
(2009) 02 KL CK 0040
In the High Court Of Kerala
Case No : WP (C) No. 9489 of 2006 (D)

Julius K.J.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 19-02-2009

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 50(1)
Constitution of India, 1950 — Article 141
Contract Act, 1872 — Section 23
Payment of Gratuity Act, 1972 — Section 4(2), 4(3), 4(5)

Citation : (2009) 121 FLR 1090 : (2009) 1 KLJ 882 : (2009) 4 LLJ 860

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : T.C. Govinda Swamy, D. Heera and Sumy P. Baby, for the Appellant;
K.R. Sunil, A.M. Shaffique E.K. Nandakumar and A.K. Jayasankar Nambiar, for
the Respondent

Final Decision : Allowed

Judgement

P.R. Ramachandra Menon, J.—The challenge involved in this writ petition is as to the proper method of calculating gratuity payable to the petitioner, particularly as to the computation of the "per day wage" as contemplated under the relevant scheme. The question is whether it has to be arrived at by dividing the monthly wages by the deviser of 30 (the total number of days in the month) or by 26 (after excluding the four Sundays/holidays). It is also in dispute whether the petitioner is justified in taking a "U" turn to contend that the computation of the "per day wages" shall only be in conformity with the stipulation under the statute i.e., Section 4(2) of the Payment of Gratuity Act ("Act" in short) after praying for and obtaining the benefit under a Scheme.

2. The petitioner while working as Assistant Executive Engineer (Electrical) under the second respondent retired from the service on 30-06-1997 after attaining at the age of superannuation. In fact, the second respondent being an autonomous body and separate legal entity/the CCS. (Pension) Rules are not applicable as

such. However, the Board of Trustees, on the basis of a resolution passed has adopted the CCS. (Pension) Rules, which govern the service conditions, particularly as to the retirement benefits payable to the employees. However, in the case of gratuity, it is contended by the second respondent that the benefits payable to the workers/employees were under the provisions of the Act, calculation under the Act being more beneficial and as a natural consequence, the amounts payable thereunder had to be limited to the maximum amount of Rs. one lakh as stipulated thereunder.

3. Pursuant to retirement of the petitioner, the benefits were worked out under the Act, the calculation according to the second respondent being more favourable to the employees and the maximum amount of Rs. one lakh was disbursed to him. After obtaining this amount, the petitioner approached this Court stating that he was eligible to get much higher benefits under Exhibit P1 scheme. It is to be noted that the maximum amount of gratuity payable under both the Payment of Gratuity Act, 1972 as well as under the CCS. (Pension) Rules were originally Rs. one lakh. The Pension Rules were amended and the maximum ceiling was enhanced to Rs. 2.5 lakhs with effect from 1-4-1995, whereas, the Act was amended raising the ceiling initially to Rs. 2.5 lakhs and thereafter, to Rs. 3.5 lakhs with effect from 24-9-2007.

4. After delivering Exhibit P1 scheme, taking note of the fact that the Act was amended only with effect from 24-9-1997, the first respondent/Government brought about a rider confining the benefit of Exhibit P1 scheme to those employees who have retired on or after 24-9-1997 i.e., date of the amendment of the Act. Aggrieved by the above restrictive provision, the petitioner challenged Exhibit P2 before this Court by filing O.P. No. 24282 of 2001.

5. During the pendency of the O.P. No. 24282 of 2001, the first respondent, after considering the grievance exposed from different corners, issued a further clarification vide communication dated 20-2-2004 (Exhibit P3) whereby, it was specified that the maximum ceiling of gratuity payable under Exhibit P1/P2 would stand enhanced from Rs. One lakh to Rs. 2.5 lakhs to Rs. 3.5 lakhs with effect from 1-1-1997. A copy of the said proceedings was produced by the petitioner in O.P. No. 24282 of 2001 as "Exhibit P6" and after hearing, the said original petition was disposed of vide Exhibit P4 judgment directing the second respondent to pay the balance amount as might be payable to the petitioner pursuant to exhibit P6 therein (Exhibit P3 in the instant case). It was pursuant to the said verdict that the second respondent compound the actual gratuity payable to the petitioner as Rs. 1,62,560/- instead of Rs. one Lakh as originally paid vide Exhibit P5, correctness of which is subjected to challenge in the present writ petition.

6. It is submitted by the learned Counsel for the petitioner that neither Exhibit P1 nor Exhibit P3 does speak about the manner of computation of "per day wages" and in the said circumstances, it was every much essential for the second respondent to have effected the computation only in accordance with the

Payment of Gratuity Act, particularly in view of the "Explanation" given in Section 4(2) of the Act. Exhibit P5 has been sought to be intercepted in so far as the second respondent has computed the benefit under Rule 50(1)(a) of the CCS. (Pension) Rules.

7. The learned Counsel for the second respondent highlighted the inconsistent stand being pursued by the petitioner simultaneously seeking to have the benefits both under the Act and under the Scheme so as to suit to his requirements and convenience. The learned Counsel submits that the petitioner, after having succeeded in getting Exhibit P1 Judgment from this Court getting rid of the maximum ceiling of Rs. 1 lakh prescribed under the Act, stating that he was eligible to have the benefit under different Scheme, it was no more open to him to approach this Court to have the gratuity calculated/computed following the norms under the Act. In other words, the petitioner wants to have the best out of both the streams, which is not permissible, submits the learned Counsel. It is further pointed out by the learned Counsel for the second respondent that the second respondent being an autonomous body was not bound by Exhibit P1 scheme since the Board of Trustees had not adopted the same and never implemented or given effect to.

8 True, though such a contention has been raised by the second respondent in paragraph 7 of the counter affidavit, the petitioner has not rebutted the same by filing any reply affidavit. But it is pertinent to note that there was no case for the second respondent ever before, when the earlier proceedings were finalised vide Exhibit P4 judgment passed on 15-3-2004. On the other hand, Exhibit P3 in the present case prescribing the extent of benefit payable under Exhibit P1 scheme, was produced before this Court in O.P. No. 24282 of 2001 (as Exhibit P6), and it was accordingly that Exhibit P4 judgment was passed by this Court directing the second respondent to pay all benefits flowing therefrom to the petitioner. Admittedly, the said verdict has not been challenged by either side and it has become final.

9. Payment of Gratuity Act, 1972 is a beneficial piece of legislation. It is also true, by virtue of Section 4(5) of the Act, the employee is entitled to choose the better option, if there exists any other scheme/provision for payment of Gratuity. But the crucial question whether an employee can opt to have the best from both the streams simultaneously; had come up for consideration before the Apex Court in Beed District Central Co-operative Bank Ltd. Vs. State of Maharashtra and Others, .

10. In the said case, the factual situation was that besides the provision for payment of gratuity under the Act there existed a scheme as well, wherein the "rate" for calculating the computation of gratuity was much higher, though the maximum ceiling was lower than the ceiling specified under the Act. Under the said scheme, gratuity had to be computed reckoning the "per day wages" and the amount payable was 26 days' wages for every completed year of service, subject to the maximum/ceiling of Rs. 1.7 lakhs from 20-7-1996 to 30-11-1999,

which was subsequently raised to Rs. 2.5 lakhs from 1-12-1999 to 17-9-2005.1116 contention of the employees was that the amount should be worked out by adopting the "higher rate" (26 days" wages for every completed year of service) as prescribed under the Scheme and the maximum ceiling had to be taken as provided under the Act - in view of Section 4(5) of the Act providing for the better option.

11. The Apex Court observed that the Scheme of the Bank in the above case was one of the terms of contract of employment between the parties and under the Scheme, the employee were entitled to Gratuity on the following terms:

(i) eligibility to receive gratuity - Minimum 5 years of service. (ii) rate of gratuity - 26 days" wages for every completed year of service. (iii) the maximum amount of gratuity - Rs. 2,50,000/-

The contention raised by the employees was that the third stipulation prescribing the maximum ceiling at Rs. 2.5 lakhs was repugnant to Section 4(3) of the Act, and void u/s 23 of the Contract Act, which hence should have been severed from the rest of the contract applying the "Blue pencil doctrine", to be replaced by Section 4(3) of the Act.

12. After considering the rival contentions, it was specifically held by the Apex Court that the said "Blue pencil doctrine" cannot be said to have any application to the said case and instead, applying "golden Rule of interpretation of statute" (as discussed in paragraph 14), it was held that the Act did not contemplate that the workman would be at liberty to opt for better terms of the contract, while keeping the option open in respect of a part of the statute. Accordingly, the law was declared and the impugned verdicts were set aside holding that the workman had to confine to the benefits provided either under the Act or under the Scheme (emphasis supplied).

13. Coming to the instant case, the issue stands entirely on a different footing. By virtue of the declaration of law by the Apex Court, it is true that it is no more open to the petitioner to contend that he should be given the best of both under the Act and under Exhibits P1/P3 Scheme. But the question is whether the second respondent was right in not calculating the "per day wages" so as to compute the gratuity payable at the rate of 15 days wages for every completed year of service as contemplated under the Scheme, which benefit has been ordered to be given by Exhibit P4 judgment. Obviously, calculation of "per day wages" was never a subject matter involved in the decision of the Apex Court reported in Beed District Central Co-operative Bank Ltd. Vs. State of Maharashtra and Others, . The learned Counsel for the second respondent contends that the extent of benefits payable to the petitioner having been finalised on, the basis of Exhibit P4 judgment, it is not correct or proper to go back to the stipulation given under the head "explanation" to Section 4(2) of the Act enabling the calculation of "per day wages" by dividing the monthly wages by "26" (after excluding the holidays).

14. The Payment of Gratuity Act, 1972 was amended incorporating the above head "explanation" u/s 4(2) only with effect from 19-10-1997. But even much prior to that, the position of law had been crystallized by virtue of the decision rendered by the Hon"ble Supreme Court in Digvijay Woolen Mills Limited v. Mahendra Prataprai Buch reported in AIR 1980 SC 194, wherein it was held that the "per day wages" were to be calculated by dividing the monthly wages by the deviser of "26" (after excluding the Sundays) and not by 30. The above decision was considered and re-affirmed in the subsequent decision reported in Jeewanlal (1929) Ltd. Vs. Appellate Authority under the Payment of Gratuity Act and Others, as well. This being the position, it can easily be said that even if no reference is made to the "explanation" provided u/s 4(2) of the Payment of Gratuity Act, 1972, the law laid down by the Apex Court is quite unambiguous and the "per day wages" had to be computed by dividing the monthly wages by the deviser of "26". The law declared by the Apex Court being the law of the land by virtue of Article 141 of Constitution of India, this Court and every other Court/ Authority in India are very much bound to follow the same. In such circumstances, it is clear that the calculation made by the Second respondent vide Exhibit P5 under Rule 50(1)(a) of the CCS. (Pension) Rules is not correct or sustainable.

15. In the above facts and circumstances, Exhibit P5 order passed by the second respondent is set aside. The second respondent is directed to re-consider the quantum of gratuity payable to the petitioner reckoning the "per day wages" by dividing the monthly wages by "26", and by granting the benefit flowing from Exhibit P3 as ordered to be paid vide Exhibit P4 Judgment (where it is niarked as Exhibit P6). Final orders in this regard shall be passed and the balance amount flowing therefrom shall be disbursed to the petitioner as expeditiously as possible and at any rate, within a period of three months from the date of receipt of a copy of this judgment. Petitioner shall produce a copy of this judgment before the second respondent for pursuing further steps. It is made clear that the petitioner will not be entitled to get interest on the due amount, the said prayer having already been rejected by this Court vide Exhibit P4.

16. The writ petition is allowed to the above extent.