
(2013) 10 P&H CK 0408
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 10323 of 1994

D.K. Tyagi

APPELLANT

Vs

Board of Governors

RESPONDENT

Date of Decision : 31-10-2013

Acts Referred:

Citation : (2014) 2 SCT 517

Hon'ble Judges : Gurmeet Singh Sandhawalia, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Gurmeet Singh Sandhawalia, J.—The present petition has been filed for issuance of a direction to the respondents for release of gratuity of the petitioner for the service rendered by him in Sainik School, Kunjpura, Karnal from 01.07.1981 to 27.08.1992. The case of the petitioner is that he had joined the Sainik School, Kunjpura, Karnal on 01.07.1981 as Assistant Master in the scale of Rs. 440-750 and was confirmed on 01.07.1983. Initially, the post was non-pensionable and the institution used to give Contributory Provident Fund, according to the rules. In the year 1986, he was put in the pay-scale of Rs. 1400-2600 and in the Year 1988-89, pension and gratuity were introduced, as per circular issued by the Board of Governors and he opted for the said benefit. After putting in service of about 11 years, the petitioner tendered his resignation by submitting an advance notice and was relieved from service on 27.08.1992. The petitioner was entitled to other releases apart from gratuity and under the wrong conception that it was not to be paid to the employees who resigned, the benefit was refused to him vide letter dated 17.04.1993 (Annexure P2). The petitioner made demand by serving a legal notice on 19.08.1993 and a sum of Rs. 12996/- was claimed which included a sum of Rs. 11400/-, gratuity @ Rs. 1900/- per month and Rs. 1596/- as 14% interest. However, vide letter dated 10.09.1993, the Board of Governors of the school denied gratuity to him by relying upon Rule 26 of the Central Civil Services (Pension) Rules, 1972 (hereinafter, referred to as the

"Central Rules"). Accordingly, reliance was placed upon Section 4 of the Payment of Gratuity Act, 1972 (hereinafter, to be referred to as the "Act") to make the said claim. Reliance was also placed upon Union of India v. M/s. Darshan Engineering Works & others 1994 (1) RSJ 533.

2. In the written statement, filed on behalf of the respondents, plea taken was that u/s 2 of the Act, the petitioner did not fall under the definition of an employee and that the Sainik School run by Sainik School Society also did not come within the definition of establishment. It was alleged that the petitioner was not covered under both the provisions as he is not an employee as defined under the Act and neither the school was an establishment and therefore, the petitioner could not be said to be an employee in the establishment as defined under the Act. On merits, it was pleaded that the petitioner had the alternative remedy to approach the Labour Commissioner for deciding the matter. It was admitted that he had joined the school on 01.07.1981 as Assistant Master in the pay-scale of Rs. 440-750 but he was not entitled to other allowances as applicable to Central Government employees. The petitioner was not entitled to gratuity in view of the circular dated 08.02.1989 (Annexure P1) as a Sainik School employee would now be granted gratuity w.e.f. 01.04.1988, as per the Central Government Scheme, in lieu of the existing scheme, laid down in Sainik School Staff General Rules, 1984. A person who had resigned was not entitled for gratuity. The judgment of the Apex Court was sought to be distinguished on the ground that it pertained to a Government employee who was drawing salary and who worked in factory establishment or a particular shop.

3. In replication, it was pleaded that vide letter dated 08.02.1989 (Annexure P1), Sainik School employees were entitled for gratuity w.e.f. 01.04.1988 in lieu of the existing scheme. Any clause which deprived the gratuity was unwarranted and unjustified and the respondents could not escape the statutory liability.

4. Counsel for the petitioner has, accordingly, submitted that in view of the provisions of the Act, gratuity is payable the moment a person renders continuous service for not less than 5 years and placed reliance upon Section 4 of the Act to contend that the Act would have statutory force and the respondents could not deny the said benefit.

5. Counsel for the respondents, on the other hand, submitted that the Central Rules would be applicable and as per Rule 26(ii), a person who had resigned was not entitled for the said benefits.

6. After hearing counsel for the parties, this Court is of the opinion that the denial of gratuity to the petitioner is unjustified. The defence taken by the respondents that the Act is not applicable as it is not an establishment and the petitioner is not an employee under the Act, is without any basis. Admittedly, as per the letter dated 08.02.1989, the Sainik School employees were held to be entitled for gratuity, as per the Central Government Scheme w.e.f. 01.04.1988 in lieu of the existing scheme. Relevant clauses of the letter dated 08.02.1989

reads as under:

3. Gratuity: "3. Gratuity:

3.1. The Sainik School employees will now be entitled to "Gratuity" as per the Central Government Scheme w.e.f. 1st April, 1988 in lieu of the existing scheme laid down in Sainik School Staff Gratuity Rules, 1984.

3.2. The present scheme: All the Sainik School employees, who have completed 5 years and more qualifying service on retirement shall be paid Retirement Gratuity equal to one fourth of his emoluments, for each completed six monthly period of qualifying service, subject to a maximum of 16 = times the emoluments, provided that the amount of retirement gratuity payable shall, in no case, exceed one lakh rupees. There will also be no ceiling on reckonable emoluments for calculating the gratuity.

7. It is not denied by the respondents that the said letter was not issued and gratuity was introduced on the pattern of the Central Government employees. In the written statement, regarding the applicability of the said letter, it was admitted that employees were governed by the rules and regulations governed by the society. In the first instance, the school denied the liability to pay the gratuity on the ground that the employee had resigned vide communication dated 17.04.1993 (Annexure P2). Thereafter, when legal notice was served, the defence taken was that Central Rule 26 provided that once the employee had resigned from service, he was not entitled for payment of gratuity or pension. The plea taken in the written statement is that the school is not an establishment and the petitioner is not an employee, as defined under the Act. A perusal of sub-rule (ii) of Central Rule 26 provides that if resignation is taken with prior permission, it would not entail forfeiture of past service. Similarly, Rule 50 further provides that gratuity is payable on completion of 5 years of qualifying service. The said Rules read as under:

Rule 26-Forfeiture of service on resignation:

(i) Resignation from a service or a post, unless it is allowed to be withdrawn in the public interest by the appointing authority, entails forfeiture of past service.

(ii) Resignation shall not entail forfeiture of past service if it has been submitted to take up, with proper permission, another appointment, whether temporary or permanent, under the government, where service qualifies.

Rule 50-Retirement/Death Gratuity. A government servant, who has completed five years qualifying service and has become eligible for service gratuity or pension under Rule 49 shall, on his retirement, be granted retirement gratuity equal to one-fourth of his emoluments for each completed six monthly period of qualifying service subject to a maximum of 16=times the emoluments.

8. It is categorical case of the petitioner that he had put in his resignation after 11 years of service by submitting an advance notice and was relieved from

service on 27.08.1992, as per averments made in paragraph No. 8 of the petition. The said fact is not denied in the written statement, filed by the respondents. Once the petitioner had taken permission to resign, it would not lie in the mouth of the respondents to say that resignation would amount to the forfeiture of service and as per provisions of Central Rule 26(ii), the petitioner would not be entitled to gratuity. Even otherwise, under the provisions of Section 4(1)(b) of the Act, which would prevail over the Rules, relied upon by the respondents, gratuity would be payable to an employee once he had rendered continuous service of 5 years, even if he resigns and the employment was terminated. Section 4 of the Act reads 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,

(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 nominees or heirs is 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 of 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 farther 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 days' 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 [ten lakh 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 subsection (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 ¹ [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.

A reading of the sub-section (6) of Section 4 goes on to show that only such an employee whose services had been terminated, for any act of wilful omission or negligence, causing damage or loss to the property belonging to the employer, will not be entitled to gratuity. The case of the petitioner does not fall under this category. Section 14 further provides that the provisions of the Act shall have overriding effect notwithstanding anything inconsistent, contained in the enactment other than this Act. The said provisions read as under:

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.

9. The Apex Court in M/s. Darshan Engineering Works (supra), while allowing the appeal of Union of India against the striking down of the 5 years" clause of service, held that provisions of the Act applies to all establishments where 10 or more persons are employed. It was held that the payment of gratuity was, thus, obligatory, being one of the minimum conditions of service and the non-compliance was an offence, punishable with imprisonment and fine. It was held

that it is a welfare measure, introduced in the interest of the general public to secure social and economic justice to assist the workman. It was further held that it was payable even if the employee resigned or voluntarily retired from service. The relevant observations read as under:

16. The aforesaid survey of the relevant authorities shows that in labour jurisprudence the concept of "gratuity" has undergone a metamorphosis over the years. The dictionary meaning may suggest that gratuity is a gratuitous payment, a gift or a boon made by the employer to the employee as per his sweet will. It necessarily means that it is in the discretion of the employer whether to make the payment or not and also to choose the payee as well as the quantum of payment. However, in the industrial adjudication it was considered as a reward for a long and meritorious service and its payment, therefore, depended upon the duration and the quality of the service rendered by the employee. At a later stage, it came to be recognised as a retrial benefit in consideration of the service rendered and the employees could raise an industrial dispute for introducing it as a condition of service. The industrial adjudicators recognised it as such and granted it either in lieu of or in addition to other retrial benefit(s) such as pension or provident fund depending mainly upon the financial stability and capacity of the employer. The other factors which were taken into consideration while introducing gratuity scheme were the service conditions prevalent in the other units in the industry and the region, the availability or otherwise of the other retrial benefits, the standard of other service conditions etc. The quantum of gratuity was also determined by the said factors. The recognition of gratuity as a retrial benefit brought in its wake farther modifications of the concept. It could be paid even if the employee resigned or voluntarily retired from service. The minimum qualifying service for entitlement to it, rate at which it was to be paid and the maximum amount payable was determined likewise on the basis of the said factors. It had also to be acknowledged that it could not be denied to the employee on account of his misconduct. He could be denied gratuity only to the extent of the financial loss caused by his misconduct, and no more. Thus even before the present Act was placed on the statute book, the courts had recognised gratuity as a legitimate retrial benefit earned by the employee on account of the service rendered by him. It became a service condition wherever it was introduced whether in lieu of or in addition to the other retrial benefit(s). The employees could also legitimately demand its introduction as such retrial benefit by raising an industrial dispute in that behalf, if necessary. The industrial adjudicators granted or rejected the demand on the basis of the factors indicated above.

10. In *Municipal Corporation of Delhi Vs. Dharam Prakash Sharma and Another*,¹⁰ it was observed by the Apex Court that the provisions of the Act would apply over and above the pension rules wherein, there was a provision for gratuity also, in view of the over-riding provisions of Section 14 of the Act. It was observed as under:

2. The short question that arises for consideration is whether an employee of the MCD would be entitled to payment of gratuity under the Payment of Gratuity Act when the MCD itself has adopted the provisions of the C.C.S. (Pension) Rules, 1972 (hereinafter referred to as "the Pension Rules"), where under there is a provision both for payment of pension as well as of gratuity. The contention of the learned counsel appearing for the appellant in this Court is that the payment of pension and gratuity under the Pension Rules is a package by itself and once that package is made applicable to the employees of the MCD, the provisions of payment of gratuity under the Payment of Gratuity Act cannot be held applicable. We have examined carefully the provisions of the Pension Rules as well as the provisions of the Payment of Gratuity Act. The Payment of Gratuity Act being - a special provision for payment of gratuity, unless there is any provision therein which excludes its applicability to an employee who is otherwise governed by the provisions of the Pension Rules, it is not possible for us to hold that the respondent is not entitled to the gratuity under the Payment of Gratuity Act. The only provision which was pointed out is the definition of "employee" in Section 2(e) which excludes the employees of the Central Government and State Governments receiving pension and gratuity under the Pension Rules but not an employee of the MCD. The MCD employee, therefore, would be entitled to the payment of gratuity under the Payment of Gratuity Act. The mere fact that the gratuity is provided for under the Pension Rules will not disentitle him to get the payment of gratuity under the Payment of Gratuity Act. In view of the overriding provisions contained in Section 14 of the Payment of Gratuity Act, the provision for gratuity under the Pension Rules will have no effect. Possibly for this reason, Section 5 of the Payment of Gratuity Act has conferred authority on the appropriate Government to exempt any establishment from the operation of the provisions of the Act, if in its opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Admittedly MCD has not taken any steps to invoke the power of the Central Government u/s 5 of the Payment of Gratuity Act. In the aforesaid premises, we are of the considered opinion that the employees of the MCD would be entitled to the payment of gratuity under the Payment of Gratuity Act notwithstanding the fact that the provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. Needless to mention that the employees cannot claim gratuity available under the Pension Rules.

11. The Apex Court in Allahabad Bank & others v. All India Allahabad Bank Retired Employees Association, 2010 (1) S.C.T. 531 : 2010 (1) RSJ 663 held that unless the establishment is granted exemption from the operation of the provisions of the Act, by the appropriate Government, the Act would be applicable, being a welfare legislation. Exemption could also be granted only on the ground that the employee was in receipt of gratuity or pensionary benefits which were more favourable than the benefits conferred under the Act and the right of gratuity was a statutory right. Relevant observation read as under:

14. Gratuity payable to an employee on the termination of his employment after rendering continuous service for not less than 5 years and on superannuation or retirement or resignation etc. being a statutory right cannot be taken away except in accordance with the provisions of the Act whereunder an exemption from such payment may be granted only by the appropriate Government u/s 5 of the Act which itself is a conditional power. No exemption could be granted by any Government unless it is established that the employees are in receipt of gratuity or pension benefits which are more favourable than the benefits conferred under the Act.

12. Thus, keeping in view the statutory liability of the respondents under the Act and the fact that the school was paying gratuity after 1989, as per Central Government Scheme, in lieu of the existing scheme, the denial of gratuity was not justified. Accordingly, the petitioner is liable to be paid gratuity for his period of service from 01.07.1981 to 27.08.1992. Keeping in view the fact that the petitioner has been denied his entitlement for a period of more than 20 years, he is also liable to be paid the said amount alongwith compound interest @ 8% since Section 8 of the Act itself provides that the amount of gratuity could be recovered with compound interest. Section 8 reads as under:

8. Recovery of Gratuity.- If the amount of gratuity payable under this Act is not paid by the employer, within the prescribed time, to the person entitled thereto, the controlling authority shall, on an application made to it in this behalf by the aggrieved person, issue a certificate for that amount to the Collector, who shall recover the same, together with compound interest thereon [at such rate as the Central Government may, by notification, specify] from the date of expiry of the prescribed time, as arrears of land revenue and pay the same to the person entitled thereto:

[Provided that the Controlling Authority shall, before issuing a certificate under this section, give the employer a reasonable opportunity of showing cause against the issue of such certificate: Provided further that the amount of interest payable under this section shall, in no case, exceed the amount of gratuity payable under this Act].

13. Accordingly, the respondents are directed to pay the amount of gratuity for the period of service rendered by the petitioner from 01.07.1981 to 27.08.1992 alongwith compound interest @ 8% per annum from 01.10.1992, within a period of two months from the receipt of a certified copy of this order. However, the amount of interest shall not exceed the amount of gratuity payable under the Act. Writ petition is allowed in the abovestated terms.