(2001) 04 GUJ CK 0051

In the Gujarat High Court

Case No : S.C.A. No. 9755 of 1998

Himatbhai Panchabhai Makwana APPELLANT

Vs

Jiviben Khimabhai and Another RESPONDENT

Date of Decision : 20-04-2001

Acts Referred:

Payment of Gratuity (Central) Rules, 1972 — Rule 10(1)
Payment of Gratuity Act, 1972 — Section 7(7)

Citation : (2002) 22 GLH 398 : (2002) 2 LLJ 241

Hon'ble Judges : K.M. Mehta, J

Bench : Single Bench

Advocate : R.A. Mishra, for the Appellant; Bhushan B. Oza, M.A. Panwala, A.D. Oza, G.P., H.C. Patel, A.G.P. and Parekh, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Mehta, J.—Leave to add controlling authority as party respondent.

The petitioner Himatbhai Panchabhai Makwana, Proprietor Param Shakti Ceramic Industries. Ambawadi, Ahmedabad-petitioner has filed this petition against the judgment and order dated March 26, 1998 passed by the appellate authority, Payment of Gratuity in appeal No. 39 of 1997. The appellate authority by its impugned judgment and order was pleased to condone the delay in filing the application by the employee in the interest of employee and after condoning the delay also decided the matter on merits that the employee-respondent is entitled to payment of gratuity as per the Payment of Gratuity Act (hereinafter referred to as ''the Act'') and Payment of Gratuity Rules (hereinafter referred to as ''the Rules''). It may be noted that the petitioner has also filed review application on May 6, 1998 which has also been rejected by the authority on July 15, 1998.

2. The facts giving rise to this petition are as under:

Jiviben Khimabhai respondent-original employee, was working with Param Shakti Ceramic Industries since 1978 and she worked there upto April 8, 1990. The contention of the employee is that she has resigned from the service of the Petitioner on April 8, 1990 and therefore she is entitled to payment of gratuity as per the provisions of the Act. Her case before the authority was that in spite of the provisions of the Act, the employer has not paid any amount of gratuity to her.

When the employer failed and neglected to make payment of gratuity as per the provisions of the Act, on October 14, 1996 the employee had filed an application as per the provisions of the Act and Rules particularly Rule 10 Form F. The employer failed and neglected to scrutinize the said application and did not even entertain the application of the employee.

As the employer failed and neglected to consider the application of the employee, the employee was constrained to file application on December 11, 1996 as per Rule 10(1) of the Rules in Form N before the Controlling Authority, Payment of Gratuity. In the said application it has been stated that she had served the employer from March 8, 1978 to April 8, 1990 and the last salary which was drawn by her was Rs. 1000/- per month from the employer and therefore she was entitled to Rs. 16,060/- as payment of gratuity as per the provisions of the Act and Rules.

The Controlling Authority after receiving the said application being Application No. 277 of 1996 was pleased to issue notice to the employer-petitioner on December 19, 1996 with a direction that the employer must remain present on January 6, 1997. The respondent employee has also produced certain documents before the authority on January 20, 1997.

The employer has filed reply dated February 20, 1997 before the Controlling Authority and raised preliminary contention that the application filed by the employee is barred by limitation and the same should be rejected on the ground of limitation.

However, except raising this preliminary contention, the employer failed and neglected to give any alternative submission on merits of the matter.

The Controlling Authority by its order dated February 24, 1997 was pleased to hold that as per Section 7(1) read with Section 7(5) of the Act, application filed by the employee is barred by period of limitation. Even the employee as per the provisions of Section 7(5) of the Act did not file the application for condonation of delay and therefore also her application is required to be rejected.

3. Being aggrieved and dissatisfied with the said order the employee filed an appeal before the appellate authority, Payment of Gratuity on September 22, 1997. The appellate authority thereafter issued notice to the employer and the respondent also filed reply to that appeal on February 9, 1998.

4. The appellate authority after hearing both the parties by its judgment and order dated March 26, 1998 has come to the conclusion that application for condonation of delay has to be considered on the ground that the employee had

worked from July 4, 1980 and she is entitled to Rs. 16,060/- as payment of gratuity as per the provisions of the Act and the Rules and on merits of the matter, the employer has not controverted any of the facts of the employee in this behalf. The payment of gratuity is a provision for which the employee has done and I therefore there is no question of application being barred by limitation and in the interest of the employee the same should be granted and the employer should pay gratuity of Rs. 16,0607- to the employee in this behalf.

5. Thereafter, it appears that the employer has also filed a review application on May 6, 1998 and the said application was rejected on July 15, 1998. Thereafter, the Controlling Authority by its communication dated August 5, 1998 directed the employer-petitioner to pay Rs. 16,060/- to the respondent employee.

6. Being aggrieved and dissatisfied with the aforesaid, the Petitioner has filed this Petition before this Court challenging the said action.

7. On behalf of the Petitioner Mr. R.A. Mishra, learned advocate appeared. On behalf of the Controlling Authority Mr. Patel and Ms. Parekh appeared. Mr. Bushan O. appeared on behalf of the employee. The learned A.G.P. had contacted the Officers and brought the original record before this Court and rendered very valuable assistance to this Court for deciding this very old matter. Mr. Oza has also rendered very able assistance to support the order of the authority in this behalf.

8. Before I consider the rival contention let me consider even provisions of Payment of Gratuity Act. Payment of Gratuity Act provides for payment of gratuity to the employees employed in factories, mines, oil-fields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto. Section 2 of the Act provides definitions. Section 2(a) of the Act defines ''appropriate Government''. Section 2(a)(ii) provides for appropriate Government in any other case, the State Government. Section 2(b) provides for ''completed year of service'' means continuous service for one year. Section 2(c) of the Act provides for ''continuous service'' which means continuous service as defined in Section 2A. Section 2(d) of the Act provides for ''controlling authority'' which means an authority appointed by the appropriate Government u/s 3, Section 2(e) of the Act defines the term ''employee''. Section 2(f) of the Act provides for ''employer''. Section 2(o) of the Act provides for ''prescribed'' which means prescribed by Rules made under this Act. Section 2(s) of the Act defines the term ''wages''. Section 2A of the Act provides ''controlling authority''. Section 4 of the Act provides for ''payment of gratuity'' which reads as under:

(i) 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.

Section 7 of the Act provides for determination of the amount of gratuity. The relevant portion of Section 7 of the Act is reproduced hereunder:

"Section 7(1) A person who is eligible for payment of gratuity under this Act or any person authorised, in writing, to act on his behalf shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity.

Section 7(2)- As soon as becomes gratuity payable, the employer shall, whether an application referred to in Sub-section (i) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.

Section 7(3)- The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable.

Section 7(3-A)- If the amount of gratuity payable under Sub-section (3) is not paid by the employer within the period specified in Sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may by notification specify.

Section 7(4) to 7(6). xxxx xxx

Section 7(7)- Any person aggrieved by an order under Sub-section (4), may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf.

Provided that the appropriate Government or the appellate authority as the case may be, may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days.

Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under Sub-section (4), or deposits with the appellate authority such amount.

Section 7(8)- The appropriate Government or the appellate authority, as the case may be, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the controlling authority".

Section 8 of the Act provides for ''recovery of gratuity''. Section 14 of the Act provides for an act to override other enactments etc. Section 15 of the Act provides for Power to make rules.

In exercise of power conferred under Sub-section (1) of Section 15 of the Act, Gujarat Government prescribed rules known as Rules, 1973. Rule 2 of the said Rules provides for certain definitions. Rule 7 of the said Rules provides for an application of gratuity. Rule 7(1) of the said Rules provides as under:

"An employee who is eligible for payment of gratuity under the Act, or any person authorised in writing, to act on his behalf, shall apply, ordinarily within thirty days from the date the gratuity became payable, in Form ''I'' to the employer.

Provided that where the date of superannuation or retirement of an employee is known, the employee may apply to the employer before thirty days of the date of superannuation or retirement. Sub-clause (5) of Rule 7 of the Rules provides for an application for payment of gratuity filed after the expiry of the period specified in this Rule shall also be entertained by the employer, if the applicant adduces sufficient cause for the delay in preferring his claim, and no claim for gratuity under the Act shall be invalid merely because the claimant failed to present his application within the specified period. Any dispute in this regard shall be referred to the controlling authority for his decision. Rule 8 provides for notice for payment of gratuity. Rule 9 of the Rules . provides for mode of payment of gratuity. Rule 10 of the Rules provides application to controlling authority for direction. Rule 10 (A) provides for production of documents. Rule 11 provides procedure for dealing with application for direction. Rule 15 of the Rules provides service of summons or notice. Rule 16 of the Rules provides maintenance of records of cases by the controlling authority. Rule 18 provides for appeal. Rule 19 provides application for recovery of gratuity."

9. Mr. Mishra, learned advocate for the Petitioner states that the first authority has rightly rejected the application on the ground of limitation and rejected the application of the employee as employer has filed an application beyond the period of 7 years. He submitted that the appellate authority has not considered that aspect properly and did not give any cogent and convincing reasons as to why the appellate authority has condoned the delay. He submitted that after condoning the delay the appellate authority has remanded the matter to the original authority so that the original authority can decide the matter on merits. It is stated that in this case the original authority has not decided the case on merit. After condoning the delay the appellate authority has straightway considered the merit of the matter. Therefore, the appellate authority has erred in law while considering the application on merit of the matter. On the other hand Mr. A.D. Oza, learned Government Pleader, through learned A.G.P. Mr. Patel and Ms. Parekh appeared on behalf of the authority. Mr. Oza has tried to support the order of the appellate authority in this behalf. Mr. Oza, learned G.P. has submitted that as per the provisions of Section 4 of the Act liability of payment of gratuity arises as soon as the conditions which are there u/s 4 are fulfilled. In

this case the learned counsel has submitted that the employee has completed 12 years of service and he has given his resignation in the year 1990 and he has also worked for 12 years and his last salary was Rs. 1000/- per month. The learned counsel has submitted that as per Section 7(3) of the Act which has come into force from October 1, 1987 the employer shall arrange to pay the amount of gratuity within 30 days from the date it becomes payable to the person to whom the gratuity is payable. In view of this specific Section, the learned counsel submitted that the liability to pay gratuity arose immediately in the year 1990 as soon as the employee resigned from the service and as per the provisions of Section 4 of the Act the liability has been fastened on the employer and the employer is liable to pay the gratuity to the employee immediately in this behalf. The learned counsel has submitted that the employer has failed and neglected to make: payment of gratuity statutorily then on conjoint reading of Rule 7 read with Rule 10 the employee has to make an application in Form I to the employer that is the effect of Rule 7(1) read with Rule 10 of the Rules, thereafter the employer has again been given power and jurisdiction to scrutinize the application of the employee and after scrutinizing the same, he can still make payment of the gratuity amount after considering whatever his objection in this behalf. If thereafter the gratuity is not paid by the employer then as per Rule 10 the employee has to make an application in Form N in this behalf. After the said application in Form N is made, the controlling authority gets jurisdiction to decide the difference and dispute between the employee and the employer and thereafter it has to adjudicate the payment of gratuity. The controlling authority has right to quantify the payment of gratuity and after the said payment is quantified there is an obligation on the employer to pay the gratuity in this behalf. If any of the parties is aggrieved and dissatisfied with the said order of the controlling authority, he can file appeal before the appellate authority as per Section 7(7) of the Act. The learned counsel for the respondent submitted that Payment of Gratuity Act, 1972 is enacted to introduce a scheme for payment of gratuity for certain industrial and commercial establishments as a measure of social security. There is no gainsaying of the fact that this statute is a beneficent piece of social legislation expressly drafted in the interest of the employees for the payment of statutory gratuity to them. As its preamble indicates, it is made applicable to all employees engaged in factories, mines, oil fields, plantations, ports etc. It also provides for all matters connected therewith or incidental thereto including the expeditious payment of gratuity when it becomes payable. Section 4 of the Act prescribes the statutory liability of the employer to pay gratuity and corresponding right of the employee to receive it whenever it becomes payable. He has also relied on the judgment of the Karnataka High Court in the case of Bhalachandra Krishnaji Kale Vs. The Karnataka State Road Transport Corporation, Bangalore and Others, in which at Para 7 the Court has observed as under at p. 934:

"A reading of the Section makes it clear that the employee acquires a right to receive gratuity on the termination of his employment after he has rendered continuous service for not less than 5 years and the provisions make it abundantly clear that this amount becomes payable on the date of retirement from service on his superannuation, or his retirement or resignation, or on the death or disablement due to accident or disease".

He has further submitted that gratuity is in the nature of a gracious gift and a donor cannot be compelled to make a gift but in the Industrial Law, gratuity came to be recognised as a retiral benefit available as of right to an employee for long, continuous and meritorious service whether such retirement is the result of superannuation, physical disability or otherwise. The Payment of Gratuity Act is a piece of beneficial legislation made in the interests of the employees and it is the intention of the Legislature that the employees should not be allowed to be exploited so as to contract out of the rights conferred on them by the Act when the terms of the contract are detrimental to their interests. The Act is intended to safeguard the employees who served the employer for a long time from penury in their declining years of old age and the helpless dependants of the employees in the event of the employee''s death. As regards limitation, on conjoint reading of the provisions of the Act and the Rules, it becomes clear that the employee has to make an application in Form-I to the employer within 30 (thirty) days from the date of termination or otherwise of the employment. Thereafter, if the employee is unable to obtain gratuity then the employee should file an application in Form-N to the Controlling Authority u/s 7(4) of the Act within 90 (ninety) days from the termination or otherwise of the employment. Application filed after the expiry of the period of 90 days could be accepted by the Controlling Authority if the applicant shows sufficient cause for the delay and the Controlling Authority was satisfied with the cause shown for the delay, the application filed after the expiry of the period of 90 days could be treated as valid application only after delay was condoned. The learned counsel for the respondent submitted that in this case though the Controlling Authority has dismissed the application on the ground of limitation, the appellate authority has considered this aspect and condoned the delay and granted the application on merits of the matter and therefore this Court should not interfere with the said discretion used by the appellate authority in this behalf. The learned counsel has also relied on the Judgment of the Kerala High Court in the case of Kerala Electrical and Allied Engineering Co. Ltd. Vs. Raveendran Pillai and Others, where the Division Bench of the Kerala High Court in para 10 has held thus at p. 1003:

"What we have to do here is only to examine whether the direction given by the learned single Judge to the appellant to pay the balance amount of gratuity to the respondents is legal and valid. Inasmuch as the respondents had already retired from service as early as in the year 1996 and 1997 the amendment to the Standing Orders with retrospective effect will not take away the accrued rights available to the respondents on the date of retirement. The above conclusion of the learned Judge is just and proper. We do not see any reason whatsoever to interfere with the impugned judgment."

10. The learned counsel further submitted that under Article 227 of the Constitution of India this Court has a very limited jurisdiction and when the appellate authority has passed perfectly justified order in law this Court may not interfere with the said finding of the authorities in this behalf. The authority has not committed any error of law in this behalf.

11. I have considered the rival submissions and I have also considered the provisions of the Act and Rules and also gone through the entire relevant records which have been supplied to me by the learned A.G.P. In my view the liability to pay gratuity arose as soon as the condition precedent provided u/s 4 of the Act (is fulfilled). In this case it is an admitted fact that the employee had resigned in the year 1990 and he has worked right from 1978 to 1990 so he has worked for more than 12 years and he has also got more than 240 days earned leave. Therefore, the employer was in law liable to make payment of gratuity to the employee particularly when the employee has served the employer for more than 12 years. In this case the employer has failed and neglected to make payment of gratuity.

12. As indicated earlier, thereafter, in my view when the employee had filed an application under Form I as per Rule 10, it was again an obligation on the employer to make payment in this behalf after scrutinising the same. However, the employer failed and neglected to scrutinise the same and even did , not pay any amount in spite of the fact that there was no dispute on the facts of the case.

13. In my view thereafter when the Form N application was filed before the controlling authority, the employer had filed only application on the ground that the application was barred by limitation and did not raise any contention on merits of the matter. The authority did not consider Section 7(3) of the Act which casts an obligation on the employer to make the payment within 30 days from the date it becomes payable to the person to whom the gratuity is payable. In my view the obligation to pay gratuity on the employer is in three stages: (i) as soon as resignation is accepted within one month from the date of resignation the employer is liable to make payment, (ii) if failed and neglected to make payment when the employee files application under Form I as per Rule 10, it is an obligation on the employer to pay up gratuity after scrutinizing and verifying the said application. In this case the employer has failed and neglected to do the same. Thereafter only the employee has filed the present application in Form No. N. Section 7(i) of the Act provides application to be filed to an employer. Section 7(3-A) of the Act also provides that if the amount of gratuity payable under Sub-section (3) is not paid by the employer within the period specified in Sub-section (3), he has to pay gratuity with interest in this behalf. As per Section 7(4)(a) even if there is any dispute as to the amount of gratuity payable to an employee under this Act the employer is under an obligation to deposit the said amount before the controlling authority.

14. In my view Section 7(4) of the Act read with Explanation enables the employee to make an application to the controlling authority for action

contemplated. However, Rule 10(1)(iii) requires to make an application only if the employer fails to make payment. Proviso to Rule 10 also enables the controlling authority to accept any application after expiry of such time on sufficient cause being shown by the applicant.

15. In my view Rule 7 is intended only to give an opportunity to the employer to make expeditious payment of gratuity within 30 days from the date it becomes payable to the employee to whom gratuity is payable.

16. In my view gratuity is in the nature of benefit available to an employee for a long and continuous service with the employer which is given at the time of superannuation, physical disability or otherwise the Payment of Gratuity Act is a beneficial legislation made in the interest of employee. Section 4 of the Act is charging Section which provides that gratuity shall be payable to an employee on the termination after he has rendered continuous service for not (sic) less than five years on his superannuation or on his retirement or resignation or on his death or disablement due to accident or disease.

17. In my view once the precedent u/s 4 is satisfied, it is an obligation on the employer to pay gratuity in this behalf.

18. In this case the first authority by his order dated February 24, 1997 was pleased to dismiss the application only on the ground of limitation. However, thereafter, appeal was filed and the appellate authority by his order dated March 26, 1998 was pleased to condone the delay and passed order on merits of the matter. Mr. Mishra, learned advocate, for the petitioner has tried to seriously assail the order of the appellate authority and stated that the appellate authority has incorrectly decided the matter and has not given any reason for condonation of delay. It is, no doubt, true that the appellate authority has not given reasons for condonation of delay. However, Mr. Oza, learned advocate for the respondent workman, stated that the Hon''ble Supreme Court in the case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, has summarized the principle for condonation of delay. The Hon''ble Supreme Court has observed as under at p. 501 of LLJ:

"1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of Justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day''s delay must be explained" does not mean that a pedantic approach should be made. Why not every hour''s delay, every second''s delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-

deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay, In fact, he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal."

He further submitted that over and above as stated earlier, payment of gratuity is a piece of beneficial legislation made in the interest of employees and therefore also the words "sufficient cause" must be given a liberal interpretation in this behalf. The legislature: has cast duty on the employer to pay gratuity on earlier two occasions but the employer failed and neglected to pay the same. In this context also, the words "sufficient cause" must be liberally interpreted. The question of existence of "sufficient cause" is one to be decided on the facts and in the circumstances of a particular case. He submitted that all that needed is that the concerned parties should show justifiable and sufficient grounds to excuse the delay. He submitted that in determining sufficient cause, circumstances of the case ought to be considered and in this case looking to the peculiar facts and circumstances of the case, the appellate authority was right in condoning the delay.

19. I have considered the above submissions. I have also considered the facts and circumstances of the case, the intention of the legislature in enacting Payment of Gratuity Act and the decisions of the Hon''ble Supreme Court. In my view therefore, the appellate authority was right in condoning the delay. In fact, when the employer has failed and neglected to make payment earlier on two occasions now it does not lie in the mouth of the employer to say that the application of the employee is barred by limitation. In fact the appellate authority has passed just and legal and valid order in the interest of employee and that is to be upheld in this behalf.

20. During the pendency of this Writ Petition my brother Mr. Justice P.B. majUMDAR has on December 27, 2000 passed order that the employer has to deposit amount of gratuity before the controlling authority. I have been informed by the controlling authority that the employer had deposited the amount before it. Therefore, I direct that the controlling authority must issue an account payee cheque in the name of respondent immediately particularly after receipt of Writ of this Court. In view of the same, the petition is rejected with costs throughout.

