

(2007) 04 AHC CK 0199
In the Allahabad High Court

Hindalco Industries Limited (Formerly known as Hindustan Aluminium Corporation Limited)

APPELLANT

Vs

Shiv Narayan Singh, Deputy Labour Commissioner Cum-Controlling Authority under the Payment and Gratuity Act and Additional Labour Commissioner-Cum-Appellate Authority

RESPONDENT

Date of Decision : 27-04-2007

Acts Referred:

Payment of Gratuity Act, 1972 — Section 2A, 4

Citation : (2007) 7 AWC 7062 : (2007) 114 FLR 783

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—Heard the learned Counsel for the petitioner. In spite of service of the summons on the opposite party no one has appeared.

2. The petitioner has challenged the validity and legality of the order passed by the controlling authority under the Payment of Gratuity Act as well as the Appellate Order. Briefly stated, the facts leading to the filing of the petition is, that the respondent No. 1 was an employee in the petitioner's establishment and had worked upto 6th August 1977 and thereafter his services was discharged. It is alleged that full and final settlement of his dues was paid to him. It transpires that after two years the respondent No. 1 was given a fresh employment w.e.f. 9.7.1979 and he continued to work till he retired from the service w.e.f. 11.8.1987. The workman filed an application u/s 4 of the Payment of Gratuity Act for payment of his gratuity which included the period from 1967 to 6.8.1977 and from 9.7.1979 till the date of his retirement.

3. The petitioner objected to the inclusion of the period prior to 6.8.1977 and submitted that his earlier employment for the period 1967 to 1977 had come to an end and that from 6.8.1977 to 8.7.1978, there was no master and servant relationship between the petitioner and the workman and therefore, the period

prior to 9.7.1977 could not be included towards his length of service while calculating the payment of gratuity under Sub-section (2) of Section 4 of the Payment of Gratuity Act. The Controlling Authority rejected the submission of the petitioner and also took into consideration the length of service of the workman prior to the period of 9.7.1979. The petitioner filed an appeal which was also rejected. Consequently, the writ petition.

4. Before proceeding, it would be better to have a look at Section 4(1) of the Payment of Gratuity Act which 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, 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:

[Provided further that in the 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 nominee or heirs is a 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.]

5. From the aforesaid it is clear that gratuity becomes payable to an employee upon rendering continuous service and for not less than 5 years. Continuous service has been defined u/s 2A which reads as under:

2. A. Continuous service - For the purposes 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, rule or regulations governing the employees of the establishment), lay-off, strike or a lockout or cessation of work not due to any fault of the employee, whether such uninterrupted service was rendered before or after the commencement of this Act.

(2) Where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause(1), for any period of one year or six months" he shall be deemed to be in continuous

service under the employer-

(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) two hundred and forty days, in any other case;

(b) for the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) one hundred and twenty days, in any other case;

[Explanation-For the purposes of clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which-

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under the Industrial Disputes Act, 1947 (14 of 1947), or under any other law applicable to the establishment;

(ii) he has been on leave with full wages, earned in the previous year.

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks]

(3) Where an employee, employed in a seasonal establishment, is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than seventy-five per cent., of the number of days on which the establishment was in operation during such period].

6. The Supreme Court in the case of State of Tamil Nadu and Ors. v. Nellai Cotton Mills and Ors. 1991 (i) L.L.J.198 held-

We agree with the High Court that the word "non-employment" would include retrenchment as well and a person whose services have been terminated or discharged albeit illegal cannot at all be said to be a person in service, much less in continuous service. Therefore, the period of non-employment or the period

after discharge cannot be counted for the purpose of giving continuity of service.

7. The petitioner has filed Annexure 3-A which is a discharge notice dated 6.8.1977. Consequently, the petitioner having not worked between the period 6.8.1977 till the date of his re employment w.e.f. 9.7.1979, the said period as well as the previous period of employment cannot be included while calculating the gratuity u/s 4 of the Gratuity Act, inasmuch as, the said period would not be treated to be in continuous service as contemplated u/s 2A of the Gratuity Act.

8. In *Dungerbha Meghabhai v. Shri Arbuda Mills Ltd. And Anr.* 1996 L.A.B.I.C. 262, the Gujarat High Court held that suspension from employment removes the master and servant relationship and that subsequent re-employment after two or three years would not entitle the workman from claiming service rendered prior to re-employment as continuous service rendered by the workman prior to 9.7.1979 cannot be taken into consideration while calculating the gratuity.

9. In view of the aforesaid, the impugned orders cannot be sustained and is quashed. The w/it petition is allowed.