BHARAT ELECTRONICS LIMITED, BANGALORE

v.

INDUSTRIAL TRIBUNAL, KARNATAKA, BANGALORE AND ANR.

MARCH 15, 1990

[RANGANATH MISRA, MADAN MOHAN PUNCHHI AND K.J. REDDY, JJ.]

Industrial Disputes Act, 1947: Section 33(2)(b)—'Night shift allowance'—Whether 'Wages'

Respondent-workman was in employment of the Appellant-management as Bus driver. Following an incident of misconduct committed by him, a domestic inquiry was conducted against him under Standing Orders 15(1)(b) and 15(1)(r) of the Company wherein he was held guilty by the Enquiry Officer and was eventually dismissed from the service w.e.f. 31.12.1979. On that day itself the management moved an application before the Industrial Tribunal under section 33(2)(b) of the Act for approval of the action taken and towards meeting the requirements of the provisions of the act paid to the workman before hand wages for one month. The workman filed his objection Statement to that application raising several contentions denying all the allegations made against him and challenging the validity of the domestic enquiry. This application somehow was kept pending by the Tribunal for over six years when sometime in July, 1986 the workman moved an application before the Tribunal seeking amendment of his objection petition to urge an additional ground that one month's wages paid to him were short by Rs.12, being the monthly night shift allowance as he was ordinarily expected to work by rotation as per standing orders of the Company and thus as full one month's wages had not been paid to him as required under section 33(2)(b) of the Act, the approval sought for ought to be declined. The management contended that the night shift allowance is neither paid nor payable unless the night shift is actually performed and thus this amount cannot form part of the month's wages automatically. The Industrial Tribunal while abandoning giving any finding on the validity of the domestic enquiry, upheld the additional objection taken by the workman and declined the management's application seeking approval to the dismissal of the workman. Hence this appeal by special leave by the management. Setting aside the impugned judgment and order of the Tribunal and allowing their application made under section 33(2)(b) of the Industrial Disputes Act, this Court in allowing the appeal,

HELD: The workman had to earn night shift allowance by actually working in the night shift and his claim to that allowance was contingent upon his reporting to duty and being put to that shift. The night shift allowance did not automatically form part of his wages and it was not such an allowance which flowed to him as an entitlement of his service. [981C]

The Tribunal fell into a grave error in declining the application of the management for approval on the ground of short payment of Rs.12 on account of night shift allowance, which the workman supposedly would have earned had he gone to report for duty. [981D]

Syndicate Bank Limited v. Ram Nath Bhat, [1967-68] (XXXII) FJR 490 at 497; M/s. Podar Mills Ltd. v. Bhagwan Singh and Another, [1974] 3 SCC 157; Bennett Coleman & Co. (P) Ltd. v. Punya Priya Das Gupta, [1970] 1 SCR 181 and Dilbagh Rai Jarry v. Union of India & Ors., [1974] 2 SCR 178, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 744 of 1987.

From the Judgment and Order dated 9.10.1986 of the Industrial Tribunal Karnataka in Serial No. 1/80 in I.D. No. 26 of 1979.

Narayan B. Shetye, Vineet Kumar and Vinay Bhasin for the Appellant.

M.C. Narasimhan and Jitender Sharma for the Respondent No. 2.

The Judgment of the Court was delivered by

PUNCHHI, J. Whether "night shift allowance" forms part of "wages" in the context of section 32(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') is the issue which crops up for decision in this appeal by special leave against the order dated October 9, 1986 of the Industrial Tribunal, Karnataka at Bangalore in Serial No. 1 of 1980 in I.D. No. 26 of 1979.

It arises on these facts.

Bharat Electronics Limited, Bangalore, the appellant-herein, is the "management" and the respondent Shri B. Sridhar, "workman"

was in employment with the management as a bus driver. The establishment of the management, at the relevant time, had about 13,500 employees out of whom about 2,800 were females. The management provided transport facilities for picking up and dropping down its employees from and at stipulated official stops. The drivers plying buses of the establishment on a rotational basis, working on night shifts, used to get a variable night shift allowance. On May 1, 1979 the workman was detailed to work in the first shift for picking up certain employees of the second shift and general shift, and for dropping school children at various scheduled points. He was also detailed to pick up female employees, who were to report for the shift commencing from 10.30 a.m. to 7.00 p.m. from the stipulated official stops. En route the workman did not park his vehicle at one of the stipulated establishment bus stops but rather quite away from it, which caught the attention of Shri K.L. Balasubramaniam, a senior Engineer in the employment of the Management wanting to go the factory. Shri Balasubramaniam went there and in the process of boarding the bus enquired whether he could go to the factory in the same bus. He was in for a shock to see the workman indulging in sexual act with a woman in the gang way of the bus. The sudden appearance of Shri Balasubramaniam surprised the workman and he abruptly and falsely replied in the negative. The matter was reported to the high officials of the Management. He confessed his guilt before Shri M.V. Subbarayappa, Deputy Manager, Transport. The misconduct committed by the workman became the subject matter of a domestic enquiry. At the enquiry S/Shri Balasubramaniam and Subbarayappa appeared for the management and deposed to the aforesaid facts. The Enquiry Officer found the workman guilty of the misconduct imputed under Standing Orders 15(1)(h) and 15(1)(r) of the Standing Orders of the Company.The workman was thereafter dismissed from service with effect from December 31, 1979. On that very day, the management sought approval from the Industrial Tribunal, Karnataka at Bangalore under section 33(2)(b) of the Act of the action taken and towards meeting the requirement of the provision paid to the workman before-hand a sum of Rs.607.90 as wages for one month.

Before the Industrial Tribunal the workman filed an objection statement raising various contentions denying *inter alia* the allegations made against him and challenging the validity of the domestic enquiry. It somehow kept pending for over six years though under the unamended section 32(5), it was required of the Tribunal to without delay hear the application and pass such order in relation thereto as it deemed fit. Now with effect from 21-8-1984, three months time limit is

A fixed though extendable by an order in writing. Anyway while that was in progress, he made an application on July 13, 1986 before the Tribunal seeking amendment of the objection petition enabling him to urge an additional ground to the effect that one month's wages paid to him were short by Rs. 12, the monthly sum due for night shift allowance. The additional objection was based on the premises that since B the workman was ordinarily expected to work on night shift on a rotational basis as per the Standing Orders of the Company, such allowance should have formed part of the wages. On that basis it was urged that since full wages had not been paid to the workman, there was a serious infraction of the provisions of section 33(2)(b) warranting the sought for approval to be declined.

C The management could not, and did not, deny that factually the night shift allowance had not been included in one month's wages as paid to the workman. The management however maintained that the question of the validity of the domestic enquiry, which the Tribunal had already undertaken, should first be settled and that in any case the D additional objection raised by the workman required leading evidence. The management further contended that the night shift allowance was neither paid nor was payable to the workman as he could not be said to have earned it automatically as part of wages unless he had actually worked on the night shift. It was pointed out that the said allowance was variable in nature depending upon the number of shifts in which E the workman had actually performed work. It was asserted that the night shift allowance is not payable to the workman when he does not come for work for any reason and thus was not such allowance which would automatically flow even without working. Lastly it was projected that since during the pendency of the domestic enquiry the workman was under suspension there could otherwise arise no occa- F sion for his coming on duty to earn the night shift allowance.

The Presiding Officer, Industrial Tribunal, Bangalore relying on the views expressed by an Hon'ble Single Judge of the Karnataka High Court in Writ Petition No. 6607 of 1985 decided on August 28, 1986, titled *Ramakrishnappa* v. *The Industrial Tribunal & Another*, sus- G tained the objection of the workman taking the view that night shift allowance should have formed part of one month's wages and on that score went alongwith the workman in abandoning giving any finding on the validity of domestic enquiry. Consequentially for the view so taken the management was declined approval to the dismissal of the workman. So the order of the Tribunal taking that view is directly H under attack in this appeal by special leave and indirectly at issue is the

correctness of the decision of the Karnataka High Court in *Ramakrishnappa's* case aforementioned. A

Two provisions of the Act which would require being adverted to are these.

Section 2(rr) provides the definition to the word "wages". It B reads as follows:

> "2. DEFINITIONS—In this Act, unless there is anything repugnant in the subject or context,
>
> (rr) 'wages' means all remunerations capable of being expressed in terms of money, which would, if the C terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment, or of work done in such employment, and includes—
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> (i) such allowances (including dearness allowance) as D the workman is for the time being entitled to;
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> (ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food-grains or other articles; E
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> (iii) any travelling concession;
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> (iv) any commission payable on the promotion of sales or business or both;
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> F
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> but does not include—
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> (a) any bonus;
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> (b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of G the workman under any law for the time being in force;
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> (c) any gratuity payable on the termination of his service;

Section 33(2)(b) as extracted reads as follows: H

"33. CONDITIONS OF SERVICE, ETC. TO REMAIN UNCHANGED UNDER CERTAIN CIRCUMSTANCES DURING PENDENCY OF PROCEEDINGS—

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],—

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

It is not disputed that section 33(2)(b) was attracted to the facts of this case. The only point, as said before, is whether night shift allowance was to be paid to the workman as part of wages even though he had not factually worked on the night shift.

The definition of the word "wages", as given in clause (rr) of section 2 is comprehensive enough to include (vide inclusion 1) such of the allowances as the workman is for the time being entitled. Yet, despite such comprehension, the inclusive meaning is subject to a meaningful change if there is anything repugnant in the subject or context. The proviso to section 33(2)(b) mandates that unless the workman is paid wages for one month and an application as contemplated is made by the employer for approval of his action, no such workman can be discharged or dismissed. The intention of the legislature in providing for such a contingency is not far to seek and as was pointed out by this Court in the case of *Syndicate Bank Limited* v. *Ram Nath Bhat,* [1967-68] (XXXII) FJR 490 at 497 was "to soften the rigour of unemployment that will face the workman, against whom an order of discharge or dismissal has been passed". One month's wages as thought and provided to be given are conceptually for the month to

follow, the month of unemployment and in the context wages for the month following the date of dismissal and not a repetitive wage of the month previous to the date of dismissal. If the converse is read in the context of the proviso to section 32(b), it inevitably would have to be read as double the wages as earned in the month previous to the date of dismissal and that would, in our view be, reading in the provision something which is not there, either expressly or impliedly. We have thus to blend the contextual interpretation with the conceptual interpretation to come to the view that night shift allowance could never be part of wages, and those would be due only in the event of working. This Court in *M/s. Podar Mills Ltd.* v. *Bhagwan Singh and Another,* [1974] 3 SCC 157 ruled that the date of dismissal under section 33(2)(b) is the date when the approval application is filed, after dissmissal. With effect from that date, the occasion to earn night shift allowance cannot, and will not, arise.

This Court in *Bennett Coleman & Co. (P) Ltd.* v. *Punya Priya Das Gupta,* [1970] 1 SCR 181 was called upon to rule whether car allowance and benefit of free telephone and newspaper were such allowances, includible in wages under section 2(rr) of the Act in order to determine a claim of gratuity of a journalist. This Court held as follows:

> "Since wages has not been defined in the Act, its meaning is the same as assigned to it in the Industrial Disputes Act. Under s. 2(rr) of that Act, "wages" means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes (i) such allowances (including dearness allowance) as the workman is for the time being entitled to; (ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food-grains or other articles; (iii) any travelling concession; but does not include any bonus and other items mentioned therein. Mr. Ramamurthi's argument was that the car allowance as also the benefit of the free telephone and newspapers would fall under the first part of the definition as they are remuneration capable of being expressed in terms of money. The argument, however, cannot be accepted as neither of them can be said to be remuneration payable in respect of emp-

loyment or work done in such employment. Neither the car allowance nor the benefit of the free telephone was given to the respondent in respect of his employment or work done in such employment as the use of the car and the telephone was not restricted to the employment, or the work of the respondent as the special correspondent. There was no evidence that the car allowance was fixed after taking into consideration the expenses which he would have ordinarily to incur in connection with his employment or the work done in such employment. *Even if the respondent had not used the car for conveying himself to the office or to other places connected with his employment and had used other alternative or cheaper means of conveyances or none at all, the car allowance would still have had to be paid. So too, the bills for the telephone and the newspapers whether he used them or not in connection with his employment or his work as the special correspondent. Therefore we have to turn to the latter part of the definition and see if the two items properly fall under.* So far as the car allowance is concerned, there was, as aforesaid, nothing to suggest that it was paid to reimburse him of the expenses of conveyance which he would have to incur for discharging his duties as the special correspondent, or that it was anything else than an allowance within the meaning of s. 2(rr) of that Act. It would, therefore, fall under the inclusive part (i) of the definition. Likewise, the benefit of the telephone and newspapers was allowed to the respondent and merely for the use thereof in connection with his employment or duties connected with it. Both the car allowance and the benefit of the free telephone and newspapers appear to have been allowed to him to directly reduce the expenditure which would otherwise have gone into his family budget and were therefore items relevant in fixation of fair wages. [See *Hindustan Antibiotics Ltd.* v. *Workmen,* [1957] 1 SCR 652]. That being the position, the two items could on the facts and circumstances of the present case be properly regarded as part of the respondent's wages and had to be taken into calculations of the gratuity payable to him."

(Emphasis supplied)

The above extract and more so the emphasised words are significant to convey that the car allowance and the benefits of free telephone and newspapers were held allowances includible in wages in the

facts and circumstances of that case. These allowances were held part of the wages of the journalist on the finding that he was entitled to them not as remuneration capable of being expressed in terms of money but as allowances within the meaning of the First inclusion.

In *Dilbagh Rai Jarry* v. *Union of India & Ors.*, [1974] 2 SCR 178 this Court was required to determine whether "running allowance" formed part of wages for the purpose of Payment of Wages Act, 1936. That was a case in which a railway guard, who was convicted in a criminal case but later acquitted, and who in the meantime had been dismissed from service but his dismissal too had been upset by the High Court followed by his reinstatement, had asked for back wages for the period between the date of his dismissal and the date of reinstatement. Finally he was let to this Court reiterating his claim that a running allowance was part of his wages which he would have earned while on duty. This Court in that context observed as follows:

> Mr. Bishan Narain further contends that Running Allowance was a part of the pay or substantive wages. In support of this argument he has invited our attention to rule 2003 of the Railway Establishment Code, clause 2 of which defines 'average pay'. According to the second proviso to this clause in the case of staff entitled to running allowance, average pay for the purpose of leave salary—shall include the average running allowance earned during the 12 months immediately preceding the month in which a Railway servant proceeds on leave subject to a maximum of 75 per cent of average pay for the said period, the average running allowance once determined remaining in operation during the remaining part of the financial year *in cases of leave not exceeding one month.* The crucial words, which have been underlined, show that such Running Allowance is counted towards 'average pay' in those cases only where the leave does not exceed one month. It cannot, therefore, be said that Running Allowance was due to the appellant as part of his wages for the entire period of his in active service. *Travelling allowance or running allowance is eligible if the officer has travelled or run, not otherwise.* We therefore negative this contention."
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> (Emphasis supplied)

It is noteworthy that running allowance or travelling allowance, as the

case may be, had to be earned by actually travelling or running, and not otherwise, as held in *Dilbagh Rai Jarry's* case (supra). Only a fiction was available for a limited period as per Clause 2003 of the Railway Establishment Code. The average running allowance once determined in accordance with the Clause, afore-quoted, was to remain operative during the remaining part of the financial year only in those cases where the employee had taken leave not exceeding one month, and not otherwise. In cases of leave exceeding one month the fiction on its own dropped.

Now confluencing the two legal thoughts expressed in *Bennett Coleman's* case (supra) and *Dilbagh Rai Jarry's* case (supra), the stream of thought which inevitably gurgles up is that an allowance which from the term of employment flows as not contingent on actual working is part of wages for the purposes of section 33(2)(b) but an allowance which is earnable only by active serving is not an allowance which will form part of wages, within the meaning of the said provision.

In *Ramakrishnappa's* case Hon'ble Single Judge of the Karnataka High Court employed *Bennett Coleman's* case to come to the conclusion that night shift allowance was part of the wages by observing as follows:

> "Therefore, I find it difficult to accede to the contention of the management that conveyance allowance, night shift allowance and turnout allowance were not wages as defined in section 2(rr) of the Act, and therefore, they were not required to be included in computing the wages of the petitioner for one month. The decision of the Supreme Court in *Bennett Coleman and Co.* [1970] 37 FJR 498; AIR 1970 SC 427, though it arose in the context of quantification of gratuity, the view taken therein that the allowances given for purchase of newspapers, towards telephone and conveyance also should be calculated in computing one month's wages for the purpose of computing gratuity, supports the construction placed on section 2(rr) of the Act for the petitioner, for, the Supreme Court invoked the said definition as the word "wages" had not been defined in the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955. In the Case of Jarry, AIR 1974 SC 130, on which the learned counsel for the second respondent relied, the question decided was, whether

> wages payable to a railway guard for the period he was kept out of service consequent on his dismissal from service till he was reinstated included the amount of running allowance, which was under the rules payable only if the railway servant had gone on duty, and the Supreme Court held that it was not, in view of the condition. Section 2(rr) of the Act did not come up for consideration in that case and, therefore, not apposite to this case."

This view, as said before, was adopted by the Tribunal to decline approval to the management. But for reasons set out before, we are of the view that the Hon'ble Single Judge fell into an error in enlarging the scope of *Bennett Coleman's* case and dwarfing that of *Dilbagh Rai Jarry's* case. Thus the conclusion is inescapable that the workman had to earn night shift allowance by actually working in the night shift and his claim to that allowance was contingent upon his reporting to duty and being put to that shift. The night shift allowance automatically did not form part of his wages and it was not such an allowance like in *Bennett Coleman's* case which flowed to him as his entitlement not restricted to his service. Thus we hold that the Tribunal fell into a grave error in declining the application of the management for approval on the ground of short payment of Rs. 12 on account of night shift allowance, which the workman supposedly would have earned had he gone to report on duty, which in the circumstances he could not, or having worked rotationally at night, which he did not, and that too fictionally, in the month following the month and the date of the application, on which date the dismissal was to be effective.

We cannot refrain from expressing our concern to the manner in which the other issue before the Tribunal regarding the validity of the domestic enquiry was side-tracked. Had there been a finding on the same, one way or the other, we could have easily finalised the matter. For over six years the matter on that count was kept pending and the additional objection being permitted to be raised was unaccountably abandoned. The matter could have in this situation been sent back to the Tribunal but at this late stage we do not propose to do so and are inclined to close the matter, as we are otherwise satisfied that plea about the validity of the domestic enquiry was without merit and even though raised was by conduct abandoned.

Before concluding the judgment the observations in *Syndicate Bank's* case, afore-quoted, are again to be borne to mind. In the facts and circumstances of this case the management paid to the workman a

A sum of Rs.607.90 as a month's salary "to soften the rigour of unemployment that will face the workman". How could a short payment of Rs. 12 be said to have lessened the softening of such rigour is thought stirring. Viewed in the context, there could genuinely be a dispute, as in the present case, as to whether a particular sum was due as wages. It is, of course, risky for the management to raise it as to pay even a paise B less than the month's wages due under section 33(2)(b), would be fatal to its permission sought. But at the same time it needs to be clarified that it is for the management to establish, when questioned, that the sum paid to the workman under section 33(2)(b) represented full wages of the month following the date of discharge or dismissal, as conceived of in the provision and as interpreted by us in entwining the C ratios in *Bennett Coleman's* case (supra) and *Dilbagh Rai Jarry's* case (supra) and adding something ourselves thereto.

Thus for the foregoing reasons, we allow this appeal, set aside the judgment and order of the Industrial Tribunal, Karnataka at Bangalore and allow the application of the management under section D 33(2)(b) of the Industrial Disputes Act without any order as to costs.

R.N.J. Appeal allowed.