

(2016) 02 BOM CK 0013
In the Bombay High Court
Case No : Writ Petition No. 11915 of 2015

Balvant Mohan Badve

APPELLANT

Vs

Ahmednagar Municipal Corporation, Ahmednagar

RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:

Payment of Gratuity Act, 1972 — Section 2A, Section 2-A, Section 4

Citation : (2016) 2 ALLMR 377 : (2016) 2 BCR 249 : (2016) 1 CLR 998 : (2016) 149 FLR 145 : (2016) LabLR 305 : (2016) 1 LLN 304 : (2016) 3 MhLJ 62

Hon'ble Judges : R.V. Ghuge, J.

Bench : Single Bench

Advocate : P.V. Barde, Advocate, for the Appellant; V.S. Bedre, Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.V. Ghuge, J.—1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is aggrieved by the judgment and order dated 04/09/2015 delivered by the Appellate Authority / Industrial Court, Ahmednagar under the Payment of Gratuity Act.

3. The petitioner submits that he had joined duties with the respondent on 07/09/1985 and had superannuated on 01/04/2007 after reaching the age of retirement. There is no dispute as regards the continuous service of the petitioner.

4. The petitioner further submits that after completing his tenure of employment till retirement as a Civil Engineer, he was issued with a charge sheet on 24/07/2007 which was after his superannuation. This Court, by its judgment dated 10/12/2015 in Writ Petition No. 6795/2013, allowed the petition and concluded that the respondent could not initiate disciplinary proceedings against the petitioner after his retirement. The judgment of the Industrial Court dated

09/07/2013 dismissing Complaint (ULP) No. 5/2008 filed by the petitioner was set aside, the complaint was allowed and the impugned order of recovery dated 05/01/2008 was quashed and set aside.

5. The petitioner submits that he had filed Application (PGA) No. 32/2008 before the Controlling Authority claiming gratuity from 07/09/1985 till 01/04/2007. Necessary details were set out in the application form. The only defence taken by the respondent for opposing the claim of gratuity was that the petitioner was overage by one year at the time of joining duties. The proposal for regularizing his services was forwarded after his retirement and the same is still pending. The competent authority, by its judgment dated 09/03/2015, allowed the application of the petitioner and granted him the gratuity considering his last drawn wages. Interest @ 10% was also granted.

6. Mr. Barde submits that the respondent/Corporation preferred Appeal (PGA) No. 4/2015 which was allowed by the impugned judgment dated 04/09/2015. The judgment of the Controlling Authority was quashed and set aside and the matter was remitted to the Labour Court for deciding the claim afresh. Grievance is that gratuity is payable to an employee after he completes 5 years in continuous employment. Whether he is a "temporary" or a "permanent" employee is not the criteria for deciding whether he is entitled for gratuity. Mr. Barde, therefore, submits that the impugned judgment is unsustainable.

7. Mr. Bedre, learned Advocate for the respondent/Corporation has strenuously supported the impugned judgment. Contention is that the very entry of the petitioner in service on 07/09/1985 can be said to be an irregular entry until the Competent Authority regularizes his services. In this backdrop, the petitioner is not entitled for gratuity since his service is circumspect. If his services are regularized, his claim for gratuity could be considered. The respondent/Corporation does not have the authority to regularize his services and relax the age criteria. The Industrial Court, which is the Appeal Court, has therefore rightly set aside the judgment of the Controlling Authority.

8. I have considered the submissions of the learned Advocates as have been recorded hereinabove.

9. Section 2A of the Payment of Gratuity Act, 1972 defines "continuous service" as under :-

"2A. Continuous Service

For the purposes of this Act, -

(1) 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;

(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 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;

(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.

Explanation.-For the purposes of clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which-

(i) he has been laid-off under an agreement or as permitted by standing order made under the Industrial Employment (Standing Orders) Act, 1946, (20 of 1946), or under the Industrial Disputes Act, 1947, (14 of 1947), or under any other law applicable to the establishment;

(ii) he has been on leave with wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.

(3) Where 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 for such period 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 such period.

10. Payment of gratuity u/s 4 is defined as under :-

"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 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 nominee 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 or 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 [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 day"s 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 [three lakhs and fifty thousand] 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 sub-section (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 [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."

11. It is, therefore, apparent that any employee, whether he be a temporary or a permanent, he would be entitled for gratuity after 30 days of severing employer-employee relationship if he satisfies Section 2A and Section 4 of the Payment of Gratuity Act. There is no dispute about the tenure of service of the petitioner from 07/09/1985 till 01/04/2007 and the fact that he was a Civil Engineer as on the date of his retirement. There is no dispute even as regards his last drawn salary.

12. I find that the Industrial Court, by its observations in paragraph No. 13 of the judgment on internal page Nos. 11 and 12, has arrived at a self-contradictory conclusion. On the one hand, it has concluded that the service of the petitioner is not legalized and therefore he is not entitled for gratuity. On the other hand, it has concluded that the matter deserves to be remanded to the Controlling Authority for a fresh adjudication. Needless to state, these conclusions are perverse, erroneous and reflect non-application of mind.

13. Even if it is presumed for the sake of presumption that the Government finally does not regularize the services of the petitioner, yet, he would be entitled for gratuity for having worked continuously and having fulfilled the requirement of Section 2-A and Section 4 of the Payment of Gratuity Act. Non-payment of gratuity after 30 days from the date of severing employer-employee relationship entails interest as may be granted by the competent authority.

14. In the light of the above, this petition is allowed. The impugned judgment of the Industrial Court dated 04/09/2015, being perverse and erroneous, is quashed and set aside. The judgment of the Controlling Authority dated 09/03/2015 is sustained. Appeal (PGA) No. 4/2015 filed by the respondent stands dismissed.

15. Rule is made absolute in the above terms.