

(2012) 07 KAR CK 0068

In the Karnataka High Court

Case No : Writ Petition No. 16127 of 2011 (L-PG)

B. Yoganandam

APPELLANT

Vs

The Divisional Controller K.S.R.T.C. Tumkur Division, Tumkur,
The Assistant Labour Commissioner and Controlling Authority
Under The Payment of Gratuity ACT of 1972 and The Deputy
Labour Commissioner and Appellate Authority Under The
Payment of Gratuity ACT of 1972

RESPONDENT

Date of Decision : 24-07-2012

Acts Referred:

Payment of Gratuity Act, 1972 — Section 2 (s), 4 (5)

Citation : (2012) 6 KarLJ 302 : (2013) 2 SCT 409

Hon'ble Judges : Subhash B. Adi, J

Bench : Single Bench

Advocate : Lakshman Rao, for the Appellant; H.R. Renuka, for R1, for the Respondent

Judgement

Mr. Justice Subhash B. Adi

1. Petitioner has called in question the order of the Authority under the Payment of Gratuity Act 1972 dated 12.3.2009 produced at Annexure-A confirmed by the Appellate Authority dated 29.01.2011 produced at Annexure-B. Brief facts leading to this case are:

Petitioner retired as an Assistant Traffic Inspector on 30th September 2005. He had put in 37 years 3 months of service without any break. His basic salary was Rs. 9,000/- and the Dearness Allowance was Rs. 6,390/- and he was entitled for 10% of basic towards the price index. As such, the component for the purpose of determination of payment of gratuity was Rs. 16,290/-. However, the Controlling Authority as well as the Appellate Authority erroneously only took the basic pay and number of years of service, accordingly, calculated the gratuity at Rs. 3,31,500/-. Though the petitioner is entitled for additional gratuity of Rs. 2,71,230/-, the Appellate Authority also concurred with the findings of the

Gratuity Authority and committed an error in not noticing the settlement of 1981 and 1989.

2. Learned Counsel for the petitioner submitted that, under the settlement, the Corporation employee is entitled for calculation of the gratuity by taking into consideration one month's wages multiplied by number of years of service. The "wages" as defined u/s 2 clause (s) of the Payment of Gratuity Act is inclusive of the Dearness Allowance. The Apex Court in a judgment reported in 2007-I-LLJ page 231 in the matter of Management of KSRTC Th. Chief Law Officer -vs- R. Krishna Reddy has held that, wages means inclusive of the Dearness Allowance and under the Corporation Scheme, 30 days' wages for each completed year of service has to be taken. Following the said judgment, this Court in W.P. Nos. 828-849/2009 and connected matters dated 13th February 2009 has held that, addition of Dearness Allowance is different from merger of wages, merger means the inclusion of Dearness Allowance i.e., basic pay + Dearness Allowance for one month of every completed year of service for the purpose of calculating the gratuity. The said judgment was confirmed by the Division Bench in Writ Appeal No. 1470/2009 and connected matter dated 9th March 2010 and submitted that, what is taken by the Controlling Authority as well as the Appellate Authority is only the basic pay and thereby has denied the legitimate difference of amount of gratuity by both the authority. He relied on the settlement dated 27th September 1981 clause (7) and also 1989 settlement and submitted that, in terms of the settlement by the Corporation, the gratuity has to be calculated.

3. On the other hand, learned Counsel for the Corporation submitted that, the Dearness Allowance as permissible to the Government employee has been adopted by the Corporation in terms of 1989 settlement i.e., the portion of Dearness Allowance would be merged in the basic pay and the basic pay component is inclusive of the Dearness Allowance. During the tenure of the service of the petitioner, there was only one merger and Dearness Allowance @ 138% one time has been merged in the basic pay and accordingly, in terms of the calculation at Annexure-R10, the basic pay as permissible has been determined. Referring to Annexure-R10, it is stated that, as on the date of retirement, the basic pay of the petitioner was Rs. 9,000/-, that is with the merger of portion of Dearness Allowance i.e., inclusive of 138% of basic Dearness Allowance i.e., Rs. 3,961/- + Rs. 2,945/- + 10% City benefit i.e., Rs. 294.50 paise and increment at Rs. 75/-, in all, it worked out to Rs. 7,275/- and basic pay became Rs. 8,025/- and after inclusion of the additional factors, it comes to Rs. 9,000/- in 2005. As such, the basic pay is inclusive of permissible portion of the Dearness Allowance.

4. To support the same, learned Counsel for the Corporation relied on Annexure-R9 and submitted that, the Dearness Allowance admissible on basic pay existed on 1.4.1998 at the rate specified in the Government Order dated 8.5.1996 to the State Government employees w.e.f. 1.1.1996 is treated as "Basic Dearness Allowance" and this basic Dearness Allowance shall be constant and will be

deemed as part of pay for determining the Dearness Allowance w.e.f. 1.1.1999.

5. It is further submitted that, the principles enunciated in Krishna Reddy's case (supra) followed by this Court subsequently is only to the extent of merger of Dearness Allowance and the Dearness Allowance as permissible under the Circular dated 24th July 1999 has been calculated and the amount has been paid. It is also submitted that, the judgment of Krishna Reddy's case is applicable to the employees, who retired as on 29.11.1995 to 31.3.1998, as w.e.f. 1.4.1998 in respect of all the Corporation employees, the merger has taken place.

6. Learned Government Pleader submitted that, these contentions, which are raised now by both the Counsel, were not placed before the Controlling Authority or before the Appellate Authority, as such, the Controlling Authority as well as the Appellate Authority did not go into the said question and consider the settlement of the Corporation in determination of the gratuity payable to the petitioner.

7. It is not in dispute that, the Controlling Authority as well as the Appellate Authority has not gone into the question of settlement between the Union and the Corporation. The law laid down by the Apex Court in a judgment reported in 2007-I-LLJ page 1 in the matter of Beed District Central Co-op. Bank Limited - vs- State of Maharashtra and Others shows that the right of employee to receive better terms of gratuity under the contract - option is to receive gratuity either under statute or under contract, but not best of the both.

8. Though the Payment of Gratuity Act provide for determination of gratuity, however, it does not preclude the Management or the industry from adopting different method of calculating the gratuity, but at any rate in a settlement between the workman or Union on one side and the establishment on the other side cannot be less than the gratuity payable under the Payment of Gratuity Act.

9. In this case, it is not in dispute that, under the settlement of 1981 for the purpose of calculating the gratuity as agreed by the Union and the Management reads as under:

(b) The quantum of gratuity shall be equal to one month's pay for each completed year of service. For incomplete period of final year of service, if any prorata contribution of gratuity shall be reckoned for completed months excluding part of the month if any. In the event of payment of gratuity to employees dismissed from service for misconduct the Management may deduct from the gratuity payable, financial loss if any, caused to it on account of any such misconduct.

(c) Gratuity shall be paid on the basis of pay drawn on the date of any events stipulated in Clause (5) of Gratuity Regulations and the pay would include basic pay, personal pay and charge allowance consequent upon holding incharge of a higher post and not additional charge.

As far settlement of 1981 is concerned, it did not refer to the definition of "wage" as a component for the purpose of determination of the gratuity.

10. Section 4 sub-section (2) of the Payment of Gratuity Act reads as under:

4. Payment of Gratuity.-

(1)...

(2) 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.

11. Further, u/s 4 sub-section (5) of the said Act, it does not prohibit an employee to receive better terms of gratuity under any award or agreement or contract with the employer. Thus, from the provisions of Section 4(5) of the Act, it is clear that the employee has a choice of receiving the gratuity either under the provisions of the Act or if there is any other settlement or agreement, he may opt for the same i.e., if it is beneficial to the employee, however, the Apex Court in the judgment of Beed District Central Co-op. Bank Ltd. (supra) has held that, an employee can choose any one of them and not best of both.

12. In this case, the employees of the Corporation have thought it fit that the settlement of 1981 is beneficial, as one month's payment for every completed year of service is taken for the purpose of calculating the gratuity instead of 15 days under the Act. However, the issue as to whether the Dearness Allowance is included in wages is concerned, the Apex Court in Krishna Reddy's case has referred to the definition of "wages" u/s 2 clause (s) of the Act and has observed at para-17 as under:

17. What was necessary to be taken into account was the merger of any portion of the Dearness Allowance with pay which was being paid to its employees. In such an event that portion of the Dearness Allowance was also to be reckoned at appropriate level by the appellant for determining the quantum of Gratuity payable to its employees. The said settlement was arrived at for calculating amount of gratuity payable to the employees of the appellant and not for any other purpose.

From this, it is clear that the definition of wages referred to by the Apex Court was inclusive of portion of Dearness Allowance i.e., merger of Dearness Allowance with the basic pay for the purpose of calculating the gratuity.

13. There was a further settlement on 17th July 1989 wherein, under Clause (5), the Corporation adopted the merger of portion of Dearness Allowance as and when the Government of Karnataka were to merge any portion of Dearness Allowance. Clause (5) reads as under:

5. If during the currency of this Settlement, the Government of Karnataka were to merge any portion of Dearness Allowance presently being paid to its employees, that portion of the Dearness Allowance so merged will also be

reckoned at appropriate levels by the Corporation for determining the Dearness Allowance, House Rent Allowance, City Compensatory allowance and Gratuity payable to the employees of the Corporation, but shall not be reckoned for other purposes.

14. Thus, from the 1989 settlement, it is clear that, in case of merger of payment of Dearness Allowance into basic pay by the Government of Karnataka, similar benefit also recommended to the Corporation employees.

15. Undoubtedly, the Apex Court in Krishna Reddy's case and also this Court have held that, the definition of "wages" u/s 2 clause (s) of the Payment of Gratuity Act includes the Dearness Allowance. However, the portion of Dearness Allowance to be included as per the settlement, in the basic pay. Even at para-17 of the judgment of Krishna Reddy's case, the merger is in respect of portion of Dearness Allowance. It is not disputed by the Corporation that, the portion of Dearness Allowance in consonance with the decision of the Government of Karnataka is merged in basic pay and same is taken as a component for the purpose of determining the gratuity payable to the employees.

16. However, neither the Controlling Authority nor the Appellate Authority has referred to the settlement between the Corporation and its employees. Admittedly, the payment of gratuity claimed by the petitioner is not in terms of the provisions of the Payment of Gratuity Act, but in terms of the settlement. The contention of the learned Counsel for the petitioner that the Dearness Allowance means, the Dearness Allowance paid last to the employee. However, neither under the Payment of Gratuity Act nor under the settlement, there is any provision made that the entire Dearness Allowance to be added to the basic pay, but the merger of Dearness Allowance was as per the decision of the State Government taken from time to time. In such an event, if there is already merger of Dearness Allowance, if in addition to the same again the Dearness Allowance is added as on the date of retirement, that would become double addition of Dearness Allowance. Only such portion of the Dearness Allowance as per the settlement has to be added and not the entire Dearness Allowance.

17. Clause (5) of the 1989 settlement does provide for merger or addition of full Dearness Allowance, but only portion of it and same has to be in consonance with the decision of the Government of Karnataka taken from time to time as regard to the merger. No doubt, learned Counsel for the Corporation has furnished a statement of calculation at Annexure-R10, but it is not possible for this Court to calculate whether what was the basic pay, whether this component of basic pay was inclusive of the portion of Dearness Allowance as per the settlement or not, and even both the authorities have not taken into consideration the settlement and blindly have calculated the gratuity treating Rs. 9,000/- as a basic pay and multiplying with the number of years. Hence, the matter requires reconsideration by the Controlling Authority and the Controlling Authority has to take into consideration the settlement arrived between the Corporation and its employees in the matter of payment of gratuity and based on

the same, the gratuity has to be determined. It is made clear that the employee, either he has to choose the payment of gratuity under the provisions of the Payment of Gratuity Act or has to choose under the settlement, but he cannot choose best of both. Hence, if the gratuity is to be paid under the settlement, it must be strictly in accordance with the settlement.

Accordingly, this petition is partly allowed. The order passed by the Controlling Authority dated 12.3.2009 produced at Annexure-A and the order of the Appellate Authority dated 29.1.2011 produced at Annexure-B, are hereby quashed, and the matter is remitted to the Controlling Authority to dispose of the claim of the petitioner afresh in the light of the above observation.