

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.4900 OF 2007

Jitendra Anant Mhatre and ors. ... Petitioners
V/s.
The Union of India and ors. ... Respondents

Mr.A.I.Bhatkar for the Petitioners.

CORAM : A.S.OKA AND M.S.SONAK, JJ.

Reserved for judgment on: August 30, 2018.
Judgment pronounced on : September 26, 2018.

JUDGMENT:- (*Per M.S. SONAK,J.*)

1. Heard learned counsel for the parties.
2. The challenge in this petition is to the judgment and order dated 6th December, 2006 made by the Central Administrative Tribunal (CAT) dismissing Original Application No.446 of 2005 instituted by the petitioners seeking overtime allowance on the basis of revised pay scale made applicable to them.

3. The petitioners had pleaded that they were initially appointed as Lower Division Clerks and thereafter, promoted as Upper Division Clerk at the Naval Armament Depot (Respondent No.6). As a part of their duties, the petitioners were posted/transferred to the time keeping section on rotation basis for fixed tenure of three years. Here, the petitioners were required to work overtime as and when directed by the administration and also observed non-industrial timings. It is the case of the petitioners that while they were posted at the time keeping section, they were invariably required to work in the excess of 48 hours per week or 9 hours per day. As a result, the petitioners had contended that they were entitled to overtime allowance at twice their ordinary rate of wages in terms of Section 59 of the Factories Act 1948, which was clearly applicable.

4. The respondents also do not dispute the entitlement of the petitioners for overtime allowance in terms of Section 59 of the Factories Act. In fact, there is no dispute that such overtime was being paid to the petitioners. However, it is the case of the petitioners that the respondents by misconstruing the office

memorandum dated 1st July, 1998 issued by the Ministry of Defence, Government of India have been computing the overtime allowance, on the basis of “*Pre-revised scale*”, even though there had been a revision in the pay scales of the petitioners and the petitioners were entitled to the overtime allowance on the basis of such revised pay scales.

5. The petitioners aggrieved by the denial of overtime allowance on the basis of the revised pay scales made representations to the respondents, which were, however, turned down by the respondents mainly relying upon the office memorandum dated 1st July, 1998. The petitioners then instituted Original Application No.446 of 2005 seeking directions for payment of overtime allowance on the basis of revised pay scales. By the impugned judgment and order dated 6th December, 2006, the Central Administrative Tribunal dismissed their Original Application No.446 of 2005, again relying almost exclusively on clause (iii) of the O.M. dated 1st July, 1998. Hence, the present petition.

6. Mr.A.I.Bhatkar, learned counsel for the petitioners contends that the case of the petitioners was squarely governed by clause (i) of the O.M. dated 1st July, 1998, which had clearly provided that the employees who are “workers” within the meaning of the Factories Act, 1948, are entitled to payment of overtime allowance in terms of Section 59 of the Act on the basis of revised pay scales. Mr.Bhatkar submits that clause (iii) of the O.M. dated 1st July, 1998 applies only to “workers” who came within the scope of Section 64 of the Factories Act and whose basic pay was more than Rs.1,600/- per month in the pre-revised pay scales. Mr. Bhatkar points out that since the petitioners were not at all “workers” who came within the scope of Section 64 of the Factories Act, 1948, the Central Administrative Tribunal was not at all right in applying clause (iii) of the O.M. dated 1st July, 1998 and on such basis denying relief to the petitioners.

7. Mr.Bhatkar further pointed out that the petitioners in Paragraph Nos.4.8 and 4.9 of their Original Application No.446 of 2005 before the Central Administrative Tribunal had made clear averments that employees, identically placed at the Naval

Dockyard of the Respondent No.4 were being paid overtime allowance in terms of Section 59 of the Factories Act, 1948 on the basis of their revised scales. Mr.Bhatkar points out that since there was absolutely no difference between the petitioners and their counter parts at the Naval Dockyard, the denial of overtime allowance to the petitioners on the basis of revised pay scales, amounted to clear discrimination and violation of the constitutional rights under Articles 14 and 16.

8. Despite service, none appears on behalf of the respondents.
9. We have carefully considered the submissions made by Mr. Bhatkar and we have also perused the impugned judgment and order made by the CAT. According to us, for the reasons which we shall indicate hereafter, the impugned judgment and order made by the CAT warrants interference and the petitioners deserve to be granted the relief of overtime allowance on the basis of their revised pay scales.
10. Since the petitioners were working as clerks at the Naval

Armament Depot, there can be dispute that they were “workers” as defined under Section 2(l) of the Factories Act, 1948. There is also no dispute that the Naval Armament Depot where the petitioners were working, answers the definition of factory under Section 2(m) of the Factories Act, 1948. There is also no dispute that when the petitioners were posted at the time keeping section of the Naval Armament Depot, they were required to work overtime i.e. in excess of 48 hours of the weeks and 9 hours of the day.

11. Section 59 of the Factories Act, 1948 inter alia provides that where workers in a factory for more than 9 hours in any day or for more than 48 hours in any week, they shall in respect of overtime work be entitled to wages at the rate of twice his ordinary rate of wages. Sub-section 2 of Section 59 of the Factories Act, 1948 provides that for the purposes of sub-section (1) “*Ordinary rate of wages*” means the basic wages plus such allowance, including the cash equivalent of the advert according to the concessional sale to the workers of fit ground and other workers, as the worker is for the time being entitled to but does

not include bonus and wages for the overtime work.

12. On a plain reading of the provisions of Section 59 of the Factories Act, 1948, which are admittedly applicable to the case of the petitioners, therefore, the petitioners were entitled to wages at the rate of twice their ordinary rate of wages, in respect of overtime work they discharged at the time keeping section of the Naval Armament Depot. As noted earlier, even the respondents do not dispute this position. The respondents as well as the CAT, however, relying upon Office Memorandum dated 1st July, 1998 have held that such overtime allowance payable to the petitioners must be computed on the basis of their pre-revised scales, since, the basic pay of the petitioners was more than Rs.1,600/- per month in the pre-revised scales. This is on the basis of their construction of clause (iii) of the O.M. dated 1st July, 1998. The contention of the petitioners, as noted earlier is that their case is covered by clause (i) and not clause (iii) of the O.M. dated 1st July, 1998.

13. In order to appreciate the rival contentions, it will be

appropriate to quote the O.M. dated 1st July, 1998 issued by the Ministry of Defence, Government of India dealing with payment of overtime allowance to employees of Defence Industrial Establishment. The O.M. dated 1st July, 1998 reads as follows :

F.NO.14(1)97/D(Civ-II)
Government of India
Ministry of Defence

New Delhi the 1st July 1998

OFFICE MEMORANDUM

PAYMENT OF OVERTIME ALLOWANCE TO
EMPLOYEES OF DEFENCE INDUSTRIAL
ESTABLISHMENTS

The undersigned is directed to refer to this Ministry's OM Nos.14(1)/86/D(Civ-II) dated 14.01.88 and DO P&T OM No. dated 21/11/97 and to say that the matter regarding payment of OTA to the employees of Defence Industrial Establishments has been reviewed in consultation with DO P&T and Ministry of labour taking into account the provisions of the Factories Act, 1948 and the following clarifications are accordingly being made here:-

(i) The employees of Industrial establishment who are “Workers” within the meaning of the Factories Act, 1948, are 59 of the Act on one basis of the revised pay scales. As already stated in the Ministry of Defence OM No.14(2)/87/D(Civ.II) dated 11.09.87 and OM No.14(1)/86/D(Civ.II) dated 14.01.88, they are entitled to Overtime Allowance only at the time rate, for the work done between the prescribed working hours and upto

48 Hours a week.

(ii) Those categories of “Workers” of Industrial Establishments who come within the scope of Section 64 of the Factories Act covering only those employees who are under the rules framed by the state Govts under section 64(1) of the Factories Act, 1940 or who are declared to be workers by the Inspector of Factories under Section 64(1) of the Factories Act, are entitled to payment of Overtime Allowance under Section 59 of the Act, on the basis of revised pay scales but subject to the conditions that their basic pay in the pre-revised pay scales is not more than Rs.1,600/- p.m. notionally determined. They are entitled to OTA at time rate as explained in sub para (i) above for the work done between the prescribed duty hours and upto 48 hours work in a week.

(iii) Those Categories of “Workers” who come within the scope of Section 64 of the Factories Act and whose basic pay is more than Rs.1,600/- p.m. in the pre-revised scales are eligible for OTA in terms of Ministry of Defence OM No. 14(2)/76/D(Civ.II) dated 25.06.1983. Accordingly, OTA will be paid to them on the basis of old pay scales notionally determined. They will also, be paid OTA for overtime work done between the prescribed duty hours and upto 48 hours a week only at time rate calculated on the basis of old pay scales notionally determined. They will be entitled to OTA at double the time rate calculated on the basis of old pay scales, notionally determined, for work beyond 48 hours under the orders dated 25.06.1983 referred to above. This will not entitle anyone who is not covered by 25.06.1983 orders to claim OTA.

2. Overtime allowance may be paid on the basis of instructions contained in sub-para (i), (ii), and (iii) of para 1 above with effect from 01.01.1996 or date from which the pay in revised scale of pay

is drawn and past cases regularised accordingly.

3. This issues with the concurrence of Ministry of Defence (Fin/AG) vide this ID No.547/AG/PB/98 dated 01.07.98 and after consultation with DO P &T vide their U.O.No.15013/1/98-Estt(AL) dated 03.02.98 and Ministry of Labour vide U.O.No.S. 25025/2/97-ISII-II dated 23.06.98.

Sd/x x x

(V.A.Chavda)

Under Secretary to the
Government of India.

(emphasis supplied)

14. The case of the petitioners, according to us, is covered by clause (i) of the O.M. dated 1st July, 1998, which was not even adverted to, by the CAT in the impugned judgment and order. As noted earlier there is absolutely no dispute that the petitioners are “workers” within meaning of the Factories Act, 1948 and are therefore, entitled to payment of overtime allowance in terms of Section 59 of the Factories Act, 1948. Clause (i) of the O.M. dated 1st July, 1998 in terms provides that such overtime in terms of Section 59 of the Factories Act, 1948 has to be paid “*On basis of revised pay scales*”.

15. Clause (iii) of the O.M. dated 1st July, 1998 relied upon

by the respondents as well as the CAT applies to only those categories of “workers” who come within the scope of Section 64 of the Factories Act and whose basic pay is more than Rs.1,600/- per month in the pre-revised scales. This means that for clause (iii) to be attracted, two conditions have to be satisfied by the category of workers:-

- (a) The workers concerned must come within the scope of Section 64 of the Factories Act, 1948; and
- (b) The workers concerned must be drawing basic pay of more than Rs.1,600/- per month.

16. Only if the aforesaid two conditions were to be satisfied, can it be said that the workers concerned could be paid the overtime allowance on the basis of old pay scales notionally determined and not on the basis of the revised pay scales. In the present case, both the respondents as well as the CAT have applied clause (iii) of the O.M. dated 1st July, 1998 to the case of the petitioners merely on the basis that the basic pay of the petitioners was more than Rs.1,600/- per month in the pre-revised pay scales. Neither the respondents nor the CAT have gone into the question as to whether the petitioners were

workers who came within the scope of Section 64 of the Factories Act, 1948.

17. The record bears out that the petitioners, were not workers who came within the scope of Section 64 of the Factories Act, 1948. Therefore, one of the conditions for applicability of clause (iii) of the O.M. dated 1st July, 1998 was not fulfilled and consequently clause (iii) of the O.M. dated 1st July, 1998 was not at all attracted to the case of the petitioners. Rather, as noted earlier, the case of the petitioners was fully covered by clause (i) of the O.M. dated 1st July, 1998.

18. Section 64(1) of the Factories Act, 1948 empowers the State Government to make rules defining the persons who hold positions of supervision or management or are employed in a confidential position in a factory or empowering the Chief Inspector to declare any person, other than a person defined by such rules, as a person holding position of supervision or management or employed in a confidential position in a factory if, in the opinion of the Chief Inspector, such person holds such

position or is so employed, and the provisions of this Chapter, other than the provisions of clause (b) of sub-section (1) of section 66 and of the proviso to that sub-section, shall not apply to any person so defined or declared. Provided that any person so defined or declared shall, where the ordinary rate of wages of such person does not exceed the wage limit specified in sub-section (6) of section 1 of the Payment of Wages Act, 1936, as amended from time to time, be entitled to extra wages in respect of overtime work under section 59.

19. In pursuance of powers vested in the State Government under section 64(1) of the Factories Act, 1948, the State Government has framed Rule 100 in the Maharashtra Factories Rules, 1963, which reads thus:-

“Rule – 100:
PERSONS DEFINED TO HOLD POSITION OF
SUPERVISION OR EMPLOYED IN A CONFIDENTIAL
POSITION.

(1) In a factory the following persons shall be deemed to hold position of supervision or management within the meaning of sub-section (1) of section 64, provided they are not required to perform manual labour or clerical work as a regular part of their duties namely:

- (i) The Manager, Deputy Manager, Assistant Manager, Production Manager, Works Manager and the General Manager;
- (ii) Departmental Head, Assistant Departmental Head, Departmental in-charge or Assistant Departmental in-charge;
- (iii) Chief Engineer, Deputy Chief Engineer and Assistant Engineer;
- (iv) Chief Chemist, Laboratory incharge;
- (v) Personnel Manager, Personnel Officer;
- (vi) Labour Officer, Assistant Labour Officer;
- (vii) Welfare Officer, Additional Welfare Officer or Assistant Welfare Officer;
- (viii) Safety Officer;
- (ix) Security Officer;
- (x) Foreman, Chageman, Overseer and Supervisor;
- (xi) Jobber in Textile Factories;
- (xii) Head Store Keeper and Assistant Store Keeper;
- (xiii) Boiler Sarang or such Boiler Attendants who are in-charge of a battery of boilers and are only required to do supervisory work;
- (xiv) Any other person who in the opinion of the Chief Inspector, holds a position of supervision or Management and is so declared in writing by him.”

20. Now it is not the case of the respondents that the petitioners were ever holding position of supervision or management or that they were employed in a confidential position in a factory. It is also not the case of the respondents that the petitioners were included in any of the categories set

out under Rule 100 (ii) of the Maharashtra Factories Rules, 1963. The petitioners were thus not “workers” who came within the scope of Section 64 of the Factories Act, 1948. Since this was one of the conditions for clause (iii) of the O.M. dated 1st July, 1998 to apply, clearly, both the respondents as well as the CAT, seriously erred in applying clause (iii) of the O.M. dated 1st July, 1998 to the case of the petitioners and on that basis denying the petitioners overtime allowance on the basis of the revised pay scales.

21. There was no contention raised that Rule 100 of the Maharashtra Factories Rules does not apply to the industrial establishment of the respondents. However, even if we were to proceed on the basis that Rule 100 is inapplicable, there is not the slightest material on record to suggest that the petitioners were workers covered under Section 64 of the Factories Act, 1948. In the absence of any such material, both the respondents as well as the CAT were obviously not right in treating the petitioners as workers covered under the scope of Section 64 of the Factories Act, 1948 and on such basis applying clause (iii) of the O.M. dated 1st July 1998.

22. That apart in Paragraph Nos.4.8 and 4.9 of the original application instituted by the petitioners before the CAT, they have clearly pleaded that clerks like them who have been posted in the time keeping section of the Naval Dockyard or at the office of General Manager, Naval Armament Depot, Mumbai have all been receiving overtime allowance on the basis of their revised pay scales. In the written statement filed on behalf of the respondents on 27th February, 2006 before the CAT there is no denial on this aspect. In fact, in Paragraph Nos.17 and 19 of such written statement, it is expressly admitted that the clerks at the time keeping section in the Naval Dockyard, Mumbai are receiving overtime allowance on the basis of revised pay scales. There is no basis for distinguishing the cases of the petitioners and the cases of their counter parts at the Naval Dockyard or the Naval Armament Depots, all of which are establishments of the Ministry of Defence, Government of India. This aspect has really not being considered by the CAT in the proper perspective. Award of Overtime allowance to similarly placed clerks in other defence industrial establishment on the basis of their revised pay scale but denial of the same to the petitioners clearly amounts to

infringement of the petitioners' right guaranteed by Article 14 of the Constitution of India.

23. For all the aforesaid reasons, we dispose of this petition by following order:-

ORDER

(a) The impugned judgment and order dated 6th December, 2006 made by the Central Administrative Tribunal in Original Application No.446 of 2005 is hereby set aside.

(b) The respondents are directed to pay to the petitioners overtime allowance on the basis of their revised pay scales for the period they were posted at the time keeping section of the Naval Armament Depot, Karanja, Uran within a period of three months from today

(c) If such dues are not paid within three months from today, then the respondent will have to pay interest thereon at the rate of 6% p.a. from the date such amounts became due and payable to the petitioners, till the date of actual payment.

24. The Rule is accordingly made absolute in the aforesaid terms. However, there shall be no order as to costs.

(M.S.SONAK, J.)

(A.S.OKA, J.)

Priya
Rajesh
Soparkar

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Soparkar
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