

(1986) 07 BOM CK 0035
In the Bombay High Court
Case No : Writ Petition No. 1306 of 1982

Dinkar Shankar Pawar

APPELLANT

Vs

The Elphinstone Spg. and Wvg. Mills Co. and Another

RESPONDENT

Date of Decision : 21-07-1986

Acts Referred:

Industrial Disputes Act, 1947 — Section 33(C)
Payment of Gratuity Act, 1972 — Section 4

Citation : (1995) 3 LLJ 641

Hon'ble Judges : Pendse, J

Bench : Single Bench

Advocate : R.J. Kochar, for the Appellant; P.G. Laud and N.B. Bhogani for R.1, B.N. Srikrishna and B.N. Naik for R.2, for the Respondent

Final Decision : Dismissed

Judgement

Pendse, J.—By this petition filed under Article 226 of the Constitution of India, the petitioner is challenging the legality of order dated March 31, 1982 passed by the Industrial Court, Bombay and appellate authority under the Payment of Gratuity Act, 1972 (hereinafter referred to as the "Act") confirming the order dated June 18, 1981 passed by the Controlling Authority under the Payment of Gratuity Act dismissing the application filed by the petitioner u/s 4 of the Act. A few facts which gave rise to the filing of the application are as follows:

2. The petitioner joined the service of respondent No. 1 Mill as Jobber in Nov., 1958. On Dec. 28, 1971, the petitioner claims that he suffered injury while carrying out his job. According to the petitioner, he left Bombay and went to his native place and stayed there for a period of 15 months. The petitioner returned back for duty on March 29, 1973 and was employed as Badli Worker. On April 1, 1974 the petitioner was made permanent. The petitioner resigned his job on July 9, 1980 and thereafter : made claim for gratuity on Sept. 12, 1980. The claim was not accepted by the Mills and, therefore, the petitioner filed application before the competent authority on October 7, 1980 demanding total amount of

Rs. 11,000/- towards gratuity on the basis of his service from Nov. 1958 to July 9, 1980.

3. The Mills resisted the claim claiming that the petitioner was appointed as badli Worker on March 29, 1973 after he left service on Dec. 28, 1971. The Mills claim that the appointment of the petitioner as Badli worker on March 29, 1973 was a fresh appointment and, therefore, it is not open for the petitioner to claim gratuity for the period from Nov. 1958 to July 1980. The Mills also claimed that the petitioner was made permanent on April t, 1974 and he would have been entitled to gratuity from April 1974 to July 1980 provided the petitioner had put in five years continuous service. The Mills claim that the petitioner did not work, for 240 days at a stretch for a period of five years and, therefore, he is not entitled to claim gratuity.

4. The competent authority after recording evidence came to the conclusion that the petitioner had left service in Dec. 1971 and was appointed afresh in March 1973 and, therefore, the claim for gratuity can be considered only for the period from April 1974 to July 1980. The competent authority also held that the petitioner is not entitled to gratuity because the petitioner did not serve for 240 days for a period of five years. The petitioner carried an appeal against the order of the competent authority but the appeal ended in dismissal and that has given rise to the filing of this petition.

5. Shri Kochar, learned counsel appearing on behalf of the petitioner, submitted that the two authorities below were in error in holding that the petitioner was not in continuous service from 1958 to 1980. The submission of the learned counsel is not correct. The expression "continuous service" has been defined u/s 2(c) of the Act and means uninterrupted service and includes service which may be interrupted on account of sickness. Shri Kochar urged that the petitioner suffered injury while working and, therefore, went away to his native place. It is not possible to accept this claim as the two authorities below have rightly pointed out that the petitioner did not establish that he received injury while on work. Save and except the oral word of the petitioner, no evidence was led to establish that the petitioner suffered injury and that too while carrying out his job. I enquired from Shri Kochar as to what was the nature of the injury and did it require the petitioner to go away for a period of 15 months to his native place, but Shri Kochar was unable to give any answer in absence of any material on record. The two authorities below also relied upon the fact that the petitioner accepted the new job as Badli worker in March 1973 and this conduct could not be that of an employee who had taken leave due to the injury suffered by him while on work. The finding recorded by the two authorities below is based on appreciation of evidence and cannot be disturbed in these proceedings. The petitioner can always file application u/s 33(c) of the Industrial Disputes Act for the claim for the period from Nov. 1958 to Dec. 1971.

6. Shri Kochar then submitted that in any event, the authorities below should have granted the gratuity for a period commencing from April 1974 when the

petitioner was made permanent, till July 1980. The claim for gratuity flows from Section 4 of the Act, which inter alia provide that gratuity shall be payable to an employee, on termination of his employment, after he has rendered continuous service for not less than five years. The Mills produced the record before the authorities below and the record early indicates that for the period commencing from the year 1973 and ending with year 1980, the petitioner had worked for 240 days or more only for a period of three years, i.e. in the years 1974, 1976 and 1978. As the petitioner had not rendered continuous service for a period of five years, the authorities below were perfectly right in holding that the petitioner was not entitled to any gratuity u/s 4 of the Act.

7. Shri Kochar submitted that independently of Section 4 of the Act, the petitioner was entitled to gratuity in view of the agreement dated August 19, 1980 reached between the Mills "Owners" Association and Rashtriya Mill Mazdoor Sangh, which was representative Union for the workers in the Cotton Mills. The learned counsel urged with reference to Clause 1(a) of the agreement that an employee shall be deemed to be in continuous service for the purpose of Section 2(c) of the Act so long as his name is borne on the permanent register roll of the Mills. It is undoubtedly true that in view of the agreement, the petitioner would be entitled to claim gratuity, but the learned counsel for the Mills pointed out that the claim for gratuity arising out of the agreement cannot be enforced by filing an application under the Act, but the workman will have to adopt proceedings u/s 33-C(2) of the Industrial Disputes Act. The submission of the learned counsel for the Mills is correct and is well supported by the decision of the Supreme Court in the case of *Lalappa Lingappa v. Laxmi Vishnu Textile Mills Ltd.* reported in 1981 Labour and Industrial Cases 307. Shri Kochar tried to overcome this obstacle by submitting that by my judgment dated Sept. 8, 1983 delivered in Writ Petition No. 334 of 1981 I had taken the view that in an application made under the Act, the authorities can enforce the right accrued under the agreement. I am afraid Shri Kochar is misreading the judgment. What was held by me was that if the right of seeking gratuity arises under the Act, then for the rate at which it is to be granted, reliance can be placed on the agreement reached between the employer and the employee. In my judgment, I specifically referred to the distinction between the right to claim gratuity and the rate at which it is to be granted. If the right is available to claim gratuity u/s 4 of the Act, then for the purpose of determining the rate at which it is to be granted, reference can be made to the agreement but if the right is not available to claim gratuity u/s 4 of the Act, then the application under the Act would not be maintainable by basing the claim on the right arising out of the agreement. In my judgment, the two authorities below were right in dismissing the application and those orders suffer from no infirmity.

8. Accordingly, petition fails and rule is discharged with no order as to costs.