

(1997) 11 BOM CK 0009
In the Bombay High Court
Case No : Writ Petition No. 1036 of 1997

Baburam Rameshwar

APPELLANT

Vs

Phoenix Mills Ltd. and others

RESPONDENT

Date of Decision : 25-11-1997

Acts Referred:

Industrial Disputes Act, 1947 — Section 25

Payment of Gratuity Act, 1972 — Section 2A, 2A(1), 4, 4(1), 4(6)

Citation : (1999) 1 LLJ 258 : (1998) 3 MhLj 43

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Judgement

F.I. Rebello, J.—Rule. Respondent No. 1 waives service. By consent petition heard forthwith.

The point involved in this petition is interpretation of the words "continuous service" as defined in Section 2-A of the Payment of Gratuity Act, 1972. The relevant portion of Section 2-A(1) reads as under :

"2-A (1) Continuous Service. (1) For the purpose of this Act :

(I) 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 beings 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. The facts giving rise to this petition are as under :

The petitioner was employed with the Respondent No. 1. There was a general

strike in the mills which included the Respondent No. 1 mill lie said strike was declared as illegal strike by the Court under the Bombay Industrial Relations Act by its order dated February 10, 4 1982. The petitioner's services came to be terminated on February 28, 1982. The petitioner was taken back in service on June 6, 1983. No fresh letter of appointment was issued to the petitioner. His Number under the P.P.F. and E.S.I. Scheme remained the same. The Government of Maharashtra was pleased to make a reference in respect of dismissed workmen of the Respondent No. 1. The said reference came to be numbered as Reference No. IT/2111986. The petitioner filed a pursis in the said reference setting out therein that his name he dropped from the reference as he has settled the matter with the Respondent No. 1. The Industrial Court by Part 1 Award dated July 10, 1990 was pleased to exclude the name of the petitioner from the reference. In the pursis it was set out that the petitioner had compromised with the Respondent No. 1 directly outside the Court and had brought the dispute to an end. It is further pointed out that no further dues were payable to the petitioner except Gratuity and leave pay and there was no other claim of whatsoever kind against the Company. Subsequently Gratuity was paid to the petitioner for the period upto February 28, 1982. Petitioner thereafter has also been paid gratuity for the period from June 6, 1983 till his superannuation. The service record of the petitioner which was produced and relied upon also shows that he was shown to be re-employed on June 6, 1983.

3. The petitioner after superannuation filed a claim before the Competent Authority under the Payment of Gratuity Act. It was the contention of the petitioner therein that he was employed with the Respondent No. 1 from March 8, 1956 and that he had completed 39 years of service and he was superannuated on May 7, 1995. In the total gratuity payable the petitioner deducted the amount already received by him and claimed balance of Rs. 42,976.00. The said application was moved on July 24, 1995. The Controlling Authority by order dated August 31, 1996 has been pleased to dismiss the application moved by the petitioner. The Authority held that there was break in services of the Applicant. The Authority also gave a finding that the petitioner was paid the gratuity due and payable.

The petitioner preferred an appeal before the Appellate Authority under the Payment of Gratuity Act. The Appellate Authority by order dated March 31, 1997 partly allowed the appeal by setting aside the order and modified it to the limited extent that it awarded interest at 12% per annum on the delayed payment of gratuity amount of Rs. 9,7001 which was due and payable to the petitioner in the year 1982 but which was paid in 1990. The petitioner aggrieved by both the orders refusing continuity of service has preferred this petition.

4. It is the contention of the learned counsel for the petitioner that there was no break in service considering Section 2-A of the Payment of Gratuity Act. It is further contended that the petitioner was a member of the R.M.M.S. which had not declared the strike. It is further contended that the petitioner offered himself

for employment and was denied employment. It is further contended that in so far as the reference is concerned, the petitioner had already been taken in service before the reference was made and consequently merely filing a pursis to exclude his name from the reference is of no consequence and as such the orders are liable to be set aside.

In support of his contention, learned counsel relied on the judgment of a single Judge of the Calcutta High Court in *B. N. Elias & Co. (Private) Ltd. and Fifth Industrial Tribunal, West Bengal, and Others* (1965-II-LLJ-324). This was a case u/s 25 of the Industrial Disputes Act wherein the learned single Judge held that the amount of retrenchment compensation paid could be adjusted against the dues of the workman and by merely receiving the retrenchment compensation would not estop the workmen from challenging the legality of the retrenchment. This judgment therefore is of no assistance. Another judgment relied upon is the judgment of the Division Bench of this Court in the case of *Phoenix Mills Ltd. Vs. Balasaheb Dagdoo Hinge and Others*, to which was a party. In the said judgment on the facts of the said case and in the absence of any material being led by the employer we held that the employer had failed to prove that there was a break in service of the workman and accordingly rejected the employer's petition against the orders of the authorities below who had granted relief to the employee. The petitioner also relied on another judgment dated June 25, 1997 of a single Judge of this Court in the case of *Shri Ramchandra Ganpat Dalvi v. M/s. Phoenix Mills Ltd. and Others* passed in Writ Petition No. 407 of 1995. In that case on facts it is seen that no evidence was led by the employer and it was in these circumstances that the Controlling Authority accepted the plea of the employee. The Authority set aside the order on the ground that the workman was out of service from 1982 to 1985 and therefore, there was a break of service. This Court held that there was no evidence to show that there was actual participation of the employee in the strike which commenced on January 18, 1982. The learned single Judge relied on the definition of "continuous service" and as such interfered with the order of the Court below. To my mind this judgment was given on the fact. of that case and will be of no assistance to the petitioner herein.

5. Learned counsel for the respondents has relied on an unreported judgment of this Court in Writ Petition No. 2115 of 1996 in the case of *Shri Ranikrihna Bhagoo v. M/s. Phoenix Mills Ltd. and Others*. On perusal of the said order it is seen that the petition was dismissed at the admission stage. The order of the Appellate Authority was confirmed. There is no reasoning given in the said judgment from which it can be spelt out that there is any law declared by this Court while passing that order.

6. With this background we can now look at the provisions of Section 2-A of the Payment of Gratuity Act. Section 2-A contemplates that an employee is entitled to gratuity if he has been in uninterrupted service including services which may be interrupted as set out in the said Section. This includes interruption by strike

or 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 the Act. A literal reading of the definition would, therefore, indicate that as long as the employee is in service and his service has not been terminated, then mere absence or not reporting for duty or ceasing to work for no fault of the employee, the employee is deemed to be in service. Sub-section (6) of Section 4 is also relevant. The said sub-section reads as follows :

"4. Payment of Gratuity. -

(6) Notwithstanding anything contained in sub-section (i).

(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 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;

(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".

On perusal of the above sub-section, it is seen that if the services of an employee had been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property, belonging to the employer, gratuity shall be forfeited to the extent of the damage or loss so caused. In so far as sub-section (h) of sub-section (6) of Section 4 is concerned, gratuity can be wholly or partially forfeited if his services have been terminated for any riotous or disorderly conduct or any other act of violence on his part. Similarly, if the services 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.

7. From a conjoint reading of Section 2-A(I) and sub-section (6) of Section 4 it is clear that though in terms of sub-section (1) of Section 4 gratuity is payable to an employee on the employee completing 5 years of services. In the circumstances set out in sub-section (6) of Section 4 gratuity can either be forfeited wholly or partially.

In the instant case the employer, after the 2 strike was declared, moved the Labour Court by Application No. 38 of 1982. The Labour Court by order dated February 10, 1982 declared the strike illegal on and from January 18, 1982. Thereafter by publication a show cause notice was issued to all the employees. Subsequent thereto another notice was issued wherein it was mentioned that on account of the strike the Company was becoming weak financially and as such

the Company will have no other alternative but to dismiss the petitioner from the services for misconduct. In fact in the show cause notice itself it was mentioned that account of the strike the smooth running of the Mills was affected and consequently the production of cotton and cloth had been interrupted. Further as already pointed out in the application moved before the Industrial Court the petitioner himself has stated that he was re-employed as a fresh employee on June 6, 1983.

8. Considering the above facts can the petitioner now contend that his termination is of no consequence and the documents filed by him before the Industrial Court were in ignorance of its contents, and that even if the same had been filed before the Industrial Court it would make no difference as the Reference pertained only to those who had not been reinstated.

9. Section 2-A of the Payment of Gratuity Act speaks of what is "continuous service". In the event there is a strike or lock out which is not on account of the fault of the employee such interruption would not be considered for the purpose of holding that the workman was in continuous employment. However, what is material to note is that there should not be a cessation of relationship of employer and employee. Section 2-A of the Payment of Gratuity Act does not take into consideration a case where the services of the workmen were terminated for whatsoever reason and the said termination has not been set aside or withdrawn. In the instant case, it is sought to be pointed out that the workman was taken back in service on June 6, 1983, and if that be the case there has been no termination. However, there is an order of dismissal dated February 28, 1982. Whether the same was communicated to the employee will make no difference as subsequent events will show that the services of the employee were in fact terminated. The petitioner was one of those employees whose case was referred to the Industrial Court by the order of reference. The petitioner before the Industrial Court had moved an application admitting that he had been re-employed on June 6, 1983 and that the Company had agreed to pay him gratuity for the earlier part of the services put in by him. He in fact has availed of and received the gratuity paid to him without demur or protest. From the date on which he received the Gratuity till the subsequent application there is no material to show that the workman protested and agreed to return the amount so paid on the ground that his services were never terminated.

Even otherwise from the application moved before the Industrial Court to exclude his name from the reference it is mentioned that he has compromised the matter with the Company and that the Company has agreed to pay him gratuity and some other incidental benefits. This is limit bearing in mind the language of Section 4 of the Payment of Gratuity Act. As pointed out earlier sub-section (6) of Section 4 of the Payment of Gratuity Act visualises a situation where the amount of gratuity can be deducted for reasons set out therein. In this case the services of the workman were terminated for misconduct. If the same fell within the sub-clause (6) then gratuity to that extent could have been forfeited. It is in

the light of this that the compromise between the workman and the Respondent Mills has to be understood. If this is taken into consideration then clearly there has been termination of the services of the workman with effect from February 28, 1982 and he has been freshly employed on June 6, 1983. No material has also come on record to show that the petitioner had been taken back into service within the time stipulated on a compromise arrived at between the Mill Management and the recognised Union whereby if the workman had resumed work on or before May 31, 1983 in which case the question whether there was in fact a dismissal would have arisen. On the facts of this case this material is not available nor has it been so pleaded by the petitioner. Hence the need of going into that question also does not arise.

10. Having held that the services of the petitioner were terminated by the act of dismissal which was reflected in the reference to the Industrial Court and consequently striking of the name of the petitioner from the reference, it cannot be said that the petitioner was in continuous service from the date of his first employment till his superannuation. The Appellate Authority has noted that there was a delay in payment of Gratuity, for the first period of service and has awarded interest on that amount at 12%. I see no reason to interfere with the order of the Authorities below.

11. In the result, rule is discharged. There shall be no order as to costs.

Record and proceedings of the trial Court be sent back immediately .