

(1994) 05 OHC CK 0009
In the Orissa High Court
Case No : O.J.C. No. 9784 of 1993

Chairman-cum-Managing Director, Orissa Mining Corpn. Ltd. APPELLANT
Vs
Controlling Authority, Payment of Gratuity Act and Others RESPONDENT

Date of Decision : 02-05-1994

Acts Referred:

Orissa Mining Corporation Employees Gratuity Fund Rules — Rule 4
Payment of Gratuity Act, 1972 — Section 14, 2

Citation : (1994) 78 CLT 683 : (1995) 1 LLJ 381

Hon'ble Judges : S.K. Mohanty, J;A. Pasayat, J

Bench : Division Bench

Advocate : Jitamitra Mohanty, A.K. Panigrahi and P.Kr. Mishra, for the Appellant;
Additional Government Advocate for Respondent Nos. 1 and 2 and B. Das
Mohapatra and N.K. Mishra, for the Respondent

Judgement

Pasayat, J.—The Orissa Mining Corporation Ltd. (hereinafter referred to as the "Corporation") calls in question legality of the direction given by Controlling Authority under the Payment of Gratuity Act, 1972 (in short "Act") directing payment of gratuity to Himansu Sekhar Satpathy (hereinafter referred to as "employee").

2. The background facts which are almost undisputed are as under:

The employee joined the Corporation as a trainee Accounts Officer on September 14, 1987, worked as ad hoc Accounts officer from April 1, 1988 to May 17, 1989, and as a regular Accounts Officer from May 18, 1989 till September 19, 1992. Thereafter he resigned and joined another organisation. Claim for gratuity was made by him on the ground that he had rendered more than five years continuous service to be entitled to gratuity. Controlling authority held that he was entitled to gratuity. Corporation assails correctness of the conclusion on the ground that under the Orissa Mining Corporation Employees Gratuity Fund Rules (hereinafter referred to as "the Corporation Rules") apprentices and trainees were not eligible to get gratuity and, therefore, the claimant-employee was not

entitled to any gratuity. Learned counsel for the claimant-employee, however, submits that relevant Rule 4 is contrary to the provisions of Section 2(e) of the Act, which excludes an apprentice and not a trainee. It is his case that Corporation was not authorised to enlarge the scope of disentitlement by the rule, since it runs contrary to the statutory provisions as embodied in the Act.

3. Rule 4 of the Corporation Rules on which great emphasis has been laid by the Corporation, so far as relevant, runs as follows:

"4. Applicability:

Gratuity will be granted for efficient and faithful service to the wholetime employees of the Corporation employed on a regular basis either at Headquarters or elsewhere and shall exclude the following:

(a) to (c) xxx xxx xxx

(d) Apprentices and Trainees.

(e) and (f) xxx xxx xxx"

Sections 2(e) 2A(1) 4(1) and 14 of the Act are relevant for the purpose of adjudication of the dispute raised in this writ application. They so far as relevant read as follows:

"2. xx xx xx xx

(e) "Employee" means any person (other than an apprentice) employed on wages not exceeding one thousand and six hundred rupees per mensem, in any establishment, factory, mine, oil field, plantation, port, railway company or shop, to do any skilled, semi- skilled, or unskilled, manual, supervisory, technical, or clerical work, whether the terms of such employment are express or implied and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.

Explanation - In the case of an employee who having been employed for a period of not less than five years, on wages not exceeding one thousand rupees per mensem is employed at any time thereafter on wages exceeding one thousand rupees per mensem, gratuity, in respect of the period during which such employee was employed on wages not exceeding one thousand rupees per mensem, shall be determined on the basis of the wages received by him during that period.

2A. 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 imposing punishment or

penalty or 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;

xx xx xx

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:

xx xx xx

14. Act to override other enactments, etc.-

The provisions of this Act or any rule made, thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

Section 2(e) of the Act excludes an apprentice, but does not exclude a trainee. "Apprentices" and "trainees" stand on different footings and this is also accepted by the Corporation because they have put "apprentice" and "trainee" in Rule 4 separately.

4. Definition of the term "employee" in Section 2(e) excludes an employee from its scope. The term "apprentice" has been defined in Section 2(a) of the Apprentices Act, 1961 (in short, "Apprentices Act") in the following words:

""Apprentice" means a person who is undergoing apprenticeship training in a designated trade in pursuance of a contract of apprenticeship."

According to Stroud's Judicial Dictionary, "Apprentice" has been described as follows, (with reference to *Clapham v. St. Pancras* 29 L.J.M.C. 143 per Cockburn C.J.)

"In legal acceptance, an apprentice is a person bound to another for the purpose of learning his trade or calling: the contract being of that nature that the master teaches and the other serves the master with the intention of learning".

A trainee employed under a contract of employment is not an apprentice, under

the Apprentices Act, unless he is undergoing apprenticeship training in a designated trade in pursuance of a contract of apprenticeship. trainee outside the Apprentices Act is to be distinguished from an apprentice undergoing training in a designated trade in pursuance of a contract of apprenticeship. The former is covered by the definition of the term "employee" while the latter is excluded from the definition. The heart of the matter in apprenticeship is, therefore, the dominant object and intent to impart on the part of the employer and to accept on the part of the person learning under certain agreed terms. (See The Employees' State Insurance Corporation and Another Vs. The Tata Engineering and Locomotive Co. Ltd. and Another, .

5. Section 14 of the Act provides that the provisions of the Act or any rule made thereunder shall have effect, notwithstanding anything inconsistent therewith contained in any enactment other than the Act. Therefore, any inconsistency with the Act has to give way to the provisions specifically made in the Act.

Notwithstanding the prescription in the Corporation Rules, an employee putting in five years continuous service as provided in Section 4(1) would be entitled to the benefits under the Act. It is accepted by learned counsel for Corporation that the employee has rendered more than five years continuous service. Since Rule 4(d) is inconsistent with the Act same has to be altered. Similar direction was given to Som Prakash Rekhi v. Union of India and Anr. . The learned counsel for the Corporation states that necessary alteration shall be made within a month from today. The claimant-employee is entitled to gratuity in view of the analysis made above. Let the payment be made to him within six weeks from today.

The writ application is accordingly disposed of. No cost.

S.K. Mohanty, J.

I agree.