

**Central Administrative Tribunal
Principal Bench, New Delhi.**

OA-650/2016

Reserved on : 19.02.2018.

Pronounced on : 25.04.2018.

Hon'ble Ms. Praveen Mahajan, Member (A)

1. Employees Union-Ordnance Factory, Raipur,
Dehradun through its
General Secretary,
Ashok Sharma, 51 years
S/o Sh. Jagdish Parshad Sharma,
R/o C-61, New Type-III, Ordnance
Factory Estate, Raipur,
Dehradun(UK).
2. Nandam Singh Bisht, aged 35 years,
S/o Sh. Gopal Singh Bisht,
Working as Mechanist (HS-II),
Ordnance Factory, Raipur, Dehradun.
R/o No.8, New Nehrau Gram,
Garwali Colony, Raipur,
Dehradun(UK).

.... Applicants

(through Sh. Yogesh Sharma, Advocate)

Versus

1. Union of India through
the Secretary,
Department of Defence Production,
Ministry of Defence, Govt. of India,
South Block, New Delhi.
2. The Director General,
Ordnance Factory Board, Ministry of
Defence, Govt. of India, 10-A,
S.K. Bose Road, Kolkatta.
3. The General Manager,
Ordnance Factory, Raipur,
Dehradun (UK).

.... Respondents

(through Sh. Piyush Gaur, Advocate)

ORDER

Briefly stated, the facts of the current O.A. are that the applicant No. 1 is a recognized Union by Ministry of Defence, Government of India working in Ordinance Factory, Raipur, Dehradun and the applicant No.2 is working on the post of Mechanist (HS-II) in the same organization.

2. The applicants have submitted that they were getting overtime allowance whenever they were detained for duty beyond the normal working of 48 hours in a week. The said allowance was calculated and computed by including all allowances admissible to the employees like House Rent, City Compensatory, Transport, Small Family etc. as per the provisions of the Factories Act, 1948. Vide Memorandum dated 26.06.2009, respondent No.1 decided that HRA, Travelling and Small Family allowances would stand excluded for the purpose of computation of overtime allowance without assigning any reason and justification. In compliance of the said order, respondent No. 3 excluded the House Rent, Travelling, Small Family allowances for the purpose of computation of over time allowance w.e.f. 01.01.2006. Against the Memorandum dated 26.06.2009, various Unions and Associations made their representations. Subsequently one Union i.e. Heavy Vehicles Factory Employees Union filed OA-1144/2009 before the Madras Bench of Central Administrative Tribunal, which was dismissed on 24.12.2010.

Against the order of the Tribunal, Writ Petition No. 609/2011 along with other Writ Petitions were filed before the Hon'ble Madras High Court. Vide judgment dated 30.11.2011 Hon'ble Madras High Court allowed the Writ Petitions. Against the order of Hon'ble Madras High Court, respondent No.1 filed SLP Nos.-12845-12852/2012. In the said SLPs, no stay was granted and the judgment of Hon'ble Madras High Court was implemented subject to outcome of the SLP.

3. It is submitted that Ordinance Factory Civilian Employees Union, Medak also filed OA-1372/2012 seeking the benefit of the judgment of the Hon'ble Madras High Court. The same was allowed vide judgment dated 04.04.2014 with the following directions:-

"4. Accordingly, the respondents are directed to include all allowances such as HRA, TA and SFA in calculation of Over Time Allowance from 1.1.2006."

4. It is further informed that the judgment of the Hyderabad Bench of the Tribunal has been implemented by respondent No. 2 vide order dated 12.05.2015.

5. The applicants submit that they are also similarly placed persons and are entitled for overtime allowance by extending the benefit of Hon'ble Madras High Court judgment dated 30.11.2011 in Writ Petition No. 609/2011 and other connected cases and the judgment of Hyderabad Bench of this Tribunal in OA-1372/2012 dated 04.04.2014. They submit that they approached the respondents and were told that the above judgments are

applicable only to the applicants who filed the cases and the same cannot be extended to them. The applicants also sent a legal notice dated 08.09.2015 to which no reply has been received.

6. Aggrieved by the action of the respondents of not extending similar benefits, the applicants have approached this Tribunal by filing the current O.A. seeking the following relief:-

“(i) That the Hon'ble Tribunal may graciously be pleased to pass an order declaring to the effect that the whole action of the respondents not including House Rent Allowances, City Compensatory Allowance, Travelling Allowances etc. and all other allowance admissible in conformity with Section 59 of the Factories Act, 1948 for the purpose of calculation of overtime allowances, by way of extending the benefit of Hon'ble Madras High Court Judgment dated 30.11.2011 in the Writ Petition No. 609/2011 and other connected cases (Annex.A/2) and the benefit of Hon'ble Tribunal, Hyderabad judgment dated 4.4.2014 in OA No. 1372/2012 is illegal, arbitrary, against the rules and discriminatory in the eyes of law and consequently pass an order directing the respondents to include House Rent Allowances, City Compensatory Allowance, Travelling Allowances etc. for the purpose of calculation of overtime allowances, w.e.f. 1.1.2006 with all consequential benefits including the arrears with interest.

(ii) Any other relief which the Hon'ble Tribunal deem fit and proper may also be granted to the applicant along with the costs of litigation.”

7. The applicants have also placed reliance on the following judgments:-

1. **Girdhari Lal Vs. UOI & Ors.**
2. **Inder Pal Vs. UOI & Ors.**, 1985 SCC(2)648.
3. **Raj Pal Vs. State of Haryana**, 1996(1)SC SLJ 92.
4. **R.K. Sharma Vs. UOI & Ors.**, 1998(1)SLJ SC 55.

8. In reply, the respondents have taken the plea of limitation as the applicants are claiming benefits w.e.f. 2006 and the current O.A.

has been filed on 08.10.2015. They have placed reliance on the judgment of Hon'ble Supreme Court in the cases of **State of Karnataka & Ors. Vs. S.M. Katrayya & Ors.**, (1996)6 SCC 267 and **UOI Vs. M.K. Sarkar**, (2010) 2 SCC 59. They submit that the issue involved here is pending before Hon'ble Supreme Court in SLP(No.) 12845-12852/2012, hence no relief can be granted to the applicants before final disposal of the same.

9. The respondents submit that counting of various allowances for computation of overtime has been made in accordance with the orders/instructions issued by Ministry of Defence as well as Ministry of Labour & Employment. They contend that prior to 26.06.2009, the inclusion of various allowances while computing the overtime allowance, was also done in pursuance to the orders/instructions of Ministry of Labour and Employment. Respondent No.1 vide Memorandum dated 26.06.2009 decided that house rent allowance, travelling allowance and small family allowance would get excluded for the purpose of computation of overtime allowance. Hon'ble Madras High Court judgment dated 30.11.2011 vide which judgment of Madras Bench of the Tribunal in OA-1144/2009 dated 24.12.2010 was set aside failed to appreciate that the compensatory allowance including transport allowance, house rent allowance, conveyance allowance, closing allowance, washing allowance etc. cannot fall within the meaning of expression 'ordinary rate of wages'

for the purpose of entitlement to 'extra wages for overtime' as mandated under Section 59(1) of the Factories Act, 1948. It is averred that the compensatory allowance may not be included in wages for the purpose of calculation of 'overtime allowance' under Section 59(2) of the Act. Also the applicants have not been able to explain as to how they are similar to the applicants who filed Writ Petition No. 609/2011 before Hon'ble Madras High Court. Though the applicants have sent a legal notice dated 08.09.2015 but no representation has been filed by them.

10. I have gone through the facts of the case and carefully considered the rival contentions of both sides. I find that the issue regarding admissibility of allowances such as HRA, TA and SFA while calculating the Over Time Allowance, has been allowed by the Hon'ble Madras High Court in Writ Petition No. 609/2011 vide order dated 30.11.2011. It has been held therein that:-

"14. We have gone through the entire materials placed on record. It is seen from the perusal of the records that aggrieved of the order passed by the Tribunal, wherein original applications were filed by the employees working in the third respondent factory challenging the order, dated 26.06.2009, issued by the first respondent, wherein House Rent Allowance, Travelling Allowance, Small Family Allowance were excluded from the overtime allowance for the purpose of computation of the same, the present writ petitions have been filed.

15. It is an admitted case that the third respondent factory is governed by the provisions of the Factories Act. It is also the case of the employees that they are enjoying the overtime allowances all along and suddenly, a decision was taken to discontinue the payment of the aforesaid allowances by relying on Section 59(2) of the Factories Act, wherein Wages and Allowances were defined, to the effect that 'ordinary rate of wages' means the basic wages plus such allowances, including the cash equivalent of the advantage

accruing through the concessional sale to workers of food grains and other articles, as the worker is for the time being entitled to, but does not include a bonus and wages for overtime work'. When the definition of the term, 'wages' specifically excludes bonus and overtime wages to calculate the overtime work and the aforesaid allowances were excluded only on the basis of the opinion given by the legal advisor of the Ministry of Law and not in consultation with the Ministry of Law (Department of Legal Affairs), as requested by the Ministry of Labour, based on which, the Tribunal has dismissed the original applications by a common order dated 24.12.2010, which, in our considered opinion, is illegal.

16. As rightly contended by the learned counsel for the petitioners, as per the definition of Sub Section(2) of Section 59 of the Factories Act, calculating the 'ordinary rate of wages means, basic wages plus such allowances including the cash equivalent of the advantage accruing through the concessional sale to workers of food grains and other articles, as the worker is for the time being entitled to, but does not include a bonus and wages for overtime work. In the absence of any rules governing the subject with regard to the exclusion of the abovesaid allowances, from the definition of ordinary rate of wages, as per Sub Section 2 of Section 59 of the Factories Act and when the petitioners are catering the same all along, taking a decision, which is contrary to the definition as contained in Sub Section 2 of Section 59 of the Factories Act, is unsustainable in law.

17. It is also seen from the perusal of the records that when the Ministry of Finance, through their official memorandum, dated 14.11.2002, has requested the Ministry of Labour to reconsider the matter in consultation with the Ministry of Law (Department of Legal Affairs), but after consulting with the legal advisor of the Ministry, the Ministry of Labour and Employment has issued the above memorandum, which in our considered opinion, is not legal, since consulting the Ministry of Law is different from consulting the legal advisor of the Ministry. We are unable to understand as to what is the legal sanctity attached to the advice given by the legal advisor of the Ministry to exclude the abovesaid allowances to calculate the basic rate of wages. In the absence of any rule to exclude the aforesaid allowances from the definition of the basic wage, when the Section excludes only two items, viz., bonus and wages for overtime work, the action of the first respondent in excluding the said allowances without any authority, but only based on the opinion expressed by the legal advisor of the concerned Department, which cannot be considered to be the power given to exclude those allowances, and also the order passed by the Tribunal in rejecting the claim made by the petitioners based on the aforesaid memorandum, are considered to be illegal and unsustainable in law.

18. For the foregoing reasons, the order passed by the Tribunal is liable to be set aside and it is, accordingly, set aside. The writ petitions are allowed. Connected M.Ps. are closed. However, there will be no order as to costs."

The respondents have challenged this decision in SLP Nos. 12845-12852/2012. The SLPs are pending for final decision and no stay has been granted against the order dated 30.11.2011.

11. The Hyderabad Bench of the Tribunal has also passed a similar order dated 04.04.2014 in OA-1372/2012. They have held that:-

"3. Having heard the applicant, party-in-person and the learned Additional Standing Counsel for the Respondents and since the impugned order of Respondent No.2 dated 26.6.2000 has already been quashed by the Hon'ble High Court of Madras though the Department preferred SLPs before the Hon'ble Apex Court, no stay was granted in the SLPs, we are of the considered view that the applicant is entitled to get the relief as prayed in the application.

4. Accordingly the Respondents are directed to include all allowances such as HRA, TA and SFA in calculation of Over Time Allowance from 1.1.2006.

5. In the result, the OA is allowed. No order as to costs."

12. Based on these two judgments, the respondent No.2 has issued an order dated 12.05.2015, in favour of Ordnance Factory Civilian Employees observing that:-

"Sub: Contempt Petition (Civil), No. 021/0025/2015 arising out of
OA No. 1372 of 2012 – Ordnance Factory Civilian Employees Union
& Anr. V. UOI & Ors.

Ref: GM/OF Medak DO No. 15/1011/VLC/LEGAL/2015 dated 29.04.2015.

Contents of the DO dated 29.04.2015 addressed to Member/Per on the subject has been examined and considered. It has been decided that O F Medak may provisionally implement CAT Hyderabad order dated 04.04.2014, subject to outcome of Writ Petition filed before the Hon'ble High Court and SLPs pending before the Hon'ble Supreme Court."

"3. Having heard the applicant, party-in-person and the learned Additional Standing Counsel for the Respondents and since the impugned order of Respondent No.2 dated 26.6.2009 has already been quashed by the Hon'ble High Court of Madras though the Department preferred SLPs before the Hon'ble Apex Court, no stay

was granted in SLPs, we are of the considered view that the applicant is entitled to get the relief as prayed in the application.

4. Accordingly the Respondents are directed to include all allowances such as HRA, TA and SFA in calculation of Over Time Allowance from 1.1.2006.

5. In the result, the OA is allowed. No order as to costs."

13. In view of the aforementioned facts, I am of the considered view that the applicants are also entitled for similar consideration by the respondents as prayed for in the OA. The relief may be granted to them provisionally subject to the final outcome of the decision of the Hon'ble Apex Court in SLP Nos. 12845-12852/2012.

14. Accordingly, the O.A., as prayed for, is allowed. No costs.

(Praveen Mahajan)
Member (A)

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