

(2008) 02 MP CK 0099
In the Madhya Pradesh High Court

Kedar Nath Mishra

APPELLANT

Vs

Appellant Authority under Payment of Gratuity Act, 1972 and
Commissioner (C) and Another

RESPONDENT

Date of Decision : 21-02-2008

Acts Referred:

Aluminium Corporation of India Limited (Acquisition and Transfer of Aluminium Undertaking) Act, 1984 — Section 12, 5, 6
Constitution of India, 1950 — Article 227
Industrial Disputes Act, 1947 — Section 25F, 25FF
Payment of Gratuity Act, 1972 — Section 2A, 7

Citation : (2008) 118 FLR 640 : (2008) ILR (MP) 1923 : (2008) 3 LLJ 311 :
(2008) 2 MPLJ 438

Hon'ble Judges : R.K. Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.K. Gupta, J.

The present petition is filed by the petitioner invoking the writ jurisdiction of this Court under Article 227 of the Constitution of India challenging the order March 13, 2004, Annexure P/5 which has been passed by the Appellate Authority in exercise of its powers vested with him u/s 7 of the Payment of Gratuity Act, 1972 whereby the appeal preferred by the respondent Management has been allowed and the order passed by the Controlling Authority has been set aside.

The facts leading to the present case are that the petitioner earlier was an employee of the Coal Mines Welfare Organisation and the aforesaid Act was repealed by the Coal Mines Welfare Organisation (Repeal Act, 1986) with effect from October 1, 1986. The Repeal Act has been filed by the petitioner as Annexure P/1 to the petition. As a consequence of the same, all the assets and liabilities in relation to the erstwhile employees employed in Coal Mines Welfare Organisation stood transferred to different Companies with effect from October 1, 1986 and the services of the petitioner were transferred to respondent No. 2

The petitioner retired from the services of the respondents with effect from January 15, 1999 on reaching the age of superannuation of 60 years.

Since the amount of gratuity was not properly paid to the petitioner, therefore, the petitioner filed a case before the Controlling authority appointed under the Payment of Gratuity Act.

The case of the petitioner before the Controlling Authority was that full period of employment of the petitioner has not been counted. It is submitted by him that the period of services which he has rendered with the Coal Mines Welfare Organisation has not been counted for the purposes of calculating the amount of gratuity and accordingly he felt aggrieved and filed a case before the Controlling Authority for the proper calculation of the gratuity.

The Controlling Authority allowed the claim in favour of the petitioner by passing an order Annexure P/4. The Controlling Authority directed that the respondents have committed an illegality by not counting the previous services rendered by the petitioner with the Coal Mines Welfare Organisation.

The respondent Management preferred an appeal to the Appellate Authority and the appellate authority by its impugned order Annexure P/5 allowed the appeal and consequently the order passed by the Controlling Authority was set aside.

In view of the aforesaid factual backdrop of the case, the question in the present case is whether the respondent Management were justified in not counting the previous services rendered by the petitioner with the Coal Mines Welfare Organisation and whether the respondent Management is justified in counting the services of the petitioner from the date the services of the petitioner were transferred to the respondent No. 1.

The submission that the previous services should have been counted as made by learned Counsel for the petitioner is to be appreciated in the light of the Coal Mines Labour Welfare Fund (Repeal Act, 1985), a copy of which is placed on record as Annexure P/1. By virtue of Sub-section (1) of Section 4 of the Act, on dissolution of the Welfare Organisation, all rights and privileges of the Welfare Organisation become the rights and privileges, respectively, of the Central Government. Clause-b further provides that all properties movable and immovable, including cash balance, reserve funds, investments and moneys lying to the credit of the Welfare Organisation and all rights and interests in, or arising out of, such properties as were immediately before the appointed day, in the ownership, possession, power or control of the Welfare Organisation, and all books of account, registers and records and all other documents of whatever nature relating thereto, shall vest in the Central Government. Clause-C further provides that all borrowings, liabilities and obligations of the Welfare Organisation of whatever kind and subsisting immediately before the appointed day shall be deemed on and from such day to be the borrowings, liabilities and obligations, as the case may be, of the Central Government. Clause-D further provides that all contracts entered into, and all matters and things engaged to be

done by, with or for, the Welfare Organisation and subsisting immediately before the appointed day shall be deemed, on and from such day to have been entered into or engaged to be done by, into or for, the Central Government. Clause-e provides that all licenses and permits granted to the Welfare Organisation and in force immediately before the appointed day shall be deemed on and from such a day to have been granted to the Central Government and shall have effect accordingly.

Section 5 of the Act further provides the power of Central Government to direct vesting of rights in a Government company. Notwithstanding anything contained in Section 4, the Central Government may, if it is satisfied that a Government company is willing to comply, or has complied, with such terms and conditions as that Government may think fit to impose, direct, by an order in writing that the right, title and interest of the Welfare Organisation in relation to any property shall, instead of continuing to vest in it, vest in the Government company.

The Central Government also issued a circular on September 22, 1986, copy of which is placed on record as Annexure P/2. According to para 3 of the said circular, all the regular employees of Coal Mines Welfare Organisation will also stand transferred to the address of respective Co. Companies with effect from October 1, 1986 with certain terms and conditions. Clause I of the said conditions stipulate that employees opting for such absorption with the new employer will receive the same terminal and other benefits for their Government services prior to absorption in Coal Companies. This is the relevant provision. It also provide for exercise of option by an employee. The option was to be notified whether the employees employed by the erstwhile Coal Mines Welfare Organisation are willing to be retained in Government services or exercise their option for voluntary retirement and according to the same, the option was liable to be exercised within a period of 30 days.

The petitioner employee exercised his option not to be retained in the Government service but opted to be absorbed in any of the Government Companies. The option form submitted by the petitioner has been filed by the respondents which is Annexure R/1 to the return. According to the option form, the employee will become member of the Contributory Provident Fund under the Coal Mines Provident Fund Scheme w.e.f. August 1, 1985 from the date of his absorption. There was a specific provision with regard to Provident Fund and Gratuity in the said option form and the relevant portion of the same is reproduced as under:

Provident Fund and Gratuity:

The employees will become member of the Contributory Provident Fund under the Coal Mines Provident Fund Scheme with effect from August 1, 1985 or October 1, 1986, as the case may be. Gratuity will be admissible for the services rendered in the Company in terms of payment of Gratuity Act and relevant provisions of NCWA-III. Past services rendered with Coal Mines Welfare

Organisation will not be taken into account for the purpose.

In respect of the services rendered by the employees upto July 31, 1985 or September 30, 1986, as the case may be, under Coal Mines Welfare Organisation they will be eligible to receive such retirement benefits from the Government as would have been admissible to them on that date, as may be decided by the Government.

According to the same, it was a specific condition with reference to the calculation of gratuity. According to the option form, the gratuity will be admissible for the services rendered in the Company in terms of the Payment of Gratuity Act and also in accordance with relevant provisions of NCWA-III. It also provides that the past services rendered with Coal Mines Welfare Organisation will not be taken into account for the purpose. It also provides that in respect of services rendered by the employees upto July 31, 1985 or September 30, 1986, as the case may be under Coal Mines Welfare Organisation they will be eligible to receive such retirement benefits from the Government as would have been admissible to them on that date, as may be decided by the Government.

In view of the Coal Mines Labour Welfare Fund (Repeal Act, 1986) including the option and also the order passed by the Central Government, it is clear that after the absorption, the employees those who were willing to work with the Coal Mines were to submit their option for their absorption, with any of the Companies as directed by the Central Government. The petitioner has chosen not to be retained in the services of the Welfare Organisation and as a consequence of the option submitted by the petitioner, the Central Government as per Annexure P/2 directed for transfer of services of the petitioner with the new Company. It is pertinent to mention that the petitioner has also accepted the amount of terminal benefits with respect to the period of service rendered by him with the Welfare Organisation. Petitioner since has accepted its terminal benefits with respect to the period for which he has served with the Welfare Organisation, it is, therefore, clear from the aforesaid documents that after absorption, the petitioner shall become the employee of the new Company.

On the basis of the same, it is thus clear that the services of the petitioner after his absorption with the respondent Company were treated to be a fresh employment. Learned Counsel for the petitioner could not show any provision either from the Repeal Act or from any of the circular including the option form that the Central Government has agreed that the services of the employees employed in the erstwhile Coal Mines Welfare Organisation shall be continued with the same terms and conditions with the new Company where the employees are absorbed. In the absence of any provision as such for continuing the services of the petitioner with the new Company, it cannot be concluded that there had been no interruption of services of the petitioner. The conditions which have already been discussed above shows that it will be a fresh employment on transfer of assets and liabilities to the Company belonging to erstwhile Coal Mines Welfare Organisation." On absorption, it vests with the Central

Government and the Central Government directed that the services as such shall be absorbed by the Company as directed by the Central Government.

Learned Counsel appearing on behalf of the petitioner relied upon the judgment passed by the Apex Court in *M.C. Chamaraju Vs. Hind Nippon Rural Industrial (P) Ltd.*, . On this basis, counsel for the petitioner submitted that the Apex Court has already dealt with the question with regard to completion of 15 years continuous service which is the eligibility for claiming the gratuity and on this basis it is submitted by him that the entire services of the workman have to be counted. In the said case, it is seen that the employee was working in different divisions belong to the same Company and on the date of retirement, the services rendered by an employee in other divisions belonging to the same Company were not taken into account and, therefore, the Apex Court came to the conclusion that the services rendered by an employee in other organisation belonging to the same Company have to be counted for the purposes of eligibility of 5 years continuous service to make an employee eligible to claim his gratuity. The question which was involved in the present case is directly not considered by the Apex Court in the judgment cited by the learned Counsel for the petitioner which is involved in the present case. The Apex Court was considering the question with regard to power of High Courts to exercise judicial review while deciding the case has held that the High Court while exercising the powers of judicial review has limitations. The Apex Court further came to the conclusion that Payment of Gratuity Act was enacted with a view to grant benefits to workers, a "weaker Section" in the industrial adjudicatory process and thereafter it was held that once a single Judge has allowed the petition preferred by an employee, that should not have been quashed by the Division Bench. Apart from the aforesaid, in the judgment cited, the question was entirely different than the counting of services rendered by an employee in the other Organisation belonging to the same employer and while applying the provisions of functional integrity" it was held that the services are to be counted.

In the present case, the question is entirely different. The question in the present case is that as a consequence of the repeal act (Annexure P/1), whether the services of the petitioner which he has rendered with the Coal Mines Welfare Organisation can be counted for the purpose of gratuity particularly when there had already been a scheme floated by the Central Government by issuing a circular Annexure P/2 that the present employer shall not be entitled for any liability or to pay any benefit to the employee with respect to the period of service rendered by an employee during the period when he was in the employment of the Coal Mines Welfare Organisation.

Learned Counsel for the petitioner relied upon the judgment passed by the Division Bench of Calcutta High Court in the case of *Bharat Aluminium Co. Ltd. and Others v. Sukumar Mukherjee and Ors.* 1999 (81) IFLR 52. On this basis, the learned Counsel for the petitioner submitted that the case decided by the Division Bench of the Calcutta High Court fully applies to the present facts and

circumstances of the case.

The submission so made by learned Counsel for the petitioner is considered.

The facts of the case decided by the Division Bench of Calcutta High Court had been that the employee initially was an employee of Government Company. The said Company subsequently was taken over by the Aluminium Corporation of India Limited (Acquisition and Transfer of Aluminium Undertaking) Act, 1984. The employees thereafter become employees of the Central Government. The Apex Court was considering Section 5 of the aforesaid Act wherein it was provided that every liability of the company in relation to the Aluminium undertaking in respect of any period prior to the appointed day shall be the liability of the company and shall be enforceable against it and not against the Central Government or where the Aluminium undertaking is directed u/s 6, to vest in the Bharat Aluminium Company, against that company. The Calcutta High Court also considered Section 12 of the Act wherein a provision was made that every person who has been immediately before the appointed day, employed in the Aluminium undertaking shall become on and from the appointed day, an employee of the Central Government. Section 12 further provides that where the Aluminium undertaking is directed u/s 6, to vest in the Bharat Aluminium Company, an employee of that company on and from the date of such vesting, and shall hold office or service under the Central Government or the Bharat Aluminium Company, as the case may be with the same rights and privileges as to pension, gratuity and other matters as would have been admissible to him if there had been no such vesting and shall continue to do so unless and until his employment under the Central Government or the Bharat Aluminium Company, as the case may be, is duly terminated or until his remuneration and other conditions of service are duly altered by the Central Government or the Bharat Aluminium Company, as the case may be. Sub-section (2) of Section 12 further provides that notwithstanding anything contained in the Industrial Disputes Act, 1947, or in any other law for the time being in force, the transfer of the services of any officer or other person employed in the Aluminium undertaking to the Central Government or the Bharat Aluminium Company shall not entitle such officer or other employee to any compensation under this Act or under any other law for the time being in force and no such claim shall be entertained by any Court, Tribunal or other authority.

On the basis of the same, the Division Bench of Calcutta High Court was referring and interpreting the meaning and scope of Section 12 of the Act of 1984 and thereafter the Calcutta High Court has taken into account the definition of the word "continuous service" as defined u/s 2-A of Payment of Gratuity Act and thereafter came to the conclusion that the employees transferred to the Central Government shall count their seniority by including the period which they have rendered in the Aluminium Company.

Learned Counsel for the petitioner had "not been able to show any analogous provision in the repeal act which is Annexure P/1. In the repeal Act namely Coal Mines Labour Welfare Fund (Repeal Act, 1986), there is no analogous provision

to Section 12 which was considered by the Division Bench of Calcutta High Court. Section 12 which was considered by the Division Bench of Calcutta High Court itself provides that there will be no break in service and the employees of the erstwhile Aluminium undertaking shall be continued with the same rights and privileges and the pension, gratuity and other benefits which would have been admissible to the employees as such, if there had been no such vesting and shall continue to do so until and unless the Management is directed.

Sub-section (2) of Section 12 creates a legal fiction that on transfer of such undertaking with the Central Government, no compensation shall be payable as per Section 25-FF of the Industrial Disputes Act, 1947. For the purpose of clarity, it would be necessary to reproduce Section 25-FF of the Industrial Disputes Act, 1947 which reads as under:

25-FF. Compensation to workmen in case of transfer of undertakings. Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25-F, as if the workman had been retrenched:

Provided that nothing in this Section shall apply to a workman in any case where there has been a change of employers by reason of the transfer, if:

- (a) the service of the workman has not been interrupted by such transfer,
- (b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and
- (c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continued and has not been interrupted by the transfer.

A reading of Section 25-FF itself provides that in case the employee are to be continued with the same terms and conditions of service without there being any interruption then the employee as such shall not be entitled for any compensation u/s 25-FF of the Industrial Disputes Act, 1947. Thus, according to Section 25-FF of the I.D. Act, 1947, the compensation to the workman was payable on transfer of an undertaking and the compensation as such was only payable with reference on the certain conditions that the services of workman has not been interrupted on such transfer. The terms and conditions of service applicable to the workman has not been interrupted by such transfer. Section 12, as considered by the Calcutta High Court specifically provides that there will be no break in service, the same condition of service were applicable in favour of an employee which were applicable before the transfer of such undertaking and no

compensation under the provisions of Industrial Disputes Act, 1947 shall be payable.

Whole of the reading of Section 12 which was considered by the Division Bench of Calcutta High Court itself indicates that there was no break in service in the condition of transfer. The new employer was under a legal obligation to pay the terminal benefits in terms of Section 25-FF of the Industrial Disputes Act, 1947. The provisions under the repeal Act which are applicable in the present case are entirely different than the provisions considered by the Division Bench of Calcutta High Court. At first instance, there is no analogous provision to Section 12 which was considered by the Division Bench of Calcutta High Court, in the present repeal Act which is relevant. There is no provision that the services of the employees shall be continued with the same terms and conditions. There is no provision that there would be any interruption into the services of the petitioner. On the contrary, the condition in the option form is that the employee shall be treated to be an employee after his absorption in the Company. Further there is provision that for the previous services rendered by an employee with the erstwhile Coal Mines Welfare Organisation, the erstwhile employer shall pay gratuity. The gratuity has already been received by the petitioner. Thus, after when the gratuity has been received by the petitioner then the gratuity as such be payable only on termination of the employment and not before that. If the services are continued because of the transfer then no gratuity is payable to an employee by the erstwhile employer. The services after absorption shall be the new services for the employee. There is no stipulation in the repeal Act or in any of the provision of the circulars issued by the Central Government that the services of the employee shall be continued with the same terms and conditions without any interruption.

In view of the aforesaid, I do not find that the judgment passed by the Division Bench of Calcutta High Court on which the heavy reliance was placed by the petitioner shall apply in the present case. The judgment referred by the Division Bench of Calcutta High Court was on a different facts and circumstances and also the Division Bench was interpreting entirely different provision and in the present case there is no analogous provision in the repeal act.

For the reasons stated hereinabove, the present case has no merit and is dismissed.