

(2009) 04 MAD CK 0219

In the Madras High Court

Case No : Writ Appeal No. 95 of 2008 and M.P. No's. 1 to 3 of 2008

Indian Overseas Bank

APPELLANT

Vs

The Regional Labour Commissioner (C) and Appellate
Authority Payment of Gratuity Act Ministry of Labour, The
Assistant Labour Commissioner (C)-I and Controlling
Authority under the Payment of Gratuity Act Ministry of
Labour and N. Venkatasubramanian

RESPONDENT

Date of Decision : 28-04-2009

Acts Referred:

Constitution of India, 1950 — Article 14

Payment of Gratuity Act, 1972 — Section 14, 18, 4, 4(2), 4(3)

Citation : (2009) 4 LLJ 874

Hon'ble Judges : P. Jyothimani, J; Aruna Jagadeesan, J

Bench : Division Bench

Advocate : N.G.R. Prasad, for the Appellant; S. Seethalakshmi, ACGSC for R.1
and R.2 and C.R. Chandrasekaran, for R. 3, for the Respondent

Final Decision : Dismissed

Judgement

P. Jyothimani, J.—The appeal is directed against the order of the learned Judge dated 20.11.2007, passed in W.P. No. 17591 of 2005, by

which the learned Judge has dismissed the writ petition.

2. The facts leading to the filing of the writ petition are that the third respondent joined in the appellant bank on 30.12.1957 and he retired as an

Officer on 31.5.1994. According to the appellant bank, he was paid gratuity of Rs. 1 lakh as per Section 4(3) of the Payment of Gratuity Act,

1972 (in short, "the Act"), which was the maximum payable at the time of retirement of the third respondent, since the amount payable as gratuity

as per the bank Scheme was less beneficial.

2(a). It appears that there was a Settlement between the Indian Banks' Association representing the management and the Apex Level Officers

Association on 23.6.1995. As per the Settlement, the revision of salary to the employees was given with retrospective effect from 1.7.1993. It is

admitted that the appellant has paid the arrears of salary as per the salary revision to the third respondent from 1.7.1993 till 31.5.1994. As per the

Settlement, in respect of payment of gratuity, the benefit of revised salary would be taken only in respect of employees who retired on or after

1.11.1994.

2(b). The third respondent filed an application before the controlling authority u/s 7 of the Act, claiming an amount of Rs. 85,400/-, being the

difference in gratuity based on the revision of salary with interest as per the Settlement stated above.

3. It was the case of the appellant bank that only for the payment of revision of salary, the date "1.7.1993" was made as cut-off date as per the

Settlement and for gratuity, the cut-off date was fixed as 1.11.1994 and inasmuch as the third respondent retired much before the said date viz., on

31.5.1994, he is not entitled for the revision of gratuity based on the revised salary. It was the contention of the appellant that the said different cut-

off date for gratuity was challenged and it was ultimately decided on 30.8.2002 in W.P. No. 7365 of 1999 to the effect that the cut off date for

gratuity, namely 1.11.1994, is valid.

4. It is seen that the second respondent, the controlling authority under the Payment of Gratuity Act, by order dated 21.3.2003, directed the

difference in gratuity, viz., Rs. 85,400/- to be paid to the third respondent. It was against the said order, the appellant has filed a statutory appeal

as provided u/s 7(7) of the Act before the first respondent, who by order dated 27.4.2005, rejected the appeal stating that the Settlement cannot

stand contrary to the provisions of the Act. It was, challenging the said order of the first respondent confirming the order of the second respondent,

the appellant filed the above writ petition.

5. The main contention of the appellant before this Court as well as before the authorities under the Act was that the third respondent who joined in

the appellant bank in the year 1957 retired on 31.5.1994 and as per the Payment of Gratuity Act, 1972, he was paid the gratuity of Rs. 1 lakh,

which was the maximum amount permissible at the time of retirement of the third respondent and which was beneficial to him. The Settlement

arrived at after the retirement of the third respondent viz., on 23.6.1995 was in respect of revision of salary with retrospective effect from 1.7.1993

and the difference in salary from 1.7.1993 till the date of retirement of the third respondent viz., 31.5.1994 was paid to him.

5(a). It was also the contention of the appellant bank that in the agreement of revision of salary, a cut-off date for payment of gratuity has been

fixed and accordingly, only the officers/persons who retired from 1.11.1994 should be paid gratuity as per the Settlement and therefore, the third

respondent was paid the gratuity as per the Payment of Gratuity Act which was more beneficial to him than the one under the bank Scheme.

6. The contention raised on behalf of the third respondent was that admittedly when the salary was revised as per the settlement entered on

23.6.1995, it is only the revised salary which should be the basis for fixing the gratuity also. It was the further contention of the third respondent

that upholding of the validity of cut-off date for payment of gratuity for the persons who retired from 1.11.1994 has no application as far as the 3rd

respondent is concerned, because by virtue of amendment to the Payment of Gratuity Act which came into effect on 24.5.1994, the salary ceiling

limit of Rs. 2,500/- per month has been taken away and the third respondent was an employee of the appellant bank on the date of amendment

viz., 24.5.1994 and by virtue of the settlement, the salary was revised as on 1.7.1993 and he was entitled for the benefits of gratuity as given under

the Payment of Gratuity Act on the basis of the salary revised as per the settlement. The learned Judge having accepted the said contention of the

third respondent, dismissed the writ petition. As against the judgment of the learned Judge, the present appeal has been filed by the appellant bank.

7. It is the contention of Mr. N.G.R.Prasad, learned Counsel appearing for the appellant bank that once the cut-off date was prescribed as

1.11.1994 for payment of gratuity in respect of the employees of the appellant bank as per the Settlement, the validity of which date has been

upheld by this Court, the third respondent who retired much before the said date viz., on 31.5.1994, is not entitled to the benefit of the Settlement

for payment of gratuity. It is his submission that when the validity of cut-off date viz., 1.11.1994 for the purpose of Gratuity Act has been upheld, it

is not open to the third respondent to contend that his salary has been revised by virtue of Settlement with effect from 1.7.1993 and based on the revision, arrears of salary has been paid from 1.7.1993 to 31.5.1994 and therefore, he is entitled for the benefit of gratuity on the salary revised under the Settlement as per the Payment of Gratuity Act.

7 (a). He would submit that when, as per the Payment of Gratuity Act, the maximum limit is Rs. 1 lakh even by applying the revised salary, since

the third respondent could make his claim under the Payment of Gratuity Act only, he would not be entitled for more than Rs. 1 lakh.

7 (b). Further, he would submit that the third respondent can claim the benefit either under the Payment of Gratuity Act or under the bank Scheme

and as per law, if the bank Scheme is more beneficial, he would be entitled for the same and vice-versa. According to him, the third respondent,

cannot mingle the Scheme under the Settlement with the revision of his pay for the purpose of payment of gratuity under the Gratuity Act and

contend that under the Scheme he would be entitled for a better benefit and therefore, more amount should be paid as gratuity, by ignoring the

principles under the Payment of Gratuity Act.

8. On the other hand, it is the contention of Mr. C.R. Chandrasekaran, learned Counsel appearing for the third respondent that when the Payment

of Gratuity Act got amended on 21.5.1994, removing the ceiling limit of Rs. 2,500/- per month, on the said date, the third respondent was an

employee within the meaning of the Gratuity Act entitled for the benefit. He would submit that u/s 4(5) of the Payment of Gratuity Act, the

employees will be entitled for better benefit.

8(a). It is his submission that when the third respondent remained as a member under the Payment of Gratuity Act till his retirement eligible for

gratuity, correspondingly, when subsequent revision of pay was made which had been given effect from 1.7.1993, he would be entitled to treat the

said revised pay under the Settlement as basic pay for the purpose of gratuity and therefore, he would be entitled for Rs. 1,85,400/- as gratuity.

8(b). It is his submission that fixing of cut-off date as 1.11.1994 for the purpose of payment of gratuity is not applicable to the third respondent

who was an employee within the meaning of the Payment of Gratuity Act till the date of his retirement and according to him, the said cut-off date

1.11.1994 applies to those persons who were not employees on that date within the meaning of the Payment of Gratuity Act. He would rely upon

the First Bench judgment of this Court in *P. Sevaraj v. Management of Shardlow India Ltd.* reported in 2007(1) LLN 835 to substantiate his

contention that the last drawn wages has to be taken into consideration.

8(c). His further submission is that Section 14 of the Payment of Gratuity Act, 1972 is having overriding effect and once the salary has been refixed

by the Settlement, the difference of which had already been paid to him, he will be entitled for the gratuity on the basis of basic pay refixed as per

the Settlement and he will be entitled for the gratuity under the Scheme in which there is no maximum limit.

9. On the facts of the case, it is clear that the revision of salary was made as per the Settlement entered into between the Indian Banks"

Association representing its management and the Officers Association on 23.6.1995, by which the basic salary of the third respondent was revised

as Rs. 9950/- from the old salary of Rs. 5050/- and that was given effect from 1.7.1993. By including the dearness allowance along with the basic

pay, the third respondent was receiving an amount of Rs. 9,837.37 before the Settlement, while after revision, he was receiving a total salary of Rs.

11,027.76.

10. The Indian Overseas Bank (Officers") Service (Amendment) Regulations, 1996 came into effect from 17.8.1996, i.e., after the date of

retirement of the third respondent. It was, as per the amended Regulations, the gratuity payable to officers ceased to be in service during the period

from 1.7.1993 to 31.10.1994 was fixed as per the regulation 4(1) and that amendment has not been given any retrospective effect. In the said

amendment, Clause 46 is relevant which is as follows:

46. GRATUITY:

(1) Every Officer shall be eligible or gratuity on:

(a) Retirement;

(b) Death;

(c) Disablement rendering him unfit for further service as certified by a medical officer approved by the Bank;

(d) Resignation after completing ten years of continuous service; or

(e) Termination of service in any other way except by way of punishment after completion of 10 years of service.

(2) The amount of gratuity payable to an Officer shall be one month's pay for every completed year of service, subject to a maximum of 15

month's pay.

Provided that where an Officer has completed more than 30 years of service, he shall be eligible by way of gratuity for an additional amount at the

rate of one half of a month's pay for each completed year of service beyond 30 years.

Provided further that pay for the purpose of Gratuity for an officer who ceased to be in service during the period 1.7.1993 to 31.10.1994 shall be

with regard to scale of pay as specified in sub-regulation (1) of regulation 4.

11. It is, by virtue of the second proviso to Clause 46(2), the Settlement was entered on 23.6.1995, wherein it is stated that the gratuity as

amended shall be paid only to the employees who ceased to be in the bank service on or after 1.11.1994. The relevant clause of the settlement is

as follows:

7. Gratuity:

As per the consensus reached, gratuity computed in terms of the Officers' Service Regulations to be now amended shall be recalculated and

difference paid only to such eligible officer employees who cease to be in the bank's service on or after 1.11.1994. No arrears on account of

gratuity shall be payable to officers who ceased to be in bank's service prior to 1.11.1994.

12. As per the Settlement, the revised scale of pay has been given effect from 1.7.1993. On facts, it is clear in this case and it is also admitted that

by virtue of the amendment to the Payment of Gratuity Act, 1972 which came into effect on 24.5.1994, the ceiling limit of Rs. 2,500/- per month

has been taken away, with the result the third respondent was an employee under the Payment of Gratuity Act on the said date viz., 24.5.1994

since he retired only on 31.5.1994.

13. Mr. N.G.R. Prasad, learned Counsel appearing for the appellant would rely upon the judgment of the Division Bench of Delhi High Court in

Kailash Nath Singhal Vs. Union of India, to substantiate his contention that the cut-off date prescribed as 1.11.1993 under the respondent Bank

Pension Scheme cannot be said to be arbitrary or whimsical.

14. Section 4 of the Payment of Gratuity Act, 1972, Sub-section (5) makes it clear that if the employee gets better benefit of gratuity under any award, agreement or contract with the employer, the same shall not be prevented. The said section is as follows:

4. Payment of gratuity:

(1) to (4) xxx

(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.

15. It is also relevant to point out that Section 14 of the Payment of Gratuity Act, 1972 is given overriding effect notwithstanding any inconsistent provision or instrument or contract and the said section is as follows:

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.

16. In *Syndicate Bank and Others Vs. Celine Thomas and Others*, it was held that any memorandum of understanding which includes any regulation cannot meddle with a statutory prescription and the relevant portion of the judgment is as follows:

Para 7. Memorandum of Understanding cannot meddle with the statutory prescriptions. Nobody can agree by way of a settlement at the behest of

an organisation taking away the benefit conferred on individuals by way of statutes or statutory rules. There need not have any authority to

substantiate this. Statutory prescriptions crystallize the rights in favour of the subjects of that statute. It cannot be varied to their disadvantage unless

otherwise by amendment to the statute.

Para 13. ...No nexus is pointed out for bringing any classification between those who retired between April 1, 1992 and October 31, 1994 and

those who retired between November 1, 1994 and June 23, 1995. Both these artificial groups of retirees had retired from service prior to the date

of arriving at the Memorandum of Understanding, but after the date of

retrospectively to the MoU. They therefore form themselves into one class as all of them retired later than the giving effect to the pay revision by the Memorandum of Understanding. When persons forming same class are treated differently it violates Article 14 of the Constitution denying them equal protection of law and equality before law. Denial of gratuity to the writ petitioners is therefore discriminatory. Consequently, on that reason alone, we have to sustain the view taken by the learned Single Judge.

Para 14. Consequently, W.A. No. 1584 of 2002 stands dismissed and O.P. No. 23514 of 1998 stands allowed with consequential direction to pay the respective employees the amount of gratuity payable based on the revised pay as entitled to them.

17. It was held by the learned Single Judge of the Karnataka High Court in Y.R. Shenoy v. Syndicate Bank and Ors. 2003 (2) LLJ 997, that any agreement which will offend the rights given under the Payment of Gratuity Act will be void ab initio and the offending portion of the agreement could be separated without nullifying the agreement and it is that portion of the agreement which is against the Payment of Gratuity Act will be declared as unlawful. In fact, that was a case similar to the present case where the employees retired between 1.7.1993 and 31.10.1994 were denied the benefit of revision of salary for the purpose of payment of gratuity and it was held as follows:

"Para 12. Therefore, gratuity is a statutory right to be earned by long and continuous service, which is payable as a retiral benefit, a definite sum as lumpsum payment on retirement. It is a right if accrued cannot be taken away by agreement between the parties. Amount payable is also definite, by agreement between the parties it cannot be reduced, but it could be enhanced.

Para 13. Re. Point No. (ii). The joint note entered into between the management and the officers' union is binding on the parties. However, if the term of the agreement is inconsistent with the provisions of the Payment of Gratuity Act, 1972 such a term of the agreement has no effect. Even otherwise the consideration or object of an agreement is of such a nature that if permitted it would defeat the provisions of any law the said term of the agreement would be unlawful, void ab-initio and unenforceable. When the gratuity payable to an employee is statutory right which he has

earned by long and continuous service, thus when once it is accrued, by agreement of the parties what is accrued cannot be deprived. Merely because an employee had the benefit of the other provisions of the agreement that does not estop the employee from challenging that portion of the agreement which is unlawful, void ab-initio. If the said offending portion of the agreement could be separated without nullifying the entire agreement it is permissible to challenge that portion of the agreement which is unlawful. Therefore, it is open to the petitioners who had the benefit of the remaining portion of the agreement to challenge that portion of the agreement which deprives them of a statutory right which has accrued to them by their long continuous service.

18. In *P. Selvaraj v. Management of Shardlow India Ltd.* Chennai 2007(1) LLN 835, a Division Bench of this Court consisting A.P. Shah, J. (as

he then was) and K. Chandru, J., when a similar argument was advanced that at the time of retirement of employee, the retiral benefits were given

and the gratuity accounts was settled and the long term practice of the management settling the gratuity only on the basis of the figures available on

the date of death, retirement, etc., The said contention was rejected in the following lines:

35. ...We are not impressed with this line of argument. The Gratuity Act is a beneficial piece of legislation and it should receive an interpretation

consistent with the principles of equity and fair play. Therefore, the term "last drawn wage" found in Section 4(2) of the Gratuity Act should receive

its full meaning and it cannot give any fractured interpretation. Further, the settlement provides as to what should be the wages that should be paid

to a workman and that the management cannot adopt an artificial interpretation with reference to the term "wages". It is in this context, the term

wages" which is defined under the Gratuity Act, must include not only what is paid but also what is payable to a workman....

19. It is brought to our notice that recently in similar circumstances, K. Chandru, J. in W.P. No. 6746 of 1999 by order dated 2.2.2009 has also

taken the same view and we are in agreement of the view of the learned Judge.

20. In view of the established legal position, the judgment of the Supreme Court in *Herbertsons Limited Vs. The Workmen of Herbertsons Limited*

and Others, which relates to the Industrial Disputes Act and the settlement u/s

18 of the said Act, that too, between two unions, on which reliance was placed by Thiru N.G.R. Prasad, learned Counsel for the appellant has no application to the facts of the case.

21. In these circumstances, the contention of the learned Counsel for the appellant that in the Settlement entered into in respect of revision of

salary, a subsequent cut-off date viz., 1.11.1994 was fixed for the purpose of gratuity claim and hence, the third respondent is not entitled to claim

more than what he was granted as gratuity cannot be countenanced especially when the third respondent was an employee within the meaning of

Payment of Gratuity Act, 1972, even after its amendment dated 25.4.1994. Further, the agreement entered into cannot take away the rights of

parties, particularly when a better benefit is given to the employees. In such view of the matter, it is not possible to accept the contention of the

learned Counsel for the appellant and we find no reason to interfere with the order of the learned Judge.

The writ appeal therefore fails and the same is dismissed. No costs. Connected miscellaneous petitions are closed.