
(1998) 04 CAL CK 0034

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction F.M.A. No. 327 of 1997

Bharat Aluminium Company Limited and Others

APPELLANT

Vs

Sukumar Mukherjee and Others

RESPONDENT

Date of Decision : 01-04-1998

Acts Referred:

Aluminium Corporation of India Limited (Acquisition and Transfer of Aluminium Undertaking) Act, 1984 — Section 12, 14, 17, 20(4), 3
Coking Coal Mines (Nationalisation) Act, 1972 — Section 17, 17(1), 9, 9(1), 9(2)
Constitution of India, 1950 — Article 226, 39(6)
Industries (Development and Regulation) Act, 1951 — Section 18AA
Payment of Gratuity Act, 1972 — Section 2A, 4, 4(1), 4(6)

Citation : (1998) 2 CALLT 60 : (1999) 81 FLR 52 : (1999) 1 LLJ 828

Hon'ble Judges : Satyabrata Sinha, J; Dibyendu Bhusan Dutta, J

Bench : Division Bench

Advocate : Mr. Ashok Banerjee and Mr. L.N. Seth, for the Appellant; Mr. K.K. Maitra, Mr. Alok Ghosh and Mr. Srikanta Maitra, for the Respondent

Judgement

S.B. Sinha, J.—This appeal is directed against a Judgment and order dated 24.7.96 passed by a learned single Judge of this court in C.R. No. 143 (W) of 1987, whereby and whereunder the writ application filed by the writ petitioners was allowed. The writ petitioners/respondents filed the aforementioned writ application claiming, inter alia, the following reliefs :

"(a) as to why declaratory order should not issue on the respondents, their agents, subordinates and employees namely, the petitioners, are in continuous service with the company, namely, Aluminium Corporation of India Limited, entitling them even after the Aluminium Corporation of India Limited (Acquisition and Transfer of Aluminium undertaking) Act, 1981 and to the continuity of service by the payment of notional-gratuity u/s 4 of the Payment of Gratuity Act, 1972;

(b) as to why an order in nature of Prohibition should not be issued on the respondents for non exercise of powers u/s 4 of the Payment of Gratuity Act,

1972 for not paying notional gratuity to the petitioners;

(c) as to why an order in nature of Mandamus should not issue on the respondent No. 5 his/their agents and subordinates to cancel/rescind the claims of diverse amounts as paid by respondent No. 5 with particulars given in paragraphs 23 to 42 of this petition with verdict u/s 20(4) of the Aluminium Corporation of India Limited (Acquisition & Transfer of Aluminium Undertaking) Act, 1984 and on such cancellation being made to pay notional gratuity u/s 4 of the Payment of Gratuity Act, 1972 in accordance with law to the petitioner;

The basic facts of the matter and not in dispute.

2. The employees concerned were working under Aluminium Corporation of India. A lock out was declared by the said company. On or about 1.5.78, the management of the said undertaking was taken over by the appellant company in terms of section 18AA of the Industries (Development and Regulation) Act, 1951. Parliament there after enacted The Aluminium Corporation of India Limited (Acquisition and Transfer of Aluminium Undertaking) Act, 1984 (hereinafter referred to as the said Act), whereby and whereunder the undertaking of the Aluminium Corporation of India Limited (hereinafter called as Aluminium Corporation) was nationalised. The aforementioned nationalisation was made for giving effect to the policy decision as laid down under Article 39(6) of the Constitution of India. According to the writ petitioners, they were asked by the erstwhile employer to go on leave without pay. After the management was taken over by the appellant with effect from 1.5.78, their services were taken back. In terms of the provisions of the said Act, some of the writ petitioners filed applications for payment of the amount of gratuity before the Commissioner of Payments, constituted u/s 14 of the said Act. Some orders had been passed by the Commissioner of Payments who was arrayed as respondents No. 5 in the writ application without taking into consideration the period of service rendered by the writ petitioners "In the Aluminium Corporation. In the aforementioned premises, the writ petitioners filed the writ application.

3. The learned trial Judge upon taking into consideration the contentions made before him, inter alia, held that the writ petitioners had been discriminated against. It was further held that the petitioners were presumed to be in continuous service in terms of section 12 of the said Act, and on that ground the writ petition was allowed.

4. Mr. Banerjee appearing on behalf of the appellants, inter alia, submitted that keeping in view the purport and object of the said Act, and further keeping in view the fact that a bi-partite settlement had been entered into by and between the appellant and the workmen, the same is a clear pointer to show that the service of the writ petitioners were to be treated as new services. Learned counsel contended that in that view of the matter, the amount of gratuity payable to the writ petitioners could not have been directed to be paid upon treating their services rendered by them in the Aluminium Corporation as also in the appellant

company as continuous services within the meaning of section 2A of Payment of Gratuity Act.

5. Mr. Maitra, learned counsel appearing on behalf of the writ petitioners/respondents, on the other hand, supported the judgment of the learned trial Judge, inter alia, by submitting that the conduct of the authorities of the appellant company clearly shows that the writ petitioners had been treated to be in continuous employment. The said Act was enacted. inter-alia, for maintaining harmonious industrial relations and other reasons in view of the fact that the erstwhile company failed to maintain harmonious relations and other reasons as also with a view to re-starting the said undertaking the management of the said undertaking was taken over by the Central Government on 1.5.78 and as it became necessary to make such investment for securing proper utilisation of available facilities for production of aluminium. The said Act was enacted in public interest so as to enable the Central Government to acquire such undertaking and to ensure production of aluminium and aluminium fabricated products. The said Act came into force on 2.6.84, which was thus the appointed day. Section 3 of the said Act provides that on and from the appointed day, the aluminium undertaking of the company together with its right, title and interest shall stand transferred to and vest in the Central Government. Section 5 reads thus :

"5(1) Every liability of the company in relation to the Aluminium undertaking in respect of any period prior to the appointed day shall be the liability of the company and shall be enforceable against it and not against the Central Government or where the Aluminium undertaking is directed u/s 6, to vest in the Bharat Aluminium Company, against that company.

(2) For the removal of doubts, it is hereby declared that,-

(a) save as otherwise expressly provided in this Act, no liability of the company in relation to the Aluminium undertaking in respect of any period prior to the appointed day, shall be enforceable against the Central Government or where the Aluminium undertaking is directed u/s 6 to vest in the Bharat Aluminium Company, against that company;

(b) no award, decree or order of any court, tribunal or other authority in relation to the Aluminium undertaking, passed after the appointed day. in respect of any matter, claim or dispute which arose before that day. shall be enforceable against the Central Government or where the Aluminium undertaking is directed u/s 5 to vest in the Bharat Aluminium Company, against that company;

(c) no liability incurred by the Company before the appointed day, for the contravention of any provision of law for the time being in force, shall be enforceable against the Central Government or where the Aluminium undertaking is directed u/s 6 to vest in the Bharat Aluminium Company, against that company."

6. The Central Government, admittedly, in exercise of its Jurisdiction conferred upon it u/s 6 of the said Act, issued a notification on or about 21.6.84, whereby and whereunder the said undertaking instead and place of continuing to vest in the Central Government, vested in the appellant company. Section 9 which occurs in Chapter IV of the said Act empowers the appellant company to exercise and do all such things which the Central Government was empowered.

Section 12 reads thus:

"12(1) Every person who has been, Immediately before the appointed day, employed in the Aluminium undertaking shall become,-

(a) on and from the appointed day, an employee of the Central Government; and

(b) where the Aluminium undertaking is directed u/s 6, to vest in the Bharat Aluminium Company, an employee of that company on and from the date of such vesting,

and shall hold office or service under the Central Government or the Bharat Aluminium Company, as the case may be with the same rights and privileges as to pension, gratuity and other matters as would have been admissible to him if there had been no such vesting and shall continue to do so unless and until his employment under the Central Government or the Bharat Aluminium Company, as the case may be, is duly terminated or until his remuneration and other conditions of service are duly altered by the Central Government or the Bharat Aluminium Company, as the case may be.

(2) Notwithstanding anything contained in the industrial Disputes Act, 1947, or in any other law for the time being in force, the transfer of the services of any officer or other person employed in the Aluminium under taking to the Central Government or the Bharat Aluminium Company shall not entitle such officer or other employee to any compensation under this Act or under any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority."

7. Chapter VI of the said Act provides for appointment of Commissioner of payments. The manner in which the Commissioner is to deal with the said claims has been laid down in the said Chapter. Section 17 of the said Act provides that every person having a claim against the company in relation to the Aluminium undertaking shall prefer such claim before the Commissioner within thirty days from the specified date. The question which arises for consideration is as to whether the writ petitioners were entitled to payment of gratuity or not. Payment of Gratuity Act, 1972 was enacted to provide for a scheme of payment of gratuity to employees engaged in factories, mines, oil fields, plantations etc., and for matters connected therewith or incidental thereto. It is now well settled that the very essence of the gratuity is past and not the present. Since the definition of "employee" as contained in section 2(e) of the said Act provided for an enlarged definition any person who satisfies the requirements of the inclusive clause

contained in the said provision, continues to be an employee, and thus becomes entitled to payment of gratuity. Section 2A reads thus;

"2-A. 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 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 employee of the establishment), lay-off, strike or a lockout 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."

8. A bare perusal of the aforementioned provision would clearly show that a larger meaning has been assigned to the word "continuous service". Section 4 provides for payment of gratuity, which clearly states that the gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than 5 years.-(a) on his superannuation, or (b) on his retirement or resignation, or (c) on his death or disablement due to accident or disease. It is not in dispute that the writ petitioners were in the services of the company immediately prior to the appointed day, namely, 2.6.84 by reason of the provisions contained in section 12 of the said Act, and therefore, they became employees of the Central Government with effect from the said date and employees of the appellant company with effect from 21.6.84.

9. Once the employees became the employees of the Central Government prior whereto there was no disruption in their services, there cannot be any doubt whatsoever in view of the enlarged provision of continuous service as contained in section 2-A of Payment of Gratuity Act, the entire period of service whether rendered by the concerned employees in the Aluminium Corporation or the appellant company shall have to be considered for computation in terms of section 4 thereof, the apex court in *Lalappa Lingappa and Others Vs. Laxmi Vishnu Textile Mills Ltd.*, has. inter alia, held that Payment of Gratuity Act is a beneficial legislation. While construing the provision of section 2A, the apex court took into consideration the history of legislation as set out in the statements and objects of reasons accompanying the Bill and held:

"In construing a social welfare legislation, the court should adopt a beneficent rule of construction; if a section is capable of two construction, that construction should be preferred which fulfils the policy of the Act, and is more beneficial to the persons in whose interest the Act has been passed. When, however, the language is plain and unambiguous, as here, we must give effect to it whatever may be the consequences, for, in that case, the words of the statute speak the intention of the legislature when the language is explicit, its consequences are for the legislature and not for the courts to consider. The argument of

inconvenience and hardship is a dangerous one and is only admissible in construction where the meaning of the statute is obscure and there are two methods of construction. in their anxiety to advance beneficent purpose of legislation, the courts must not yield to the temptation of seeking ambiguity when there is none. Carles On Statues. 6th Edn. Pp. 84-91.

In dealing with interpretation of sub-section (1) of section 4, we must keep in view the scheme of the Act. Sub-section (1) of section 4 of the Act incorporates the concept of gratuity being a reward for long, continuous and meritorious service. The emphasis there in is not on "continuity of employment"; but on rendering of "continuous service". The legislature inserted the two Explanations in the definition to extend the benefit to employees who are not in uninterrupted service for one year subject to the fulfilment of the conditions laid down therein. By the use of a legal fiction in these Explanations, an employee is deemed to be in "continuous service" for purposes of sub-section (1) of section 4 of the Act. The legislature never intended that the expression "actually employed" in Explanation I and the expression "actually worked" in Explanation II should have two different meanings because it wanted to extend the benefit to an employee who "works" for a particular number of days in a year in either case. in a case falling under explanation I. an employee is deemed to be in continuous service if he has been actually employed for not less than 190 days if employed below the ground in a mine, or 240 days in any other case, except when he is employed in a seasonal establishment."

10. In view of the aforementioned decision, there cannot, therefore, be any doubt that the word "continuous service" has to be interpreted liberally. The submission of Mr. Banerjee to the effect that as a lock-out had been declared, there was a cessation in the relationship of employer and employee, cannot be accepted. Not only by reason of a lock-out the relationship of employer and employee does not come to an end, but the same continues. Furthermore, as noticed hereinbefore, the very purpose of the Act was to take over the management at the first instance and to lake over to assets of the said undertaking, read with section 12 thereof clearly goes to show the intention of the parliament that all those employees who had been working in the Aluminium Corporation, should continue to work in the Central Government and the appellant company, as the case may be. The submission of Mr. Banerjee to the effect that the liability of the erstwhile owner cannot be the liability of the appellant company, cannot be accepted. The apex court in *The Workmen Vs. The Bharat Coking Coal Ltd. and Others*, clearly held that even a workman who was illegally dismissed by the erstwhile employer and in whose favour an award has been made by the industrial tribunal, would continue to be governed by the nationalisation Act. in that case, the apex court was considering the provisions of sections 9 and 17 of the Coking Coal Mines Nationalisation Act, which are in part materia with the provisions of the said Act. The apex court held:

"Section 9 deals with the topic of prior liabilities of the previous owner. Section

9(1) speaks of "every liability of the owner prior to appointed day, shall be the liability of such owner and shall be enforceable against him and not against the Central Government or the Government company. The inference is irresistible that section 9(1) has nothing to do with wrongful dismissals and awards for reinstatement. Employees are not a liability (as yet in our country). Section 9(1) deals with pecuniary and other liabilities and has nothing to do with workmen, it is regarding arrears of wages or other contractual, statutory or tortious liabilities. Section 9(2) operates only in the area of section 9(1) and that is why it starts off by saying "for the removal of doubts it is hereby declared". So, section 9(2) seeks only to remove doubts in the area covered by section 9(1) and does not deal with any other topic or subject matter. Section 9(2)(b) when it refers to "awards", goes along with the words "decree", or "order". By the canon of construction of *noscitur a sociis* the expression "award" must have a restricted meaning. Moreover, its scope is delimited by section 9(1). If back wages before the appointed day have been awarded or other sums, accrued prior to nationalisation, have been directed to be paid to any workman by the new owner. Section 9(2)(b) makes such claims non-enforceable. We do not see any reason to hold that section 9(2)(b) nullifies section 17(1) or has a larger operation than section 9(1). We are clear that the whole provision confers Immunity against liability, not a right to Jettison workmen under the employ of the previous owner in the eye of law."

11. The aforementioned decision of the apex court has been considered by a Full Bench of the Patna High Court in *Agent. Murlidhar Colliery v. Sital Chandra Pathak*, reported in 1986 PLJR 1168. In that case also, upon consideration of the provisions of sections 9 and 17 as also the provisions of the Coking Coal Mines (Nationalisation) Act, as also provisions of section 4 of the Payment of Gratuity Act. Sandhawlla. C.J., speaking for the Bench stated:

"Equally worthy of notice is the fact that the claim to gratuity is not an indefeasible right and may be defeated either wholly or partially for reasons specified in the aforequoted sub-section (6) of section 4. Therefore, the right to the payment of gratuity arises only on the fulfilment of the statutory conditions and termination of the employment in anyone of the five modes indicated above. It is only at the end of the period of his service that a workman can *strictu sensu* claim that he has now become entitled to the payment of gratuity."

Upon consideration of various provisions the Full Bench clearly held :

"One must also notice the anomalous results which necessarily flow from the construction canvassed on behalf of the petitioner. If it could be said that, however, long after the nationalisation and the appointed day the workman must seek to claim his pensionary and gratuity benefits from the previous owners, it would be virtually throwing such workmen to the wolves. A period of nearly a decade and half has elapsed since the nationalisation and the appointed day and as time passes a workman might well have served for 20 years and more under the Central Government or the Government company, as the case may be. To

require that thereafter on superannuation, retirement, or termination otherwise of his service, he should after a period of 20 years start seeking his previous employers for his service benefits would look wholly farcical and Would render nugatory the very purpose and object of section 17 of the Act. Indeed such previous employers or owners may now be non-existent and therefore, his claims pertaining to the period of service rendered to previous owner prior to the appointed day would be merely chimerical and wholly in the air. This aspect is well illustrated and highlighted by the present case itself. Here in the respondent Sital Chandra Pathak had served two or three employers during the period of his first employment from the 24th of June 1946 till the appointed day of 1st May 1972. That he should now be asked to speak his original employer of the year 1946 for gratuity which has become due to him on the successful completion of his service and retirement does not stand to reason. Therefore, a construction which would lead to such anomalous, and if one may say so. mischievous consequences and result in grave hardship to work men whose rights were expressly sought to be protected by the Act has to be avoided on larger canons of construction as well."

12. The said decision applies in all fours to the fact of the present case. In this view of the matter, we have absolutely no hesitation to declare that the writ petitioners would be deemed to be in continuous service within the meaning of the Payment of Gratuity Act v/s-a-v/s the said Act. The fact that some of the writ petitioners have filed claim petitions before the Commissioner of Payments is of no value. As indicated hereinbefore, in terms of section 4 of the Payment of Gratuity Act, an occasion to pay gratuity arises only upon cessation of employment. No such cessation of employment having taken place, the Commissioner of Payments had absolutely no Jurisdiction to entertain the claim application. The said claim applications filed by the writ petitioners, therefore were misconceived and ought not to have been entertained. There cannot, therefore, be any doubt whatsoever that the said claim applications were filed and entertained by the Commissioner of Payments on a misconceived notion. Any decision thus rendered by the Commissioner of Payments in relation to the said claim applications filed by some of the writ petitioners must, therefore, be held to be wholly without Jurisdiction and thus non est in the eye of law. ? Furthermore, the bi-partite agreement entered into by and between the employees and the management cannot stand in the way of the statutory right conferred upon the employees in terms of the provisions of the said Act in case where there exists a conflict between a bi-partite agreement and the provisions of a statute, the latter shall prevail. Furthermore, such a bi-partite agreement and/or filing of claim applications before the Commissioner of Payments must be held to have been made on a mistaken notion of the interpretation of the provisions of the said Act, and thus no credence can be given thereto. If however, while computing the amount of gratuity payable to any employee of the appellant company, the competent authority finds that by reason of their taking employment with another employer during the pendency of the lock-out any

cessation of employment had taken place, the said fact may be taken into consideration in each individual case, but it is not for us to go into the said question at this juncture as the same would be dependent on determination of fact in each case by the competent authority, as and when occasion arises therefore.

13. We, therefore, in agreement with the Judgment and order passed by the learned trial Judge hold that the writ petitioners would be deemed to be in continuous service, and would be entitled to payment of gratuity despite the fact that a part of service had been rendered by them in Aluminium Corporation of India, subject however, to the observations made hereinbefore. The appeal is, therefore, dismissed, but in the facts and circumstances of this case, there will be no order as to costs.

14. Prayer for stay of operation of the judgment made on behalf of the appellants is considered and refused as this judgment is pronounced on the basis of the decisions of the apex court and the Full Bench of Patna High Court.

15. Xerox certified copy, if applied, be supplied, on priority basis.

D.B. Dutta, J.

I agree.

16. Appeal dismissed