
(2016) 08 BOM CK 0059
In the Bombay High Court
Case No : Writ Petition No. 4851 of 2016

Baban	Vs	APPELLANT
Estate Manager, Maharashtra State Farming Corporation Ltd.		RESPONDENT

Date of Decision : 11-08-2016

Acts Referred:

Payment of Gratuity Act, 1972 — Section 2(b), 2(c), 2(s) 4, 2A, 7, 8

Citation : (2016) 6 BCR 410 : (2017) 152 FLR 17 : (2016) LabLR 1140

Hon'ble Judges : Mr. Ravindra V. Ghuge, J.

Bench : Single Bench

Advocate : Mr. A.S. Shelke, Advocate, for the Petitioner; Mr. P.V. Barde, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

Ravindra V. Ghuge, J.(Oral)—Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is aggrieved by the judgment of the Appellate Authority dated 21/03/2016 delivered in Appeal (PGA) No.263/2016.

3. Mr. Shelke, learned Advocate for the petitioner submits that the issues which deserve consideration are as to whether the weekly holidays can be added to the days actually worked while calculating completion of 240 days in a calendar year for payment of gratuity, whether the revision in the pay scale with retrospective effect would entitle the petitioner for additional gratuity and whether interest component needs to be added in this case since the respondent has failed to pay the gratuity.

4. I have heard Mr. Shelke and Mr. Barde, learned Advocates for the petitioner and the respondent at length on 08/08/2016 and again today.

5. There is no dispute that a chart at page No.36 indicates the days actually worked by the petitioner. There is also no dispute that the petitioner has been

working with the respondent from 1973-1974 and has superannuated on 31/05/2012. His last drawn wages were @ Rs.6,930/- per month. A pay revision was introduced on 31/05/2015, which has been made effective under the 5th pay Commission from 01/01/2008. The petitioner was, therefore, benefited by the pay revision and there is no dispute on this count.

6. The dispute has its origin in the number of days worked and hence, the issue of the eligibility of the petitioner for claiming gratuity under the provisions of The Payment of Gratuity Act, 1972.

7. "Wages" under the said Act are defined under Section 2(s), which reads as under :

"wages" means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance."

8. "Completed year of service" and "continuous service" are defined u/s 2(b) and 2(c), which read as under :

"2(b) "completed year of service" means continuous service for one year ;

2(c) "continuous service" means continuous service as defined in Section 2A;"

9. The definition of "continuous service" will have to be read from Section 2A (1), which was introduced w.e.f. 11/02/1981 by Act 26 of 1984 and which reads as under :

"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), layoff, 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."

10. In the light of the above definitions, there can be no dispute that interruption in service on account of sickness or accident or leave or absence from duty without leave would not be considered as a break in service. Contingencies like layoff, strike or a lock out or cessation of work not due to any fault of the employee, whether it has interrupted his service or not, is also considered to be not an interruption in continuous service.

11. The "payment of gratuity" is defined u/s 4, which reads thus :

Section - 4 Payment of gratuity

(1) 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,

(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 any employee is due to death or disablement:

[Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.]

Explanation.-For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(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:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account:

Provided further that in the case of 2[an employee who is employed in a seasonal establishment and who is not so employed throughout the year], the employer shall pay the gratuity at the rate of seven days' wages for each season.

Explanation.-In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

(3) The amount of gratuity payable to an employee shall not exceed, ten lakh rupees.

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.

(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.

(6) Notwithstanding anything contained in subsection (1),-

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer" shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee 5 [may be wholly or partially forfeited]

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

12. When it comes to the payment of gratuity, there can be no dispute that gratuity becomes payable after one month from the date of the conclusion of employer-employee relationship.

13. Section 7 of the Act provides for "determination of the amount of gratuity", which reads as under :

"Section 7 Determination of the amount of gratuity

(1) A person who is eligible for payment of gratuity under this Act or any person authorised, in writing to act on his behalf shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity.

(2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in subsection (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.

(3) The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable.

(3A) If the amount of gratuity payable under subsection (3) is not paid by the employer within the period specified in subsection (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing

from the controlling authority for the delayed payment on this ground.

(4)(a) If there is any dispute to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the controlling authority such amount as he admits to be payable by him as gratuity.

(b) Where there is a dispute with regard to any matter or matters specified in clause (a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute.

(c) The controlling authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the controlling authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.

(d) The controlling authority shall pay the amount deposited, including the excess amount, if any, deposited by the employer, to the person entitled thereto.

(e) As soon as may be after a deposit is made under clause (a), the controlling authority shall pay the amount of the deposit

(i) to the applicant where he is the employee; or

(ii) where the applicant is not the employee, to the [nominee or, as the case may be, the guardian of such nominee or] heir of the employee if the controlling authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.

(5) For the purpose of conducting an inquiry under subsection (4), the controlling authority shall have the same powers as are vested in a court, while trying a suit, under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses.

(6) Any inquiry under this section shall be a judicial proceeding within the meaning of sections 193 and 228 , and for the purpose of section 196 , of the Indian Penal Code (45 of 1860).

(7) Any person aggrieved by an order under subsection (4) may, within sixty days from the date of the receipt of the order, prefer an appeal to the

appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days:

Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under subsection (4), or deposits with the appellate authority such amount.]

(8) The appropriate Government or the appellate authority, as the case may be, may, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify, or reverse the decision of the controlling authority."

14. In the instant case, the petitioner, having retired on 31/05/2012, rendered the gratuity payable from 01/07/2012. Notice for payment of gratuity is required to be given, unless the gratuity is calculated and paid by the employer and the same is to the satisfaction of the employee. Needless to state, non payment of gratuity would make the employer, normally, liable for interest for the duration for which the gratuity was not paid.

15. Section 8 dealing with notice for payment of gratuity and which has an impact even on the interest to be paid, reads as under :

"If the amount of gratuity payable under this Act is not paid by the employer, within the prescribed time, to the person entitled thereto, the controlling authority shall, on an application made to it in this behalf by the aggrieved person, issue a certificate for that amount to the Collector, who shall recover the same, together with compound interest thereon (at such rate as the Central Government may, by notification, specify], from the date of expiry of the prescribed time, as arrears of land revenue and pay the same to the person entitled thereto :

[Provided that the controlling authority shall, before issuing a certificate under this Section, give the employer a reasonable opportunity of showing cause against the issue of such certificate:

Provided further that the amount of interest payable under this section shall, in no case exceed the amount of gratuity payable under this Act.]"

16. This brings me to the first contentious issue raised as regards the manner of calculating the number of days worked so as to be entitled for gratuity. The primary requirement is that an employee must work continuously with an employer at least for 5 years so as to be eligible for gratuity, notwithstanding whether he has put in temporary service or as a daily wager or in any other

manner.

17. Considering the definition of "continuous service", it requires no further debate that even interruptions on account of leave or absence from duty without leave or even layoff, strike or lock out or cessation of work will not be considered to be a break in service. The intent of the legislature is to protect the interest of an employee and hence the various contingencies set out in Section 2A would indicate the nature of interruptions which are not to be reckoned for calculating continuous service. In this backdrop, a weekly holiday or a national holiday cannot be termed to be an interruption or break in service. As such, a daily wager having not worked on a weekly holiday or a national holiday, is rendered insignificant in so far as payment of gratuity is concerned in the light of Section 2A.

18. The chart placed on record indicates that the petitioner had worked on the following days from 1973 onwards.

"Chart dated 09/02/2012 showing the casual days of working from 1973 till 1990 of Mr. Baban Rama Khakale, workman-

Sr. No.

Year

Days

Sr. No.

Year

Days

1.

1973-74

204

2.

1974-75

193

3.

1975-76

216

4.

1976-77

213

5.

1977-78

225-1/4

6.

1978-79

214-1/2

7.

1979-80

168-1/4

8.

1980-81

171-1/4

9.

1981-82

216

10.

1982-83

249-1/4

11.

1983-84

278-3/4

12.

1984-85

295

13.

1985-86

302-3/4

14.

1986-87

118-3/4

15.

1987-88

38

16.

1988-89

74

17.

1989-90

107-1/2

Total

3284-1/4

Information about last drawn salary (May 2012)

Basic pay +

1090

148%

1308/-

=

Rs. 2398 Total Basic pay

+ 189%

Rs. 4532/D.A.

=

Rs. 6930/Total salary.

19. The chart is prepared by the respondent/Management and the title indicates the "naimittik kamache divas" meaning casual days of working. The cross examination of the Management's witness namely Suresh Dagaduji Abhang, who is a Manager, would give a clear indication upon reading paragraph No.3 of the cross examination that he is referring to the days on which the petitioner had worked. Though he has suggested that the weekly holiday is not available to a casual labourer, he admits that many times the casual labourers may not be on duty on a weekly holiday and he does not have any document to indicate that the weekly holiday was not made available to the employee.

20. Mr. Barde has strenuously contended that the casual workers used to work even on weekly holidays and whenever they had worked, those days were

included in the number of days worked. He further submits that even weekly holidays are included in the chart placed on record.

21. The above submission of Mr. Barde could be tested by adding the 52 weekly holidays and about 5 National holidays to the number of days worked by the petitioner so as to test as to whether with such an addition, the total number of days would touch 365 or beyond. In none of the calendar years mentioned in the chart above, do I see such a situation that with the addition of the weekly holidays and National holidays, the total number of days would go beyond 365. Considering that the Payment of Gratuity Act is a piece of social legislation, a broader meaning needs to be given to Section 2A and my endeavour is to analyse the evidence so as to find out on the basis of the principles of probabilities as to whether the weekly holidays could have been added or not. The title of the chart would indicate only the number of days worked by the petitioner.

22. In the matter of Jeewanlal (1929) Ltd., etc. v. Appellate Authority under the Payment of Gratuity Act and others, AIR 1984 SC 1842, the 3 Judges Bench of the Hon''ble Apex Court has concluded that the 15 days wages for calculation of gratuity ought to be on treating the monthly wages as being paid for 26 working days in a week since the weekly holidays are to be treated as unpaid holidays.

23. In the matter of Guru Jambheshwar University, Hisar v. Dharam Pal, AIR 2007 SC 1040, the Hon''ble Apex Court has held that the principle underlying the calculation of gratuity would not be applicable to Section 25F of the I.D.Act, 1947, while calculating the retrenchment compensation.

24. In the matter of Management of Sri Ahilandeswari Mills Ltd., Salem v. Assistant Commissioner of Labour (Controlling Authority), under Payment of Gratuity Act) Salem and others, 1999(2) L.L.N. 262, it is held by the Madras High Court that Sundays/Weekly holidays and National holidays are to be added to the number of days worked while calculating completion of 240 days.

25. In the light of the above, I am of the view that the petitioner had worked for 240 days in each calendar year by adding the weekly holidays from 1973-74 till 1977-1978 thereby satisfying the requirement u/s 4. His gratuity would therefore be calculated from 1973 till his date of retirement on the basis of the revised pay scale applicable to him.

26. It has been strenuously contended by Mr. Barde that despite communications to the petitioner, he had neither come forward to get his legal dues cleared and receive his gratuity, nor did he show any willingness in accepting the gratuity, which was sent by registered post to his residence and which was refused.

27. He submits that though the Management witness has stated in his cross examination that the gratuity could not be paid as the amount was not transmitted from the Head Office, the said inadvertent statement is against the documentary evidence in view of the letter dated 14/03/2013 sent to the

petitioner. The first letter dated 16/08/2012 is indicative of the fact that he was called upon to get his clearance certificate on the payment of legal dues so that the arrears, if any ,or recoveries could then be calculated and the proposal for payment of gratuity could be forwarded to the Head Office. Mr. Shelke submits that the statement made in the cross examination is vital and the submissions of Mr. Barde deserve no consideration.

28. The communications dated 16/08/2012 and 14/03/2013 have been placed on record in these proceedings by the petitioner/workman. That would indicate that he is in receipt of the said communications. Even after the amount was deposited before the Appellate Authority in these proceedings, the petitioner did not show the desire of receiving the said amount. Mr. Shelke submits that the said amount of Rs.1,35,000/- has been withdrawn by the petitioner after this Court granted leave vide its order dated 29/04/2016.

29. It, therefore, appears that based on the calculation of gratuity made by the respondent from the date of permanency of the petitioner, which is 1990, the gratuity was calculated and offered to the petitioner. The enhanced amount of gratuity under the pay revision was also calculated from 1990 till 2012 and the same was offered to the petitioner, which he refused to accept. For this amount, the petitioner may not be entitled for interest considering the documents available as discussed above. However, since the gratuity is to be calculated from 1973 onwards, the said amount from 1973 till 1990 will carry interest @ 6% p.a. from the date on which it became payable to the petitioner, which is 01/07/2012.

30. In the light of the above, this petition is partly allowed. The impugned judgment of the Industrial Court deserves to be quashed and set aside. Nevertheless, the petitioner shall now be entitled for gratuity from 1973 under the revised pay scale and the amount of gratuity from 1973 to 1990 would carry interest @ 6% from 01/07/2012. Mr. Barde submits that this amount is also deposited in the Industrial Court though he is not very sure about the amount of interest which would be available to the petitioner.

31. As such, the respondent shall verify from the Appellate Authority as to how much interest has become payable to the petitioner. Thereafter, the respondent shall bona fide calculate the interest over the amount of gratuity from 1973 till 1990, from 01/07/2012 till the deposit of amount in the Industrial Court and if there is any shortfall, it is expected that the said amount will be paid to the petitioner within 12 weeks from today. The petitioner, therefore, is at liberty to withdraw the entire amount deposited with the Industrial Court along with interest.

32. Rule is made partly absolute in the above terms.

33. No costs.