

(2019) 03 JH CK 0051
In the Jharkhand High Court
Case No : Writ Petition(L) No. 4265 Of 2018

Anil Kumar Sinha

APPELLANT

Vs

Damodar Vally Corporation And Ors

RESPONDENT

Date of Decision : 29-03-2019

Acts Referred:

Payment Of Gratuity Act, 1972 — Section 2, 2A, 2A(1) , 2(A)(2), 2(A)(2)(ii), 2(B), 2(c), 4, 7(2), 7(3), 7(7)
Payment Of Gratuity (Central) Rules, 1972 — Rule 10(1)
Constitution Of India, 1950 — Article 14, 226

Citation : (2019) 03 JH CK 0051

Hon'ble Judges : Sujit Narayan Prasad, J

Bench : Single Bench

Advocate : Ashim Kumar Sahani, R..N. Sahay, Soumitra Baroi

Final Decision : Dismissed

Judgement

1. This writ petition is filed under Article 226 of the Constitution of India wherein the order dated 24.05.2018 passed in P.G. Appeal No.16/2018 arising out of Application No.36/(14)/2016.E.6 is under challenge, whereby and whereunder the appeal preferred by the respondent-Damodar Valley Corporation before the appellate authority under the provision of Section 7(7) of the Payment of Gratuity Act, 1972 has been allowed by which the order passed by the controlling authority under Sections 7(2) and 7(3) of the Act, 1972 read with sub Rule 1 of Rule 10 of the Payment of Gratuity (Central) Rules, 1972, has set aside.

2. The brief facts of the case of the petitioner is that he has joined service as Seasonal Message Assistant on 01.06.1978 and continued on the said post for a period from 01.06.1978 to 31.10.2004 and thereafter on 20.05.2005, was appointed as Junior Clerk-cum-Typist at Grid Operation and Maintenance Department-II, Damodar Valley Corporation, Maithan, and superannuated from service on 31.01.2014.

The grievance of the petitioner that although he has performed his duty for a

period of 20 years under the respondents but the gratuity of said period has not been paid and as such application was made before the controlling authority for disbursement of the gratuity of amount for aforesaid period, by deciding the claim the controlling authority has passed an order after hearing the respondent-Corporation on 30.11.2017 holding therein that the petitioner is entitled to receive a sum of Rs.2,55,816/- as the amount of gratuity, in consequence thereof, directed the respondent-Corporation to pay the aforesaid amount to the petitioner within thirty days from the date of the finding.

3. The respondent-Corporation has invoked the jurisdiction as conferred under Section 7(7) of the Payment of Gratuity Act, 1972 by preferring an appeal before the competent authority challenging the order dated 30.11.2017 the appeal has been allowed by which the order dated 30.11.2017 has been set aside, which is under challenge on the ground that he is entitled to the gratuity amount in view of the provision of Section 2-A which stipulates the definition of continuous service and since the petitioner has discharged his duty continuously, therefore, he is entitled to get the amount of gratuity and considering that aspect of the matter, the controlling authority has decided the claim in favour of the petitioner but the appellate authority without appreciating the provision of Section 2-A, in right perspective, has reversed the order passed by the controlling authority.

4. Mr. R.N.Sahay, learned senior counsel appearing for the respondent-Damodar Vally Corporation, has submitted that there is no error in the order passed by the controlling authority for the reason that the petitioner is not coming under the fold of the definition of continuous service since according to his admission, he has performed duty only for 153 days, therefore, as per the provision made under Section 2(A)(2), since he has not discharged service as required under the aforesaid provision, therefore he is not entitled to get the gratuity due to having not discharged continuous service.

5. Having heard the learned counsel for the parties and after appreciation of their rival submissions, this Court thinks fit and proper to deal with the relevant provisions of the Payment of Gratuity Act, 1972 which is relevant for adjudication of the issue agitated in this writ petition.

The Payment of Gratuity Act, 1972 has been enacted by virtue of the Act, 39 of 1972 implemented w.e.f. 21.08.1972 in order to provide a scheme for the payment of gratuity, the employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto.

Section 4 stipulates regarding payment of gratuity which shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years:-

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of the employee is due to death or disablement.

Thus Section 4 speaks about the occasion for making payment of gratuity, an employment at termination of his employment, and said provision contains that a continuous service is required.

Section 2 (c) contains the definition of continuous service which means continuous service as defined in Section 2-A.

Section 2-A speaks about the continuous service which is being referred hereinbelow :-

"[2A. Continuous Service.-For the purpose of this Act,--

(1) an employee shall be said to be in continuous service for a period if he has, for that, been in interrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules, or regulations governing the employees of the establishment), lay-off, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act;

(2) where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer-

(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days, in the case of any employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) two hundred and forty days, in any other case;

(b) for the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) one hundred and twenty days, in any other case."

It is evident from the aforesaid provision as contained under Section 2A(1) provides that an employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act, meaning thereby the employee will be said to be in continuous service, if he has discharged continuous service without any interruption, while sub Section 2 speaks about an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1) for any period of one year or six months, he shall be deemed to be in continuous service under the employer--

(a) for the said period of one year if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--

(I) one hundred and ninety days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week: and

(II) two hundred and forty days, in any other case

While sub Section B of Section 2 speaks that for the said period of six months, if the employee during the period of six calendar months, preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than--

(I) ninety-five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week: and

(II) one hundred and twenty days, in any other case:

The relevant applicable provision herein, would be in sub Section 2 (ii) of Section 2-A for the reason that the petitioner has not worked under the mine and therefore the requirement of having performed duty of 240 days would be there.

6. Herein, it is the case of the petitioner that he has been appointed on 01.06.1978 and rendered his duty on the casual basis till 31.10.2004 and thereafter, has been appointed as Junior Clerk-cum-Typist on 20.05.2005. The petitioner is claiming the payment of gratuity for the period of service rendered by him from 01.06.1978 to 31.10.2004, according to the petitioner, he has discharged continuous service of 240 days in a calendar year.

7. The legal position as has been discussed hereinabove that, if the employee has worked for 240 days in a calendar year, he will be said to be in continuous

service as per the provision made under Section 2-A of the Act, 1972 and as such it is to be seen by this Court as to whether the petitioner has been able to prove before the appellate authority regarding rendering of the continuous service of 240 days ?

It is evident from the material available on record that as has been taken note in the order passed by the controlling authority wherein the petitioner, during cross-examination, has accepted that he had served for 153 days per year during period of his temporary employment, the same can be seen at Paragraph-4 of the order passed by the controlling authority which is being referred hereinbelow :-

"The appellant, Shri Anil Kumar Sinha appeared in person on 01.02.2017 before the Controlling Authority and adduced his oral evidence on oath, stating that he was working at DVC, Maithan as Sup. Engg. Electrician. He temporarily joined for the period of 01.06.1978 to 31.10.2004, regularized on 20.05.2005 & retired on 31.01.2014 as Asstt. Cum- Typist. He claimed amount of gratuity for the temporary period to his retirement i.e. Rs. 2.50.000/-. He further stated that Late Deepak Kumar Gupta's wife, Sri Ravindra Raw, Shri N.K. Singh and Shri K.K. Sinha have already received gratuity for their temporary period of employment. During cross-examination, he accepted that he had served for 153 days per year during period of his temporary employment."

The controlling authority by putting reliance upon the judgment passed by the Hon'ble Apex Court in the case of D.S. Nakara and Vrs. Union of India, since the plea was taken by the petitioner that the other similarly situated employee has been extended the benefit of gratuity, has passed the order directing for making payment of gratuity.

It is the admitted case of the petitioner that he had performed his duty for a period of 153 days and as such it cannot be said that he has discharged, continuous service of 240 days as per the stipulation made under the provision of Section 2A of the Act, 1972.

So far as the finding recorded by the controlling authority with respect to granting benefit in favour of the other similarly situated employees which has been negated by the Appellate Authority on the ground of Article 14 of the Constitution of India which does not envisage negative equality.

This Court is of the view that the gratuity is a right of the employee, if covered under the Act, 1972 and is to be paid subject to fulfillment of the terms and conditions stipulated therein.

Admittedly, the petitioner has not fulfilled the continuous discharge of duty for a period of 240 days rather he has discharged duty only for 153 days, and therefore, he is held not entitled to get the gratuity for the aforesaid period.

So far as the finding of the controlling authority that since the others have been paid, so the petitioner is also entitled to get the same in view of the provision of

Article 14 of the Constitution of the India but the same has been negated by the Appellate Authority, this Court is of the view that the controlling authority is not right in passing the order merely on account of the fact that the others have been paid, even though they were not entitled to get as per the provision of the Payment of Gratuity Act, 1972 as discussed hereinabove, but the said finding has been reversed by the appellate authority which cannot be said to be illegal, it is for the reason that as per the settled legal position, Article 14 of the Constitution of India is not meant to perpetuate illegally since Article 14 envisages positive equality and not the negative one, otherwise if on the basis of wrong committed, relief would be granted to them that would lead to allowing the illegality to be perpetuated, reference in this regard be made to the judgment rendered by the Hon'ble Apex Court in the case of Chaman Lal Vrs. State of Punjab and Ors. reported in AIR 2014 SC 3640, wherein at Paragraph 15 as quoted hereinbelow:-

"15. Moreso, it is also settled legal proposition that Article 14 does not envisage for negative equality. In case a wrong benefit has been conferred upon someone inadvertently or otherwise it may not be a ground to grant similar relief to others. This Court in Basawaraj and Anr. V. The Spl. Land Acquisition Officer, AIR 2014 SC 746 considered this issue and held as under:

"It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforce by a citizen or court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a similarly wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim benefits on the basis of the wrong decision. Even otherwise, Article 14 cannot be stretched too far for otherwise it would make functioning of administration impossible. (Vide: Chandigarh Administration and Anr. v. Jagjit Singh and Anr., AIR 1995 SC 705; M/s. Anand Button Ltd. v. State of Haryana and Ors., AIR 2005 SC 565; K.K. Bhalla v. State of M.P. and Ors., AIR 2006 SC 898; and Fuljit Kaur v. State of Punjab, AIR 2010 SC 1937)."

Judgment rendered by the Hon'ble Apex Court in the case of Basawaraj and Anr. Vrs. Special Land Acquisition Officer reported in (2013) 14 SCC 81 wherein at Paragraph-8 mentioned as hereinbelow :-

"8. It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in

other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a similarly wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim benefits on the basis of the wrong decision. Even otherwise, Article 14 cannot be stretched too far for otherwise it would make functioning of administration impossible. (Vide Chandigarh Admn. V. Jagjit Singh, Anand Buttons Ltd. v. State of Haryana, K.K. Bhalla v. State of M.P. and Fuljit Kaur v. State of Punjab.)"

In view thereof, and as per the aforesaid legal proposition and on the basis of reason referred hereinabove, according to the considered view of this Court the appellate authority while reversing the order passed by the controlling authority, has committed no illegality, therefore, this Court refrains itself to interfere with the order passed by the appellate authority in exercise of power conferred under Article 226 of the Constitution of India.

8. This writ petition lacks merit and is accordingly, dismissed.