry of Labour by notification No. S.R.O. 335 dated 07/03/1951 in exercise of the powers conferred by clause (a) of sub-section (1) of section 3 read with clause (i) of sub-section (1) of section 4 and sub-section (2) of section 5 of the MW Act, 1948 fixed minimum wages payable to 59 categories of the workers of the Bombay Port Trust. On 29/03/1952 by notification No. S.R.O. 390, the Central Government fixed minimum wages payable to 217 categories of the workmen employed in the different departments in the respondent No.1 – Trust. This notification

was to take effect from 29/03/1952.

6. By the respondent No.1's – Trust Resolution (for short 'T.R.') No. 569 of 1953, Rule 25 of the Rules of 1948 was made applicable to all the categories of workmen covered under MW Act with effect from 15/03/1951 and hence, overtime allowance payable to them was calculated at double the ordinary rate of wages.

7. The Central Government by publishing a third notification No. S.R.O. 3671 dated 29/12/1954 made applicable provisions of MW Act to another 177 categories of workmen out of which 123 categories belonged to the manual and clerical category of workers and thus, they too became eligible for overtime allowance. According to the petitioners, industrial dispute was raised by remaining 54 categories of workmen who did not fall under the manual and clerical workers category interalia demanding to be covered under MW Act and to be afforded the benefit of Rule 25 of the said Rules of 1950. By an

award dated 28/11/1957, the remaining 54 categories were afforded similar benefits of overtime allowance as payable under the MW Act.

8. According to the petitioners, by virtue of T.R. No. 753 dated 25/08/1959, certain lower ranks of supervisory staff were also provided the benefit of overtime allowance at double the rate of ordinary wages. It is petitioner's case that the practice protected by Settlements for last 5 decades is that the workers with the respondent No.1 – MPT are paid double the wage rate for overtime allowance which may be either due to application of the MW Act, the Factories Act, 1948 or the Settlements arrived at between the Trust and the workers. The impugned notification of the Government of India dated 15/03/2002 had the effect of discontinuing the payment of overtime wages to the members of the petitioners Union. According to the petitioners, the respondent No.1 – Trust by the circular dated 30/05/2002 unilaterally withdrew the benefit of overtime allowance of double the ordinary rate of wages

provided under the MW Act reducing it to the overtime wage rate in accordance with the provisions of Port Trust Rules upon issuance of the notification dated 15/03/2002.

9. Being aggrieved by the change effected, a strike notice was issued by the petitioners. The Conciliation Officer and Assistant Labour Commissioner (Central) – III, Mumbai issued a notice under section 12 of the Industrial Disputes Act, 1947 (for short 'ID Act') and entertained the industrial dispute. The petitioners requested the Chief Personnel and Industrial Relations Manager, Mumbai Port Trust to withdraw the proposed change in service condition which request came to be rejected.

10. The petitioners have therefore impugned the notification dated 15/03/2002 and the circular dated 31/05/2002 in these Petitions.

11. The petitioners have also raised a challenge as regards inclusion of House Rent Allowance (HRA) while

computing the overtime allowance. Insofar as this challenge is concerned, the issue is already raised before the appropriate forum and therefore, we have refrained from entertaining this aspect of the matter in these Petitions.

12. Learned Counsel for the petitioners assailed the impugned orders contending that the same are arbitrary and against the provisions of MW Act and Factories Act and the ID Act. Our attention is invited to the relevant provisions of the MW Act 1948 which read thus :

Section 2(b) : "Appropriate Government" means –

- (i) in relation to any scheduled employment carried on by or under the authority of the ⁵ [Central Government or a railway administration], or in relation to a mine, oilfield or major port, or any corporation established by ⁶ [a Central Act], the Central Government, and
- (ii) in relation to any other scheduled employment, the ⁷ [State Government];

Section 2(c) : "Competent Authority" means the authority appointed by the appropriate Government by notification in its Official Gazette to ascertain from time to time the cost of living index number applicable to the employees employed in the scheduled employments specified in such notification;

Section 2(e) : "Employer" means any person who employs, whether directly or through another person, or whether on behalf of himself or any other person, one or more employees in any

scheduled employment in respect of which minimum rates of wages have been fixed under this Act, and includes, except in sub-section (3) of section 26, –

(i) in a factory where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any person named under ⁹ [clause (f) of sub-section (1) of section 7 of the Factories Act, 1948 (63 of 1948)], as manager of the factory;

(ii) in any scheduled employment under the control of any Government in India in respect of which minimum rates of wages have been fixed under this Act, the person or authority appointed by such Government for the supervision and control of employees or where no person or authority is so appointed, the head of the department;

(iii) in any scheduled employment under any local authority in respect of which minimum rates of wages have been fixed under this Act, the person appointed by such authority for the supervision and control of employees or where no person is so appointed, the chief executive officer of the local authority;

(iv) in any other case where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any person responsible to the owner for the supervision and control of the employees or for the payment of wages;

Section 2(g) : “Scheduled Employment” means an employment specified in the Schedule, or any process or branch of work forming part of such employment;

Section 2(h) : “Wages” means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment ¹⁰ [and includes house rent allowance], but does not include –

(i) the value of –

(a) any house accommodation, supply of light, water, medical attendance, of

- (b) any other amenity or any service excluded by general or special order of the appropriate Government ;
- (ii) any contribution paid by the employer to any Pension Fund or Provident Fund or under any scheme of social insurance;
- (iii) any travelling allowance or the value of any travelling concession;
- (iv) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or
- (v) any gratuity payable on discharge;

Section 2(i) : “Employee” means any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in a scheduled employment in respect of which minimum rates of wages have been fixed; and includes an out-worker to whom any articles or materials are given out by another person to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the trade or business of that other person where the process is to be carried out either in the home of the out-worker or in some other premises not being premises under the control and management of that other person; and also includes an employee declared to be an employee by the appropriate Government; but does not include any member of the Armed Forces of the ¹¹ [Union].

Section 12 : Payment of minimum rates of wages. –

- (1) Where in respect of any scheduled employment a notification under section 5 ²⁴ [***] is in force, the employer shall pay to every employee engaged in a scheduled employment under him wages at a rate not less than the minimum rate of wages fixed by such notification for that class of employees in that employment without any deductions except as may be authorised within such time and subject to such conditions as may be prescribed.
- (2) Nothing contained in this section shall affect the provisions of the Payment of Wages Act, 1936 (4 of 1936).

13. Learned Counsel for the petitioners also invited our attention to the relevant portion of the provisions of section

59(1) of the Factories Act which read thus :

59. Extra wages for overtime.—

(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.

14. Learned Counsel for the petitioners invited our attention to the schedule 4 item 1 and item 8 of the ID Act which read thus :

Item 1 : Wages, including the period and mode of payment;

Item 8: Withdrawal of any customary concession or privilege or change in usage.

15. According to the learned Counsel for the petitioners the issuance of the said notification is arbitrary and discriminatory as only the workmen of the Mumbai Port Trust are singled out whereas no such notification is issued qua the Port Trust of Vishakhapatnam, Kandla, Chennai. The workmen at these Ports are continued to be paid the overtime at double the ordinary rate of wages. It is also submitted that prevailing service condition so far as overtime allowance at other major Ports are similar. They are still paid at double the

rate of ordinary wages.

16. In the submission of the learned counsel for the petitioners, on the principle of parity therefore if the similar situate workmen of the other Ports are getting the benefit of the overtime at double the rate of ordinary wages, this itself is a good ground, according to the learned Counsel for the petitioners, to strike down the impugned notification as being violative of Article 14 of the Constitution of India.

17. Learned Counsel for the petitioners next contend that the practice of paying overtime allowance is protected by Settlements of last 5 decades and the workers of respondent No.1 – Trust are paid double the overtime allowance which may either be due to application of the MW Act, Factories Act, 1948 or Settlements arrived at between respondent No.1 and the workmen of the petitioner- Union. Learned Counsel for the petitioners invited our attention to the various Settlements which provide that the existing benefits and allowance including

those contained in the last and earlier Settlements should not be curtailed or withdrawn. Learned Counsel invited our attention to clause 26 of the Settlement dated 12/06/1989 which reads thus :

“26. General

(a) Existing benefits and allowances including those contained in the last and earlier settlements should not be curtailed or withdrawn. The principle of equal pay for equal work should govern the resolving of issues relating to proper classification and removal of anomalies.

Any facility, privilege, amenity, right, benefit monetary or otherwise or concession to which an employee or category or employees might be entitled to by way of any award, practice or usage should not be withdrawn, reduced or curtailed.”

18. Learned Counsel invited our attention to clause 24 of the Settlement dated 06/12/1994 which is on the line similar to clause 26 reproduced above. He also invited our attention to clause 36 of the Settlement dated 02/08/2000 which settlement is for the period from 01/01/1997 to 31/12/2006 which reads thus :

“Merely as a consequence of the implementation of this Settlement, any facility, privilege, amenity, right, benefit, monetary or otherwise or concession to which an employee or a category of employees might be entitled to by way of any award, practice, or usage, shall not be withdrawn, reduced or curtailed, except to the extent and manner as explicitly

provided for in this Settlement. Provided, however, that this protection clause shall not be used by the Federations and their affiliated unions and any person/persons enjoying benefits under this Settlement for preventing Port/DLB management from taking steps for the implementation of the provisions of this Settlement for improving productivity.”

19. According to the learned Counsel for the petitioners, the notification and the consequent circular therefore apart from being arbitrary are a complete instance of non-application of mind as the same have been issued without taking into consideration clause 36 of the settlement dated 02/08/2000. In the submission of learned counsel for the petitioners, the workmen are entitled for overtime at double the rate of ordinary wages which is the benefit they are getting right from 1951. The said notification is therefore in complete breach of clause 36 which provides that as a consequence of implementation of this Settlement, any facility, privilege, amenity, right, benefit, monetary or otherwise or concession to which an employee or a category of employees might be entitled to by way of any award, practice, or usage, shall not be withdrawn, reduced or curtailed, except to the extent and manner as explicitly provided for in this Settlement.

20. According to the learned Counsel for the petitioners the change in the service condition is effected without substituting the Settlement dated 02/08/2000 that provides continuation and protection of existing benefits and/or effecting change in the service condition without passing any Trust Resolution. The issuance of the notification virtually has an effect of terminating the settlement and thus, the action on the part of the respondents in not validly terminating the settlement before implementing the change renders the notification illegal and bad in law, so the learned Counsel would contend.

21. Learned Counsel Mr.Pakale for the petitioner in WP/1220/02 made an attempt to contend that respondent No.2 was not an appropriate authority to issue impugned notification. According to him, respondent No.2 -MPT is not an employment specified in Part I or Part II of the Schedule or added to either part by notification under section 27 as required by section 3. Realising that it is only on account of operation of MW Act by certain Notifications of 1951, 1952 and 1954 the workmen of

the petitioner's Union have derived the benefits of payment of overtime wages at double the ordinary rate from 1951 that Shri Pakale did not press this challenge. In any case, the petitioners in Writ Petition No. 2474 of 2002 have categorically stated that MW Act is applicable to the Port Trust under Entry 6 schedule I as respondent Port Trust is local authority within the meaning of Entry 6 of the Schedule.

22. Learned Counsel for the petitioners contended that by issuance of the impugned circular, respondent No.1 has virtually changed the service conditions of the petitioners in breach of section 9A of the ID Act. The petitioners or their workmen were not given notice of change as required by section 9A of the ID Act. Learned Counsel for the petitioner invited our attention to relevant portion of Section 9A of the ID Act which reads thus :

Section 9-A. Notice of change.- No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change, –
(a) without giving to the workmen likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or

(b) within twenty- one days of giving such notice:

Provided that no notice shall be required for effecting any such change--

(a) where the change is effected in pursuance of any [settlement or award]; or

(b)

23. According to the learned Counsel for the petitioners by virtue of various Settlements entered into during the last 5 decades, the workmen of the petitioners are protected by the terms of Settlement, therefore, payment of overtime wages at double the ordinary rate of wages is a service condition which cannot be altered without issuing notice of change as contemplated by section 9A. The impugned circular therefore is *non-est* and void *ab-initio*.

24. It is next submitted on behalf of the petitioners that in any case, the petitioners are entitled to the benefit of overtime wages under the Factories Act. Learned Counsel for the petitioner in WP No. 2474/2007 invited our attention to the definition of 'manufacturing process' under section 2k of the Factories Act which reads thus :

Section 2(k). “manufacturing process” means any process for—

- (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or
- (ii) pumping oil, water, sewage or any other substance; or]
- (iii) generating, transforming or transmitting power; or
- (iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding;] [or]
- (v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; [or]
- (vi) preserving or storing any article in cold storage;]

25. Our attention is also invited to the definitions of 2(l) and 2(m) of the Factories Act which read thus :

Section 2(l) “worker” means a person [employed, directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer, whether for remuneration or not], in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process [but does not include any member of the armed forces of the Union];

Section 2(m) “factory” means any premises including the precincts thereof—

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,

but does not include a mine subject to the operation of ⁶ [the Mines Act, 1952 (35 of 1952)], or ⁷ [a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place].

⁸[Explanation [I].—For computing the number of workers for the

purposes of this clause all the workers in ¹⁰[different groups and relays] in a day shall be taken into account;]

¹¹ [Explanation II.—For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof;]

26. It is contended that the workmen who are associated with the manufacturing process are being paid overtime as per section 59 under the Factories Act. Learned Counsel for the petitioners relied upon the decision of this Court in the case of **Cricket Club of India Versus Employee's State Insurance Corporation** reported in 1994 2 Mh.L.J. 1228 to contend that the workmen of the petitioners are working in the precincts of the MPT and their activities are integral to the working of the Port Trust. However, we refrain from going into this question as there are no pleadings to decide this issue. There is nothing on record to indicate the exact nature and duties discharged by the workmen. In any case, these are of disputed questions of fact and the petitioners have an alternate efficacious remedy to claim overtime wages under section 59 of the Factories Act, if they are entitled. Moreover, we do not find that the relief for payment of overtime wages under section 59 is even prayed for in these

Petitions.

27. It is next contended by learned Counsel for the petitioners that reading of section 26(2) of the MW Act would indicate that before issuing the notification under section 26(2) special reasons have to be recorded and the same is always subject to such conditions and for such period as may be specified. Learned Counsel for the petitioners submits that neither are there any reasons contained in the notification nor the period has been fixed during which time the exemption shall operate. According to the learned Counsel for the petitioners, the notification is therefore, not in accordance with sub-section 2 of section 26.

28. Learned Senior Counsel Mr.Mihir Desai for the intervenors in support of the petitioners adopted the arguments advanced by the learned Counsel for the petitioners. According to the learned Senior Counsel even those employees who are not covered in the notifications dated 07/03/1951, 29/03/1952 & 29/12/1954 are extended similar benefits of overtime under the

MW Act. The said employees are thus protected by the Settlements. The entitlement to overtime allowance is based on custom, usage and practice which is followed right from 1951 and this practice cannot be changed unless the procedure contemplated by Section 9A of the ID Act is followed. In the submission of learned Senior Counsel the entitlement to overtime allowance flowed from the practice that is adopted by MPT for all these years and not merely on the application of the MW Act.

29. In support of his submissions, learned Senior Counsel invited our attention to the minutes of the meeting held on 05/12/1972, more particularly clauses 1.3 and 1.4 which read as under :

“1.3 Government have not issued any fresh Notifications fixing minimum wages under the Minimum Wages Act after 1954 in respect of Bombay Port Trust employees. However, whenever new categories were created, the Trustees, on being satisfied that they would have been notified under the Minimum wages Act, had such Notifications been issued, have, from time to time, in a large number of cases, extended, of their own accord, the benefit of overtime payment at the rate prescribed under the Minimum Wages Act.

1.4 Thus, the present position is that all Class IV employees and the bulk of Class III employees are eligible for overtime

at the rate prescribed under the Minimum Wages Act. There are now 62 categories with a strength of about 425 not eligible for overtime at this rate.”

30. Thus, in the submission of learned Senior Counsel once the decision has been taken by the respondents to extend the benefit of the notification to the employees on its own accord, the respondents are not justified in depriving the employees of the said benefit by issuance of the impugned circular and that too without making the mandatory compliance of section 9A of the ID Act. Learned Senior Counsel therefore contends that the board extended the benefit of overtime allowance to every employee irrespective of the notification. The applicability of the MW Act therefore became a condition of service.

31. Learned Senior Counsel also contends that clause 19 of the Settlement has to be read along with clause 36. Clause 36 is already reproduced in para 18. Clause 19 read thus :

“19. Overtime Allowance : If any employee is asked by the management to work beyond prescribed working hours, overtime allowance will be paid as per relevant laws governing the payment of this allowance and full payment will not be denied.”

32. In the submission of the learned Senior Counsel after issuance of the notifications in the year 1951, 1952 and 1954, the wages have been revised consequent to the various Settlements entered into between the Management and the Union. The overtime allowance which the employees were getting for so long years therefore becomes existing benefit protected by the Settlements and the same cannot be withdrawn, reduced or curtailed except to the extent and manner as explicitly provided for in the Settlements. In the submission of learned Senior Counsel the entitlement of the petitioners to claim overtime allowance is not now as of result of applicability of the MW Act, but as a result of Settlements as the petitioners continued to receive overtime allowance right from the time they started receiving wages more than the minimum wages.

33. Learned Senior Counsel for respondent No.1 in Writ Petition No.2474/2002 and Counsel for MPT in Writ Petition No.1220/2002 contend that present Petition is completely

misconceived inasmuch as the workmen of the petitioner's Union have no right whatsoever to claim the overtime at double the rate of ordinary wages under section 14 of MW Act and Rule 25 of the said Rules of 1950. Learned Senior Counsel invited our attention to section 14 of the MW Act. According to learned Senior Counsel for respondent No.1 it is by operation of law that the members of the petitioner Union are no longer entitled to the benefit of overtime wages under section 14 of MW Act or Rule 25 of the Rules of 1950. According to the learned Senior Counsel it is only in respect of those employees whose minimum rate of wages is fixed under this Act that they are entitled to overtime wages under section 14. In the submission of learned Senior Counsel, minimum rate of overtime wages as provided under the MW wages Act and the Rules framed thereunder has to be paid to such employees but if any other law provides for higher rate then the same will have to be paid.

34. In the submission of learned Senior Counsel therefore by virtue of Settlements entered into between the

petitioners and the respondent No.1 – Trust, the workmen are getting wages more than minimum rate of wages fixed by the Act. In the submission of learned Senior Counsel therefore if the employees are getting wages more than the minimum rate of wages fixed under the MW Act, the claim of the petitioner is not justified as the appropriate Government has powers to exempt the application of Section 14 of the MW Act and Rule 25 of the Rules.

35. Learned Additional Solicitor General appearing on behalf of the Union of India invited our attention to the impugned notification. According to him, the notification has been issued in terms of the powers conferred by section 26(2) of the MW Act. The reasons have been spelt out. Learned ASG relied upon the conditions mentioned in the notification to contend that the same is in conformity with the provisions of section 26(2) of MW Act. According to learned ASG the wages which are now payable to the members of the respondent-Union are in terms of Settlements which have been arrived at

between the MPT and the Trade Union. The members of the respondent- Union are being paid wages much more than the minimum wages. In the submission of the learned ASG, when the members of the respondent – Union are being paid wages much more than the minimum wages, the Union of India is justified in issuing the impugned notification. According to the learned ASG, the wage structure of the employees of the MPT has been revised through the conciliation proceedings under ID Act and further minimum wages of these workers have never been revised as per MW Act after the initial fixation and therefore, having regard to these factors, it cannot be said that the notification is bad in law. Learned ASG in support of his submission relied upon the decision of the Apex Court in the case of **Indian Express Newspaper Vs. Union of India reported in (1985) 1 Supreme Court Cases 641** to support his contentions that the notification issued in exercise of powers conferred by section 26(2) of the MW Act is not arbitrary.

36. Learned ASG therefore submits that the factors

which have been taken into consideration which according to learned ASG in the teeth of section 14 of the MW Act and Rule 25 of the said Rules of 1950 are relevant factors taken into consideration and therefore the notification issued under section 26(2) is in conformity with the MW Act.

37. According to the learned ASG it is undisputed that under the Settlements, the employees are getting wages much more than what is fixed under the MW Act. In the submission of learned ASG, therefore, after fixing the minimum wages as per the notifications dated 07/03/1951, 29/03/1952 and 29/12/1954, the wages to the employees are paid as per the Settlements and/or as per wage structure of the employees through the conciliation proceedings under the ID Act. Learned ASG thus submits that there is nothing arbitrary or unreasonable about the notification.

38. Having regard to the rival contentions advanced on behalf of the learned Counsel appearing on behalf of the

respective parties, we now proceed to examine firstly the legality of the impugned notification dated 15/03/2002. It is not in dispute that by notification dated 07/03/1951, the minimum rates of wages were fixed under the MW Act in the Port of Bombay for the various categories of employees mentioned therein. By subsequent notifications dated 29/03/1952 & 29/12/1954 in respect of some more categories of employees, the minimum rates of wages payable under the MW Act were fixed. It is also not in dispute that these categories of employees who are covered by the notifications were paid overtime allowance as required by sections 14 of the MW Act read with Rule 25 of the said Rules of 1950. The MPT extended similar benefit even to those employees who are not covered by the notifications.

39. It is further not in dispute that the petitioner employees are getting wages much more than the minimum wages. Learned Senior Counsel for the respondent No.1 placed reliance on the decision of the Apex Court in the case of **Municipal**

Council, Hatta Vs. Bhagat Singh and ors. (1998)2 Supreme

Court Cases 443 and invited our attention to paragraphs 4 & 5

which read thus :

“4. There is also an amendment to Section 14 by addition of sub-section (1-a) under the Minimum Wages (Madhya Pradesh Amendment and Validation) Act, 1961 being Act 23 of 1961. Sub-section (1-a) which is inserted in Section 14 entitles the State Government by notification to fix the limit for overtime work in a scheduled employment. This provision is not directly relevant. To claim overtime under Section 14, the following conditions must be fulfilled by an employee (1) the minimum rate of wages should be fixed under the Minimum Wages Act, 1948; and (2) such an employee should work on any day in excess of the number of hours constituting a normal working day. Therefore, overtime under Section 14 is payable to those employees who are getting a minimum rate of wage as prescribed under the Minimum Wages Act, 1948. These are the only employees to whom overtime under Section 14 would become payable. In the present case the respondents cannot be described as employees who are getting a minimum rate of wages fixed under the Minimum Wages Act, 1948. They are getting much more and that too under the Madhya Pradesh Municipal Service (Scales of Pay and Allowances) Rules, 1967. Therefore, Section 14 has no application to them. We have not been shown any other provision under which they can claim overtime.

5. The application under Section 22 of the Minimum Wages Act, is, therefore, misconceived. The respondents seem to have proceeded on the basis that because employment under any local Authority is listed as Item 6 in the Schedule to the Minimum Wages Act, 1948 they would automatically get overtime under the said Act. Section 14, however, clearly provides for payment of overtime only to those employees who are getting minimum rate of wage under the Minimum Wages Act, 1948. It does not apply to those getting better wages under other statutory Rules.”

40. Though learned Senior Counsel for the respondents has placed heavy reliance on the decision of the Apex Court in the case of **Municipal Council, Hatta** (*supra*), in our opinion, the decision may not squarely apply to the facts of the present case. In the facts of the present case we are called upon to decide legality and validity of the impugned notification dated 15/03/2002, which we have to examine in the light of the powers conferred on the respondent No.3 by section 26(2) of the MW Act.

41. Before the Apex Court in **Municipal Council, Hatta** (*supra*), the issue was in respect of claim made by the employees under section 22 of the MW Act claiming payment of overtime under section 14 thereof for additional hours of work put in by them and it is in this context, the Apex Court was pleased to hold that as the employees are getting much more than the minimum wages, therefore section 14 has no application to those employees.

42. There is no dispute that the members of the petitioners are getting better wages under the Settlements. The right to claim payment of overtime under the MW Act flows from section 14 of the MW Act read with Rule 25 of the said Rules of 1950. It would be material to reproduce sections 14, 26(2) and Rule 25 of the said Rules of 1950.

Section 14 : Overtime : –

(1) Where an employee, whose minimum rate of wages is fixed under this Act by the hour, by the day or by such a longer wage-period as may be prescribed, works on any day in excess of the number of hours constituting a normal working day, the employer shall pay him for every hour or for part of an hour so worked in excess at the overtime rate fixed under this Act or under any law of the appropriate Government for the time being in force, whichever is higher.

(2) Nothing in this Act shall prejudice the operation of the provisions of [section 59 of the Factories Act, 1948 (63 of 1948)] in any case where those provisions are applicable.

Section 26(2) : The appropriate Government may, if for special reasons it thinks so fit, by notification in the Official Gazette, direct that ³⁸ [subject to such conditions and] for such period as it may specify, the provisions of this Act or any of them shall not apply to all or any class of employees employed in any scheduled employment or to any locality where there is carried on a scheduled employment.

Rule 25 of the Minimum Wages (Central) Rules, 1950 :

Extra wages for overtime.— (1) When a worker works in an employment for more than nine hours on any day or for more than forty-eight hours in any week, he shall in respect of overtime work, be entitled to wages,—

(a) in the case of employment in agriculture, at one and a half times the ordinary rate of wages;

(b) in the case of any other scheduled employment, at double the ordinary rate of wages.

Explanation.—The expression ‘ordinary rate of wages’ means the basic wage *plus* such allowance including the cash equivalent of the advantages accruing through the concessional sale to the person employed of foodgrains and other articles as the person employed is for the time being entitled to, but does not include a bonus.]

(2)

(3) Nothing in this rule shall be deemed to affect the provisions of the Factories Act, 1948 (63 of 1948).

43. Insofar as the benefit of overtime allowance is concerned, as indicated earlier, the same was paid to the members of the petitioners by virtue of the 3 notifications of 1951, 1952 & 1954 referred to earlier. The authority issuing the notification in exercise of power conferred under sub-section 2 of section 26 of MW Act read with sub-section (b)(i) of section 2 directed that the provisions of section 2(h), section 14 of MW Act and Rule 25 of the said Rules of 1950 shall not apply to the employees engaged in the scheduled employments in Mumbai Port whose minimum wages were fixed vide gazette notifications dated 07/03/1951, 29/03/1952 and 29/12/1954, having regard to the following :

- (i) The wage structure of the employees of Mumbai Port Trust has been revised through conciliation proceedings under Industrial Disputes Act, 1948;
- (ii) The minimum wages of these workers have never been revised under the Minimum Wages Act after the initial fixation;
- (iii) The employments of Ports are not included in the schedule to the Minimum Wages Act, 1948 except the employment in loading and unloading.

44. In the case of **Indian Express Newspaper** (*supra*), the Apex Court in paragraphs 76, 77 & 78 has observed thus :

“76. Prof. Alan Wharam in his article entitled 'Judicial Control of Delegated Legislation: The Test of Reasonableness' in 36 modern Law Review 611 at pages 622-23 has summarised the present position in England as follows:

"(i) It is possible that the courts might invalidate a statutory instrument on the grounds of unreasonableness or uncertainty, vagueness or arbitrariness; but the writer's view is that for all practical purposes such instruments must be read as forming part of the parent statute, subject only to the ultra vires test.

(ii) The courts are prepared to invalidate by- laws, or any other form of legislation, emanating from an elected, representative authority, on the grounds of unreasonableness uncertainty or repugnance to the ordinary law; but they are reluctant to do so and will exercise their power only in clear cases.

(iii) The courts may be readier to invalidate by-laws passed by commercial undertakings under statutory power, although cases

reported during the present century suggest that the distinction between elected authorities and commercial undertakings, as explained in *Kruse v. Johnson*, might not now be applied so stringently.

(iv) As far as subordinate legislation of non- statutory origin is concerned, this is virtually obsolete, but it is clear from *In re French Protestant Hospital* [1951] Ch. 567 that it would be subject to strict control.

77. In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to the statute under which it is made, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.

78. That subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned has been held by this Court in *The Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur*, *Rameshchandra Kachardas Porwal v. State of Maharashtra* and in *Bates v. Lord Hailsham of St. Marylebone*. A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc. etc. On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19 (1) (a) of the Constitution. It cannot, no doubt, be done merely on the ground that it is

not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant.”

45. Having regard to the law laid down by the Apex Court in the case of **Indian Express Newspapers** (*supra*), we find that the Central Government has exercised its powers under section 26(2) of the MW Act to issue the notification. In the said notification, it is stipulated that exemption has been granted having regard to the fact that the wage structure of the employees of Mumbai Port Trust has been revised through conciliation proceedings under the ID Act; minimum wages of these workers have never been revised under the MW Act after the initial fixation.

46. Though it is contended by the learned Counsel for the petitioners that there is ambiguity insofar as clause (iii) of the notification, we are of the opinion that the notification cannot be said to be arbitrary only on this ground. The Central Government has taken into consideration that rates of minimum wages of the various categories of the employee were fixed by

the Central Government by issuance of the 3 notifications of 1951, 1952, 1954. The right to claim overtime allowance under section 14 of the MW Act read with Rule 25 of the said Rules of 1950 applies to those employees whose minimum rates of wages are fixed under the Act. The wage structure of the employees of Mumbai Port Trust has been revised through conciliation proceedings under the ID Act which has formed the basis for exempting the category of employees covered by 3 notifications from the applicability of section 14 of the MW Act and Rule 25 of the said Rules of 1950. In this view of the matter, it cannot be said that the impugned notification is in any manner arbitrary or bad in law. The submission of the learned Counsel for the petitioners that the impugned notification is discriminatory as no such notification has been issued in respect of other Ports can only be stated to be rejected as the impugned notification is specifically issued in respect of MPT in the context of the conditions mentioned thereunder. The challenge to the notification dated 15/03/2002 therefore fails.

47. Let us now examine the second challenge as regards the impugned circular dated 30/05/2002 issued by MPT by which it was decided to discontinue the payment of overtime at double the ordinary rate of wages. This circular as indicated earlier is issued as a consequence of issuance of the impugned notification dated 15/03/2002. The said circular is challenged on various grounds already recorded earlier which in brief are again reiterated hereafter :-

(a) The entitlement of overtime wages is pursuant to the various Settlements entered into from time to time and therefore, the payment of overtime at double the rate has become a condition of service. The payment of overtime wages has now become a long standing practice and even the same is protected by virtue of clause 36 of the Settlement. The said circular is in breach of section 9A of the ID Act.

(b) The employees of the other Ports continued to receive overtime at double the rate of ordinary wages and therefore, the issuance of circular is discriminatory.

(c) Those employees covered under the Factories Act are getting the overtime as per section 59 of the Factories Act but employees who are working in the precincts of the factories though covered by the Factories Act are not paid overtime allowance.

48. Learned Senior Counsel for the MPT in Writ Petition No.2474/2002 and learned Counsel appearing for the MPT in the connected Writ Petition No.1220/2002 contended that the legality of the circular dated 31/05/2002 can best be questioned by way of availing statutory remedy available to the employees and for that matter, the petitioners could not have questioned the legality of the circular/order of withdrawing the benefits of overtime allowance by filing these Writ Petitions. It is further submitted that whether section 9A had application in the facts of the case essentially involved question of fact and therefore, when there is a specific remedy available as provided under the statute, the High Court should not deviate from the general view and interfere under Article 226 except in a very strong case

made out for making a departure.

49. In the case of **Hindustan Steel Works Constructions Ltd and anr. Vs. Hindustan Steel Works Construction Ltd. Employees Union (2005) 6 Supreme Court Cases 725**, the Apex Court in paragraphs 8, 9, 12 & 13, quoted below, has held thus :

“8. In *U.P. State Bridge Corporation Ltd. and Ors. v. U.P. Rajya Setu Nigam S. Karamchari Sangh* (2004) 4 SCC 268, it was held that when the dispute relates to enforcement of a right or obligation under the statute and specific remedy is, therefore, provided under the statute, the High Court should not deviate from the general view and interfere under Article 226 except when a very strong case is made out for making a departure. The person who insists upon such remedy can avail of the process as provided under the statute. To same effect are the decisions in *Premier Automobiles Ltd. v. Kamlekar Shantarum Wadke* (1976) 1 SCC 496, *Rajasthan SRTC v. Krishna Kant* (1995) 5 SCC 75, *Chandrakant Tukaram Nikam v. Municipal Corporation of Ahmedabad and Anr.* (2002) (2) SCC 542 and in *Scooters India and Ors. v. Vijai V. Eldred* (1998) 6 SCC 549.

9. In *Rajasthan SRTC* case it was observed as follows: (SCC pp. 91-92, para 28)

"[A] speedy, inexpensive and effective forum for resolution of disputes arising between workmen and their employers. The idea has been to ensure that the workmen do not get caught in the labyrinth of civil courts with their layers upon layers of appeals and revisions and the elaborate procedural laws, which the workmen can ill afford. The procedures followed by civil courts, it was thought, would not facilitate a prompt and effective disposal of these disputes. As against this, the courts and tribunals created by the Industrial Disputes Act are not shackled by these procedural laws nor

is their award subject to any appeals or revisions. Because of their informality, the workmen and their representatives can themselves prosecute or defend their cases. These forums are empowered to grant such relief as they think just and appropriate. They can even substitute the punishment in many cases. They can make and remake the contracts, settlement, wage structures and what not. Their awards are no doubt amenable to jurisdiction of the High Court under Article 226 as also to the jurisdiction of this Court under Article 32, but they are extraordinary remedies subject to several self-imposed constraints. It is, therefore, always in the interest of the workmen that disputes concerning them are adjudicated in the forums created by the Act and not in a civil court. That is the entire policy underlying the vast array of enactments concerning workmen. This legislative policy and intendment should necessarily weigh with the courts in interpreting these enactments and the disputes arising under them".

12. In *Basant Kumar Sarkar and Ors. v. Eagle Rolling Mills Ltd. and Ors.* (1964) 6 SCR 913 the Constitution Bench of this Court observed as follows:

"It is true that the powers conferred on the High Courts under Article 226 are very wide, but it is not suggested by Mr. Chatterjee that even these powers can take in within their sweep industrial disputes of the kind which this contention seeks to raise. Therefore, without expressing any opinion on the merits of the contention, we would confirm the finding of the High Court that the proper remedy which is available to the appellants to ventilate their grievances in respect of the said notices and circulars is to take recourse to section 10 of the Industrial Disputes Act, or seek relief, if possible, under sections 74 and 75 of the Act."

13. We find that the learned Single Judge observed that he was not entering into the factual controversy, overlooking the fact that the question relating to applicability of Section 9-A is essentially a question of fact. The Division Bench did not discuss the basic issues about the applicability of Section 9-A and whether on the facts of the case Section 9-A has really any application. It was disposed of with the following observations:

"The employees concerned are workmen within the meaning of that term as defined under Section 2(s) of

the Act and withdrawal of construction allowance from them tantamounts to a change in the conditions of service. In that view of the matter, the management of the appellant company ought not to have withdrawn the construction allowance presently paid to the employees without issuing notice envisaged under Section 9-A of the Act."

50. A useful reference can also be made to the decision of the Apex Court in the case of **Transport and Dock Workers Union and ors. Vs. Mumbai Port Trust and anr. (2011) 2 Supreme Court Cases 575**. Paragraph 14 of the **Transport and Dock Workers Union** (*supra*) reads thus :

"In our opinion the writ petition filed by the appellants should have been dismissed by the High Court on the ground of existence of an alternative remedy under the Industrial Disputes Act. It is well settled that writ jurisdiction is discretionary jurisdiction, and the discretion should not ordinarily be exercised if there is an alternative remedy available to the appellant. In this case there was a clear alternative remedy available to the appellant by raising an industrial dispute and hence we fail to understand why the High Court entertained the writ petition. It seems to us that some High Courts by adopting an over liberal approach are unnecessarily adding to their load of arrears instead of observing judicial discipline in following settled legal principles. However, we may also consider the case on merits.

51. In our opinion, therefore, having regard to the fact that apart from other questions of factual determination, one of

the question involved is relating to the applicability of section 9A of ID Act which essentially is a question of fact. Therefore, without expressing any opinion on merits of the contention raised in challenge to the impugned circular, we are of the opinion that proper remedy which is available to the petitioners to ventilate their grievance in respect of the said circular is to take recourse to the remedies available under ID Act.

52. Even the claim under section 59 of the Factories Act for overtime at double the ordinary rate of wages involves questions of factual determination and therefore also in our opinion the petitioners have alternate efficacious statutory remedy to ventilate their grievance.

53. In the case of **Hindustan Steel Works Constructions Ltd** (*supra*), the Apex Court in paragraphs 15 & 16 has observed thus :

“15. However, because of the long passage of time (the writ petition was filed in 1997), the attendant circumstances of the case in the background noted above and in view of the agreement that this is a matter which requires to be referred to the Tribunal, we direct that the

appropriate Government shall refer the following question for adjudication by the appropriate Tribunal:

(1) Whether there was violation of Section 9-A of the Industrial Disputes Act, 1947 as claimed by the employees?

(2) Whether the withdrawal of the construction allowance amounted to the change in the conditions of service?

16. The parties shall jointly move the appropriate Government with a copy of our judgment.”

54. In the present Petitions, learned Counsel for the petitioners have advanced submissions on the merits of the impugned circular dated 30/05/2002. We are therefore not inclined to entertain the present Petitions in its challenge to the impugned circular dated 30/05/2002 in the exercise of our writ jurisdiction under Article 226 of the Constitution of India. However, we may not be understood to have expressed any opinion on merits of the circular dated 30/05/2002. All the contentions of the petitioners in this regard so far as challenge to the impugned circular dated 30/05/2002 on merits are kept open with liberty to the petitioners to take appropriate legal recourse. Delay in challenging the circular may be considered sympathetically by the adjudicating authority having regard to the fact that the challenge to the circular in the present Petitions

was pending in this Court for a long time. Hence, the following order :

ORDER

- (1) The Writ Petitions are rejected.
- (2) The petitioners may challenge the circular dated 30/05/2002 before the Competent Forum. The challenge to the circular dated 30/05/2002 may be examined on its own merits without being influenced by any observations made by us. We expressly made it clear that we have not made any observations on the merits of the circular dated 30/05/2002.
- (3) No order as to costs. Rule is discharged.

(M.S.KARNIK, J.)

(A.A.SAYED, J.)

After the judgment was pronounced, learned Counsel for the petitioners made a request to expedite the demand and consequential reference if so made.

Present Petitions were pending in this Court for

longtime. In this view of the matter, it is expected that the decision on the demand that may be made and the consequential reference, if any, would be decided expeditiously by the Adjudicating Authority.

(M.S.KARNIK, J.)

(A.A.SAYED, J.)