Union of India (UOI) Vs A.K. Biswas and Others

Court: Bombay High Court

Date of Decision: Jan. 31, 2006

Acts Referred: Bombay Shops and Establishments Act, 1948 â€" Section 70
Constitution of India, 1950 â€" Article 226
Factories Act, 1948 â€" Section 2, 2(1), 59, 59(1), 64
Industrial Disputes Act, 1947 â€" Section 33C
Maharashtra Factories Rules, 1963 â€" Rule 100, 100(1)

Citation: (2006) 3 BomCR 788 : (2006) 109 FLR 1040 : (2006) 3 LLJ 53 : (2006) 3 MhLj 355 : (2006) 2 MhLj 355

Hon'ble Judges: F.I. Rebello, J; D.Y. Chandrachud, J

Bench: Division Bench

Advocate: S.V. Masurkar, for the Appellant; M.S. Karnik, for the Respondent

Judgement

D.Y. Chandrachud, J.
Rule, by consent returnable forthwith. Counsel appearing on behalf of the respondents waives service. By consent

of Counsel and at their request taken up for hearing.

I

2. The Central Administrative Tribunal has allowed the claim preferred before it by the twenty one respondents for the payment of Overtime

Allowance at "double the rate" whenever duties have been performed in excess of 48 hours per week in accordance with the provisions of Section

59(1) of the Factories Act, 1948. Arrears have been directed to be paid for a period of one year prior to the date of the institution of the

application before the Tribunal. The Union of India has petitioned. For the reasons we indicate now, we have concluded that the Tribunal has

overlooked a crucial change in legislative position. We remand the proceedings for fresh determination.

II

3. The India Security Press and the Currency Note Press at Nasik Road are under the administrative control of the Government of India in the

Department of Economic Affairs of the Union Ministry of Finance. The respondents were appointed and posted to work in the Technical Section

of the India Security Press and the Currency Note Press as Supervisors. An application was filed by them before the Central Administrative

Tribunal claiming the benefit of Overtime Allowance at twice the rate of their ordinary wages u/s 59 of the Factories Act, 1948 in respect of the

work done beyond a period of nine hours each day or in excess of 48 hours a week. The petitioner filed a Written Statement opposing the claim.

Initially the Central Administrative Tribunal came to the conclusion that it had no jurisdiction to deal with the claim for the payment of Overtime

Allowance under the Factories Act, 1948. A petition filed by the respondents before this Court under Article 226 of the Constitution was allowed

by a Division Bench on 29th January 2005. The Division Bench held that the Tribunal had jurisdiction to entertain the claim and remanded the

matter for consideration. On remand, the Tribunal allowed the application by its judgment dated 4th April, 2005 which is impugned in these

proceedings.

III

4. In order to appreciate the nature of the controversy a reference to the governing provisions of law would be necessary. Section 2(k) of the

Factories Act defines the expression ""manufacturing process"" while 2(1) defines the expression ""worker"". The latter expression is defined to mean

a person employed directly or by or through any agency including a contractor, 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. The expression ""factory""" is defined in Section 2(m). Section 59 of the Act requires an employer to

pay extra wages for overtime work in a factory and the material part of Sub-section (1) thereof is as follows:

(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.

Section 64 which is a part of Chapter VI, like Section 59, confers an enabling power upon the State Government to make rules defining persons

holding positions inter alia of supervision or management and to whom therefore, the provisions of the Chapter would not be attracted. Sub-section

(1) of Section 64, in so far as is material, is as follows:

64. Power to make exempting rules. - (1) The State Government may 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.

5. In exercise of the power u/s 64 of the Factories Act, 1948, Rule 100 of the Maharashtra Factories Rules, 1963, has been framed which, insofar

as is material, provides as follows:

Rule 100. Persons defined to hold positions 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: (x) Foreman, Chargeman, Overseer and Supervisor.

6. The Bombay Shops and Establishments Act, 1948 contained prior to its amendment, a provision in Section 70 which had the effect of

expanding the applicability of the Factories Act, 1948 by making it applicable to all persons employed in a factory irrespective of whether a person

was employed as worker or otherwise. Section 70 provided as follows:

70. Persons employed in a factory to be governed by the Factories Act and not by this Act. - Nothing in this Act shall be deemed to apply to a

Factory and the provisions of the Factories Act, 1948 shall, notwithstanding anything contained in that Act, apply to all persons employed in and in

connection with a Factory, provided that, where any shop or commercial establishment situate within the precincts of a Factory is not connected

with the manufacturing process of the factory the provisions of this Act, shall apply to it;

Provided further that, the State Government may, by notification in the Official Gazette, apply all or any of the provisions of the Factories Act,

1948, to any shop or commercial establishment situated within the precincts of a factory and on the application of that Act to such shop or

commercial establishment, the provisions of this Act shall cease to apply to it.

(emphasis supplied).

IV

7. These provisions came up for interpretation before the Supreme Court in Union of India v. G.M. Kokil (Civil Appeal No. 2736(NL) of 1972)

and in a judgment delivered by a Bench of two Learned Judges on 21st March, 1984 the Court had occasion to determine the claim of various

categories of employees engaged in the India Security Press to overtime allowance. The Central Government Labour Court had allowed the

application of these employees u/s 33C of the Industrial Disputes Act, 1947. Mr. Justice V.D. Tulazapurkar, speaking for the Bench, held that the

effect of the non-obstante clause in Section 70 of the Bombay Shops and Establishment Act, 1948 was to enlarge the scope of the Factories Act

by making it applicable to all persons employed in a factory irrespective of whether the person is employed as a worker or otherwise. The

Supreme Court held that the effect of the non-obstante clause was to override the exemption provision contained in Section 64 of the Factories

Act, 1948 and, as a result, Rule 100 which was made in pursuance of the exemption provision would have no application. The Supreme Court

held as follows:

Section 70, so far as is relevant, says ""the provisions of the Factories Act shall, notwithstanding anything contained in that Act, apply to all persons

employed in and in connection with a factory"". It is well known that a non-obstante clause is a legislative device which is usually employed to give

overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that

is to say, to avoid the operation and effect of all contrary provisions. Thus the non-obstante clause in Section 70, namely, ""notwithstanding anything

in that Act"" must mean notwithstanding anything to the contrary contained in that Act and as such it must refer to the exempting provisions which

would be contrary to the general applicability of the Act. In other words, as all the relevant provisions of the Act are made applicable to a factory

notwithstanding anything to the contrary contained in it, it must have the effect of excluding the operation of the exemption provisions. Just as

because of the non-obstante clause the Act is applicable even to employees in the factory who might not be "workers" u/s 2(1), the same non-

obstante clause will keep away the applicability of exemption provision qua all those working in the factory. The Labour Court, in our view, was,

therefore, right in taking the view that because of the non-obstante clause Section 64 read with Rule 100 itself would not apply to the respondents

and they would be entitled to claim overtime wages u/s 59 of that Act read with Section 70 of the Bombay Shops and Establishments Act, 1948.

The submission before the Supreme Court was that if this construction was placed on Section 70 that would lead to an anomalous situation and

even persons occupying the position of a Manager or a General Manager would be entitled to overtime allowance which could not have been the

intention of the State Legislature. The Supreme Court, however, held that this ""in our view is a matter of the State Legislature and not for the

Court.

V

8. The legislature stepped in after the judgment of the Supreme Court to amend the law. Section 70 of the Bombay Shops and Establishments Act,

1948 came to be amended with effect from 21st October 1986 and, as amended, the provision reads as under:

Section 70 : Persons employed in factory to be government by Factories Act and not by this Act. - Nothing in this Act shall be deemed to apply to

a Factory to which the provisions of the Factories Act, 1948, (LXm of 1948) apply. Provided that, where any shop or commercial establishment

situate within the precincts of a factory is not connected with the manufacturing process of the factory the provisions of this Act shall apply to it.

The Statement of Objects and Reasons to the amending bill is instructive and it is thus:

Clause-12 : Section 70 provides that nothing in this Act will be deemed to apply to a factory and the provisions of the Factories Act, 1948, shall

notwithstanding anything contained in that Act, apply to all persons employed in and in connection with the Factory-"". The ""non-obstante"" Clause

and the Phrase ""all persons employed"", has the effect of enlarging the scope of Factories Act, 1948 by making it applicable to all persons

employed in such Factory irrespective of whether employed as worker or otherwise. There are certain employees or officers in a Factory to whom

the provisions of the Factories Act do not apply by virtue of exemption provided for under that Act. Just as because of ""non-obstante"" Clause, the

Act is applicable even to the employees in the Factory who might not be ""workers"" u/s 2(1), the said ""non-obstante"" clause keeps away the

applicability of exemption provisions of all those working in the factory as held by the Supreme Court in Union of India v. G.M. Kokil and Ors.. In

enacting the provisions of Section 70, the intension of the State Government was not to apply the Factories Act, 1948, in spite of the exemption

provided therein, to all employees whether or not they are workers. With a view to clarify the position this Clause seeks to amended Section 70

suitably.

9. In the circumstances, the State Legislature amended the law. The result was to modify the earlier provisions of Section 70 insofar as they had

laid down an expanded applicability of the Factories Act, 1948 to all persons employed in a factory irrespective of whether or not they were

workers. The Supreme Court had contemplated in Kokil''s case that if there be an anomaly, in the earlier provision that would have to be rectified

by the Legislature and this was what the Legislature did.

10. After the amendment, a decision of this Court in relation to the India Security Press was taken in appeal to the Supreme Court in General

Manager, India Security Press v. H.M. Datar (Petition for Special Leave to Appeal (Civil) No. 866 of 1992. A Bench of three Learned Judges of

the Supreme Court in its order dated 8th October, 1992, while declining to interfere with the decision challenged in the case made the following

observations in regard to the effect of Amending Act, which are material to the present case.

It is also relevant to mention that such liability for overtime has ceased with the amendment, of Section 70 of the Bombay Shops and

Establishments Act, 1948, with effect from 26-6-1986 as the amendment has the effect of deleting the non-obstante clause in Section 70, as it

stood earlier.

VI

11. In this background, the application filed by the respondents came up for consideration before the Central Administrative Tribunal. The Tribunal

allowed the application relying upon its own decision in Ashok Pandharinath Padwal v. Union of India (O.A. 761 of 1988) which has been

decided on 6th January, 1993. The Tribunal was of the view that the order of remand that was passed by the Division Bench of this Court did not

leave anything for the Tribunal to decide save and except to allow the application and accordingly, the application was allowed with the following

observations:

In view of the earlier order of the Tribunal which has been upheld by the Apex Court and in view of the views expressed by the High Court in the

present O.A. we do not think that anything is left for us to consider any further. The High Court in para 6 of their order in W. P. 4917/01 have in

effect given its view in the matter. Accordingly, the respondents are directed to make payment of Overtime Allowance to the applicants at double

the rate whenever they performed duties in excess of 48 hours per week in accordance with the provisions of Section 59(1) of the Factories Act

without restricting the same to the basic pay of the employee concerned. As for arrears, in view of the recent direction given by the Apex Court,

the respondents are directed to pay arrears of Overtime Allowance to the applicants w.e.f. one year prior to the date of filing the present O.A. The

respondents are at liberty to adjust any honorarium paid to the applicants during the said period for such additional work taken from them.

VII

12. We find a considerable degree of merit in the submission which has been urged on behalf of the petitioners that the Tribunal has not considered

the effect of the amendment to the provisions of Section 70 of the Bombay Shops and Establishments Act, 1948, upon the entitlement that was

pleaded by the respondents to a claim to overtime allowance u/s 59(1) of the Factories Act, 1948. The judgment of the Supreme Court in Kokil''s

case (supra) interpreted the relevant provisions of Section 70 as they stood prior to the amendment of 26th October 1986. The claim of the

respondents was for the period after the amendment and it is, therefore, that the amended provisions of the law have to be applied. Under the pre-

amended provisions, Supreme Court had held that the non-obstinate clause in Section 70 of the Bombay Shops and Establishments Act, 1948 had

the effect of overriding even the exemption provisions viz., Section 64 of the Factories Act, 1948, read with Rule 100. This position has now been

altered by the Legislature by the amendment which has been brought about in Section 70 of the Bombay Shops and Establishments Act, 1948.

The judgment of the Tribunal overlooks the effect of the amendment to the governing legislative provisions.

13. The exemption that has been provided in Rule 100 of the Maharashtra Factories Rules, 1963 inter alia applies to supervisors by virtue of

Clause (x) of Sub-rule (1). Sub-rule (1) defines persons who shall be defined to hold positions of supervision or management provided they are

not required to perform manual labour or clerical work as a regular part of their duties. Therefore, the question as to whether the exemption would

apply to the respondents - who are supervisors - would depend upon whether the nature of their duties is such that they are not required to

perform manual labour or clerical work as a regular part of their duties. This is a factual issue upon which the primary determination would have to

be made by the Central Administrative Tribunal. Our attention was drawn to the judgment of the Tribunal in Padwal''s case which was decided on

6th January, 1993 and the Court is informed that a SLP against that decision came to be dismissed. That judgment of the Tribunal enters the

finding in para 5 that the Tribunal was satisfied on the basis of the material on record that the applicants there even though they were supervisors

were also performing manual work. In the present case, we had specifically called upon Counsel for the respondents to inform the Court as to

whether in the pleading that was filed by the respondents before the Tribunal, the case that the respondents were required to perform manual

labour or clerical work as a regular part of their duties has been set up. A perusal of the pleadings before the Tribunal would, however, show that

the respondents proceeded primarily on the basis that they were entitled to be treated on the same footing as their counterparts in the establishment

of the India Security Press and the India Currency Note Press. The entire case before the Tribunal seems to rest on the principle of parity of

treatment for the respondents with their counterparts in the establishment. Counsel, therefore, fairly stated that the respondents have not set up the

case that the provisions of Rule 100 would not be attracted to their positions. We are inclined to remand the proceedings to the Tribunal to enable

the parties to place all relevant material relating to the application of Rule 100(1). The Tribunal must decide the issue based, as we have observed,

on the factual question as to whether the respondents are or are not required to perform manual or clerical work as a regular part of their duties.

14. Now, an additional circumstance to which a reference will have to be made is the fact that an order was issued on 21st December, 1988 by

the Government of India in the Ministry of Finance (Department of Economic Affairs). The order of the Union Government records that the matter

regarding compensating the non-gazetted Supervisory staff of the India Security Press and Currency Note Press and Security Paper Mills who are

drawing a basic pay of more than Rs. 750 in the pre-revised scale (revised to Rs. 2200/-) was under consideration of the Government for

sometime. Consequently, it was decided to compensate the shop-floor and ministerial staff falling under the above category for extended hours of

working at the rates indicated in that order. Subsequently, on 11th April 2000 the Government of India clarified that staff whose basic pay exceeds

the ceiling of Rs. 2200/- per month in the pre-revised scales of pay would not be entitled to any Overtime Allowance. Counsel appearing on behalf

of the petitioner fairly, on instructions, does not dispute the position that the benefit of the Union of India"s administrative instructions contained in

the order dated 21st December 1988 has been extended. Hence Counsel fairly submitted that the only question pressed is as regards the benefit

u/s 59(1) of the Factories Act, 1948.

15. The Tribunal has proceeded on the foundation that the order of remand that was passed by this Court precluded it from making any judicial

determination. That, in our view, is not an appropriate reading of the order of the Division Bench. The Division Bench was seized of a petition

challenging the order of the Tribunal holding that it had no jurisdiction to entertain the claim for overtime allowance under the Factories Act, 1948

in view of the provisions of the Administrative Tribunals Act, 1985. The Division Bench of this Court set aside the ruling of the Tribunal that it

lacked jurisdiction and remanded the matter for determination. That was the scope of the controversy before the Court and the observations in the

judgment are in that context namely, the question of jurisdiction.

VIII

16. In these circumstances, we are of the view that it would be only appropriate and proper that the impugned decision of the Tribunal is set aside

and the matter is remanded back for fresh consideration in the light of this decision. We order accordingly. We, however, clarify that it would be

open to the respondents to move an application for amendment of their pleadings, if they are so advised, to place before the Tribunal all the

relevant material having a bearing on the question as to whether the respondents are or are not required to perform manual labour or clerical work

as a regular part of their duties. It would be open to the petitioners, should such an application be allowed by the Tribunal, to file a reply on merits

as well. The impugned judgment of the Tribunal is quashed and set aside and O.A. 26 of 2000 is restored to the file of the Central Administrative

Tribunal, Mumbai for fresh determination. The petition shall stand disposed of in these terms. There shall be no order as to costs.