

(1978) 07 GUJ CK 0007
In the Gujarat High Court

Akbar Hussein Gulam Hussein and Another	APPELLANT
Vs	
Appellate Authority for Payment of Gratuity and Another	RESPONDENT

Date of Decision : 28-07-1978

Acts Referred:

Factories Act, 1948 — Section 2
Payment of Gratuity Act, 1972 — Section 4(1), 4(2), 4(2)

Citation : (1979) 1 GLR 1

Hon'ble Judges : B.J. Divan, C.J.;Dhirajlal Pragji Desai, J

Bench : Division Bench

Judgement

B.J. Divan, C.J.—The first petitioner herein is the employee of the second respondent. The second respondent is the Managing Director of Shri Gandevi Sahkari Khand Udyog Mandali Ltd., Gandevi in Bulsar District. The second petitioner claims to be a trade union and, according to the petitioner, the second petitioner is the approved union for Gandevi Mahal for sugar industry under the Bombay Industrial Relations Act. The first petitioner's service came to an end and the question arose of payment of gratuity under the provisions of The Payment of Gratuity Act, 1972. The first petitioner had worked for a total period of 14 completed years with the sugar factory run by the Gandevi Sahkari Khand Udyog Mandali and, according to the contentions urged before the Authority appointed under the Payment of Gratuity Act, he was entitled to gratuity at the rate of seven days' wages for each completed year of service, whereas the workman contended that since he was a permanent workman working throughout the year for the Mandali, he was entitled to gratuity at the rate of 15 days' wages for each completed year of service. At the time when his services were terminated, he was paid gratuity at the rate of 7 days' wages per each year of service, amounting to Rs. 967-50 Paise and he claimed the balance of the amount, namely, Rs. 1422-30 Paise. The contention of the Mandali was that since its factory was working on seasonal basis for the purpose of manufacturing sugar from sugarcane, it was a seasonal establishment and all the employees of the seasonal establishment were entitled to receive gratuity only on the basis of 7

days" wages for each completed year of service. That contention was rejected by the Authority functioning under the Payment of Gratuity Act and the claim of the workman was allowed and it was directed that an amount of Rs. 1422-30 Paise should be paid to the workman by the Mandali. Against that decision of the Authority under the Act, an appeal was preferred to the Appellate Authority under the Payment of Gratuity Act and the same contentions were raised once again and urged before the Appellate Authority. The Appellate Authority accepted the contentions of the Mandali and he held that a workman, whether on permanent establishment or working only seasonally in an industry like sugar manufacturing, was only entitled to 7 days" wages for each completed year of service. He, therefore, allowed the appeal and set aside the order of the Authority of the first instance. After making the correct calculations, the Appellate Authority held that the total amount of gratuity payable to the workman came to Rs. 1115-24 Paise and after giving credit for the sum of Rs. 967-50 Paise which had already been paid to the workman, the balance amount of Rs. 147-74 Paise was directed to be paid to the workman as gratuity.

2. This Special Civil Application under Article 226 of the Constitution has been filed against this decision of the Appellate Authority, and the main question that we have to consider is whether all employees in a factory in an industry which is working on seasonal basis are governed by those provisions of the Payment of Gratuity Act which require that an employee in seasonal establishment is entitled to gratuity at the rate of 7 days" wages for each completed year of service.

3. In order to appreciate the rival contentions, it is necessary to refer to a few of the provisions of the Act. The Payment of Gratuity Act, 1972, being Act 39 of 1972, was enacted, as its long title shows, "to provide for a scheme for the payment of gratuity to employees employed in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto." u/s 1, Sub-section (3), it is provided that this Act shall apply to - (a) every factory, mine, oilfield, plantation, port and railway company; (b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or employed on any day of the preceding twelve months; and (c) such other establishments or class of establishments in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf. Our attention has not been drawn to any notification published by the Central Government u/s 1(3)(c) of the Act. The question that we have to consider is whether the Mandali would fall under Clause (a) or under Clause (b) of Sub-section (3) of Section 1. In Gujarat the Bombay Shops and Establishments Act, applies; Section 2, Sub-section (8) of the Bombay Shops and Establishments Act, 1943, defines "establishment" to mean "a. shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment to which this Act applies and includes such other establishment as

the State Government may, by notification in the Official Gazette, declare to be an establishment for the purposes of this Act." It is only commercial establishments which fall, for the purposes of this judgment, within the Bombay Shops and Establishments Act because the rest of the concerns mentioned in Section 2(8) of that Act do not apply to the facts of the case before us. Section 2 Sub-section (4) of the Bombay Shops and Establishments Act defines "commercial establishment" to mean "an establishment which carries on any business, trade or profession or any work in connection with, or incidental, or ancillary to, any business, trade or profession and includes a society registered under the Societies Registration Act, 1860 and a charitable or other trust, whether registered or not, which carries on, whether for purposes of gain or not, any business, trade or profession or work in connection with or incidental or ancillary thereto but does not include a factory, shop, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment". Therefore, a factory, by the very definition in Section 2(4), is not a commercial establishment and hence it is not an establishment for the purpose of Section 2(8) and consequently is not an establishment falling within the Bombay Shops and Establishments Act. From a review of these provisions of the Bombay Shops and Establishments Act, it is clear that so far as the Payment of Gratuity Act is concerned, the sugar factory of the Mandali will be governed by the provisions of this Act, by virtue of Section 1(3)(a); this sugar factory will thus be governed by the provisions of this Act.

4. u/s 2(b) of the Payment of Gratuity Act, "completed year of service" has been defined to mean continuous service for one year, and Section 2(c) defines "continuous service" to mean uninterrupted service and includes service which is interrupted by sickness, accident, leave, layoff, strike or a lock-out or cessation of work not due to any fault of the employee concerned, whether such uninterrupted or interrupted service was rendered before or after the commencement of the Act. Under Explanation I, in the case of an employee who is not in uninterrupted service for one year, he shall be deemed to be in continuous service if he has been actually employed by an employer during the twelve months immediately preceding the year for not less than 190 days, if employed below the ground in a mine, or 240 days, in any other case, except when he is employed in a seasonal establishment. Explanation II provides that an employee of a seasonal establishment shall be deemed to be in continuous service if he has actually worked for not less than seventy-five per cent of the number of days on which the establishment was in operation during the year.

5. Section 4, Sub-section (1) requires that gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years and it has to be paid on his superannuation or on his retirement or resignation or on his death or disablement due to accident or disease. We are not concerned with the proviso to Sub-section (1) of Section 4 in this case. Sub-section (2) of Section 4 provides that for every completed year of service or part thereof in excess of six months,

the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned. The second proviso to Section 4(2) is in these terms:

Provided further that in the case of an employee employed in a seasonal establishment, the employer shall pay the gratuity at the rate of seven days' wages for each season.

The first proviso to Section 4(2) deals with piece-rated employees and we are not concerned in this case with that first proviso.

6. It is true, as the Appellate Authority has pointed out in his decision and as Mr. Patel, learned Counsel, has emphasized, that there is no definition of "establishment" or "seasonal establishment" in the Payment of Gratuity Act. The only indication that we have got is in Section 1(3)(a) and (b) and also in Explanation II to Section 2(c) in the context of the definition of the word "continuous service". Thus, in Explanation I, while defining what is meant by "continuous service" for one year, it has been pointed out "240 days...except when he is employed in a seasonal establishment." It is clear that in an industry like sugar industry which works on a seasonal basis, the total number of days in each season depending upon the availability of sugarcane in the particular season, the number of workers will go on fluctuating from season to season and the number of days of each season will also go on fluctuating. The amount of sugarcane available for crushing and processing will determine the number of workers employed and the availability of sugarcane in a particular year will determine the total number of days in each season in the working of a sugar factory. At the same time, it must also be recognised that a big factory like a sugar factory must have permanent staff for the maintenance of machinery, looking after the machinery and seeing that it is in proper shape and proper state of repairs etc. There is also on the staff of a sugar factory other permanent staff which goes on working throughout the year. Therefore, there are some employees in a factory like a sugar factory of the Mandali who are working permanently throughout the year, whereas there are other employees who come in only for the season, when the work of crushing sugarcane and the consequential process of sugar manufacturing are actually going on. As pointed out by the Appellate Authority in his judgment, this Mandali's factory at Gandevi is an undertaking recognised under the Bombay Industrial Relations Act and has its own Standing Orders settled by the appropriate authority. In those Standing Orders, there is a classification of employees employed by the Mandali and the classifications are permanent operatives, seasonal operatives, probationers, etc. Thus, the Mandali itself makes a distinction by virtue of the Standing Orders between permanent operatives and seasonal operatives. So far as the Payment of Gratuity Act is concerned, as seen above, the Act would be applicable to the sugar factory of the Mandali by virtue of the fact that it is a factory falling within the definition of "factory" as defined in Section 2(g) which has the same meaning as in clause (m) of Section 2 of the Factories Act, 1948. It is not disputed before

us that the factory of the Mandali is a factory within the meaning of Section 2(m) of the Factories Act and consequently within the meaning of the Payment of Gratuity Act. Since it is a factory, by virtue of Section 1(3)(a) of the Act, the Act applies to it. If the meaning which is contended for by the Mandali and which has been accepted by the Appellate Authority were to be accepted, it would mean that those who are permanent employees of the Mandali would have to be content with the payment of gratuity at the rate of 7 days' wages for each season, even though they are not seasonal employees. On the other hand, if all the workers employed in this sugar factory are considered to be ordinary employees of the establishment, a large number of workers, for no fault of theirs, would be deprived of any gratuity as they will have no hope of fulfilling the criterion of 240 days in each year of service. It is to meet these cases of two types of workers in a factory or in an organisation which is a seasonal establishment that special provision has been made by the Payment of Gratuity Act for employing of seasonal establishment. Explanation II to Section 2(c) speaks about "an employee of a seasonal establishment" whereas in Section 4(2) second proviso the words used are "an employee employed in a seasonal establishment". Now it is obvious that a sugar factory, as indicated by the Standing Orders of the factory of this very Mandali, can have permanent employees, that is, employees who are on the permanent establishment of the factory, and seasonal operatives who will be on the seasonal establishment of the factory. In order not to do injustice to either of these two types of employees, namely, permanent and seasonal, we have to so interpret this beneficent piece of legislation, namely, the Payment of Gratuity Act, in such a manner that the maximum advantage is given to both the types of workers". As pointed out above, if all employees, irrespective of whether they are seasonal or permanent employees, are to be governed by Section 4(2) main clause, then, an injustice is likely to be done to seasonal employees, because seasonal employees will not be able to meet the criterion of 240 days' service for no fault of theirs. If, on the other hand, all employees in such an establishment are treated as operatives of a seasonal establishment, the permanent employees, for no fault of theirs, even though they work throughout the year with the factory as permanent employees, will have to rest content with gratuity at the rate of 7 days' wages for each season instead of 15 days' wages for each completed year of service. We have to adopt an interpretation which will not do harm to either of these two classes or categories. In our opinion, looking to the scheme of the Act and the purpose for which the Act was enacted, it is clear that in every seasonal factory to which the Act applies, like a sugar factory, a distinction has to be drawn between permanent employees, that is those who are on the regular permanent establishment of the factory, and other seasonal employees who are on the seasonal establishment of the factory. Unless such a distinction is drawn, injustice of the type that we have indicated above is likely to occur. Moreover, the seasonal employees may work, as has been known to happen to a sugar factory in India, only for four days in a particular year because available sugarcane, for want of rains, was sufficient only to last for four days' crushing in the factory. In

such a case, a seasonal employee may lose gratuity for the season, even though he has worked on all the four days. Therefore, operatives on the seasonal establishment are to be paid gratuity on the particular footing provided for in the second proviso to Section 4(2) and those who are on the permanent establishment have to be paid gratuity as provided in the main clause of Section 4(2). This interpretation has been adopted by us so that clear distinction between the seasonal establishment of a factory and the permanent establishment of a factory-"establishment" here being used not in the narrow meaning which is given in the Bombay Shops and Establishments Act but in the loose ordinary sense has to be made. The words "seasonal establishment" therefore, according to the second proviso to Section 4(2), has not to be understood in the narrower sense or in a sense in which the word "establishment" has been defined in the Bombay Shops and Establishments Act, which is the interpretation which will apply for the purposes of applicability, but the meaning which has been assigned in ordinary law, meaning thereby a section or a recognisable body of workers who are working only for a particular season of the year in connection with the industry concerned.

7. It is true, as has been pointed out by Mr. Patel for the Mandali, that in the rules framed under the Act, the word "establishment" has been used in a generic sense to cover all undertaking and concerns to which the Act applies, but for the purpose of interpretation of Section 4(2), those rules which use the word "establishment" in a generic sense are of little assistance to us. We wish to make it clear that, so far the Payment of Gratuity Act is concerned, it applies to all employees irrespective of the fact whether they are operatives on the industrial side or on the clerical side whatever, because the definition of the word "employee" in Section 2(e) covers all skilled, unskilled, semiskilled, manual, supervisory, technical or clerical workers, so long as the other requirements of the definition of the word "employee" are fulfilled, and though we have referred to the word "operatives" in the earlier part of this judgment in the context of the Standing Orders, it is obvious that it applies to all employees of the factory.

Under these circumstances, this special civil application is allowed and the order of the Appellate Authority is quashed and set aside. It is declared that the first petitioner is entitled to be paid gratuity at the rate of 15 days' wages for each completed year of service. He shall be paid his gratuity accordingly. The special civil application is, therefore, allowed. Rule is made absolute accordingly. The first petitioner will be entitled to his costs of this petition.

8. Mr. Patel for the second respondent applies for leave to appeal to the Supreme Court on the ground that the question involved is a substantial question of law of general importance which is needed to be decided by the Supreme Court. He has pointed out that there is no decision on this point of any other High Court or of the Supreme Court and the question is of importance to all seasonal factories governed by this Act. In our opinion, the question that we have decided in this case is a substantial question of law, affecting all the seasonal factories all over

the country and hence leave under Article 133(1) is granted.