

(2002) 07 MAD CK 0228

In the Madras High Court

Case No : Writ Petition No"s. 18572 and 18575 of 1994 and W.M.P. No"s. 28213 and 28216 of 1994

Krishnaveni Textile Mills, Singanallur, Coimbatore

APPELLANT

Vs

The Asst. Labour Commissioner (Central) (Controlling Authority under the Payment of Gratuity Act) Shastri Bhavan, Madras, The Regional Labour Commissioner (Central) (Appellate Authority under the payment of Gratuity Act) Shastri Bhavan, Madras, A. Karuppanna Thevar and R. Ayyasamy

RESPONDENT

Date of Decision : 22-07-2002

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Payment of Gratuity Act, 1972 — Section 2A, 2A(1), 7(7)

Citation : (2002) 95 FLR 1164 : (2002) 3 LLJ 607 : (2002) 3 MLJ 74

Hon'ble Judges : A. Kulasekaran, J

Bench : Single Bench

Advocate : T.S. Gopalan, for the Appellant; Meera Gupta, for RR 1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

A. Kulasekaran, J.—The Petitioner has filed the Writ Petition No. 18572 of 1994 seeking for a Writ of Certiotari to call for the records of the 2nd respondent in Gratuity appeal No.3/94 dated 19-08-1994 confirming the order of the first respondent dated 31-12-1993 in P.G. Application No.32/1992-D2 and quash the same.

2. Writ Petition No. 18575 of 1994 has been filed by the Petitioner seeking for a Writ of Certiotari to call for the records of the 2nd respondent in Gratuity appeal No.4/94 dated 19-08-1994 confirming the order of the first respondent dated 31-12-1993 in P.G. Application No.33/1992-D2 and quash the same.

3. In both the writ petitions, the petitioners and the respondents are one and the

same. Hence, this common order is passed.

4. The facts culled out from the affidavit in both the writ petitions are that the petitioners mill was originally a public Limited company and it was closed on 14-05-1968. Thereafter, the mill was taken over by Tamil Nadu Textile Corporation and the mill was re-opened on 18-12-1969. The Petitioners mill is a public utility service as defined in Section 2(n) of the Industrial Disputes Act. The 3rd respondent in W.P. No. 18572 of 1994 was employed in the Petitioner Mill; that he has attained the age of superannuation on 13-01-1991 and he was paid a sum of Rs.29,274/- towards gratuity. The 3rd respondent in W.P. No. 18575 of 1994 was employed in the Petitioner Mill; that he has attained the age of superannuation on 17-01-1991 and he was paid a sum of Rs.31,378.50 towards gratuity.

5. The workman of the Petitioners mill, including the 3rd respondent in W.P. No. 18572 of 1994 went on strike during the years 1979, 1980, 1983 and 1987; that the workman of the petitioners mill, including the 3rd respondent in W.P. No. 18575 of 1994 went on strike during the years 1978, 1979, 1980 and 1990. According to the petitioners, the strikes were illegal, which amounts to interruption in service within the meaning of Section 2A(i) of the Payment of Gratuity Act. According to the petitioners, the 3rd respondents in both the writ petitions are not entitled to gratuity during the period of closure between 14-05-1968 and 17-12-1969 and during the period of strike mentioned above. The 3rd respondents in these writ petitions have filed an application before the 1st respondent claiming that they are entitled to gratuity during the period of strike also, which was allowed by the 1st respondent by order dated 31-12-1993. The petitioners preferred an appeal before the 2nd respondent u/s 7(7) of the Payment of Gratuity Act 1972, which was dismissed. Hence these writ petition.

6. According to the learned counsel for the petitioners Mr. T.S. Gopalan, as per Section 2A(1) of the Payment of Gratuity Act, the period of strike could only be deemed as period of interruption of service and not otherwise. The petitioners also produced a statement to show that during the period of strike, the 3rd respondent in W.P. No. 18572 of 1994 has worked only for 204.4 days, 210.1 days, 210.7 days and 225.6 days during the year 1979, 1980, 1983 and 1987 respectively. In so far as the petitioner in W.P. No. 18575 of 1994 is concerned, he has worked only for 173 days, 192.4 days, 200.2 days and 204.7 days during the years 1978, 1979, 1980 and 1990 respectively. The respondents 1 and 2 have failed to note that an illegal strike would constitute interrupted service as it is one, which is due to the fault of the employee; that the petitioners mill being a public utility service within the meaning of Section 2(n) of the Industrial Dispute Act, any strike in the petitioners mill would be illegal as per Sections 21, 22 and 23 of the Industrial Disputes Act; that no declaration by a competent authority or Court is warranted; that the 1st and 2nd respondents ought to have held based on the materials placed before them that the strike during the relevant period was an illegal one and the 3rd respondents being parties to the illegal strike were

not entitled to payment of gratuity for the said period; that under the provisions of Industrial Disputes Act, it would not be possible for a party to get such a declaration that a strike is illegal unless one of the parties raised an industrial dispute to claim wages during the period of such strike; that the 2nd respondent was not justified in holding that the 3rd respondents should be intimated for the disentitlement for gratuity; that the 2nd respondent ought to have noted that only under circumstances mentioned in Section 4(6) of the Payment of Gratuity Act, a workman would be entitled to opportunity and not otherwise.

7. The learned counsel appearing for the petitioners relied on a judgment of Justice. K. Raviraja Pandian reported in 2001 4 LLN 855 (General Manager, Sri Sarada Mills, Coimbatore Vs. Asst. Labour Commissioner (Central) (Controlling Authority under Payment of Gratuity Act) Madras and others) wherein in Para Nos. 6 and 7 it was held thus:-

"6. The issue as to whether the third respondent has participated in an illegal strike or whether respondent No.3 has put in continuous service of 240 days is a pure question of fact and that would have been resolved by the Controlling Authority on the basis of the materials made available before him, but without giving any finding of fact to resolve the dispute, the Controlling Authority has went on interpreting Section 2A as stated above as if even for denying the gratuity for participation of strike, the Management has to issue a prior notice and follow the principles of natural justice. But on the entire reading of the order of the Controlling Authority as well as the appellate authority, there is no factual finding as to whether the third respondent was in continuous service during the disputed years of 1979 and 1985 or whether he has worked actually less than 240 days for the purpose of calculating 240 days as per the definition of Section 2A. Without there being a factual finding on the basis of the material made available, the interpretation of the statutory provision as done by the authorities would not by itself resolve the issue.

7. In view of the non-availability of the factual position, the order of the controlling authority as confirmed by the appellate authority is set aside and the matter is remanded back to the controlling authority to decide the issue by giving a factual finding as discussed above. This exercise has to be done within the period of three months from the date of receipt of copy of this order from this Court. If the records are called for pursuant to the rule nisi issued, the registry is directed to despatch the records back to the controlling authority forthwith."

In the above judgment, the learned judge held that there is no factual finding either by controlling authority or appellate authority as to whether the third respondent-employee was in continuous service are not and remanded the matter back to the controlling authority to decide the issue.

8. The learned counsel for the petitioner relied on another judgment of the Bombay High Court reported in 2001 II LLJ 295 (Bharatiya Arogya Nidhi Sheth

Kantilal C. Parikh General Hospital Vs. Bombay Labour Union and another) wherein in Para No. 12 it was held thus:-

"12. I therefore hold that resort to the disciplinary proceedings against the workmen who have gone on a strike would be wholly legal and fully justified if the employer bona fide believes and decides that the strike resorted to by the workman is an illegal strike and he need not go to a Court of Law to get it declared illegal. I therefore hold that the view taken by the labour court is totally erroneous and is required to be quashed and set aside. The Labour Court has held that since the strike was not declared illegal the act of misconduct going on an illegal strike etc., was not proved before the enquiry officer and therefore, the findings of the enquiry officer have been held perverse by the labour court. I therefore hold that the findings of the enquiry officer are not perverse and are fully justified in the given circumstances. The Act of misconduct of going on an illegal strike from January 2, 1987 to February 16, 1987 in the petitioners Hospital stands fully proved. There is another very important and crucial aspect and that is that the State Government has declared the Hospital as Public utility services u/s 22 of the Industrial Disputes Act, 1947 and a strike in any such public utility services in contravention of Section 22 of the Industrial Disputes Act would be per se illegal. The strike has been totally prohibited in public utility service by the notification issued by the State Government. The strike resorted to by the workmen of the petitioners hospital is in contravention of the said prohibitory orders of the State Government issued u/s 22 of the Industrial Disputes Act and therefore, this strike is per se illegal as it violates the said notification and the prohibition orders."

In the above judgment, it was held that it is not necessary for the employer to get the strike declared illegal before initiating disciplinary action against the striking workmen, since the Unit was declared as public utility service.

9. The learned counsel appearing for the petitioners relied on a unreported judgment of Justice. P.K. Misra dated 07-06-2002 made in W.P. No. 12833 of 1995 (Kaleeswarar Mills "A" Unit, Coimbatore Vs. The Asst. Labour Commissioner (Central), Controlling Authority under the Payment of Gratuity Act) Shastri Bhavan, Madras-6 and others) wherein in Para-7 it was held thus:-

"7. In the present case, neither the original authority nor the appellate authority has tried to find out as to whether the strike during the relevant period was illegal or not. Since the basic facts are not found, I am inclined to quash the orders passed by the original authority and the appellate authority and to remand the matter to the original authority for fresh disposal. Since the employee had died in the meantime, his legal representative, namely the widow could be allowed to participate in such proceedings and thereafter the matter shall be decided in accordance with law."

10. Now we look into the relevant provisions of the Act:-

Sec. 2(n) of the Industrial Disputes Act:-

Public Utility Service means -

- i) any railway service or any transport service for the carriage of passengers or goods by air
- ii) any service in, or in connection with the working of any major port or dock:
- iii) any postal, telegraph or telephone service
- iv) any industry which supplies power, light or water to the public
- v) any system of public conservancy or sanitation
- vi) any industry specified in the first schedule which the appropriate Government may, if satisfied that public emergency or public interest so requires, by notification in the official gazette, declare to be a public utility service for the purposes of this Act, for such period as may be specified in the notification:

Section 22 of the Industrial Disputes Act- Prohibition of Strikes and Lockouts -

(1) No person employed in a public utility service shall go on strike in breach of contract -

- (a) without giving to the employer notice of strike, as hereinafter provided, within six weeks before striking or;
- (b) within fourteen days of giving such notice: or
- (c) before the expiry of the date of strike specified in any such notice as aforesaid; or
- (d) during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.

Section 23 of the Industrial Disputes Act:-

General prohibition of strikes and lock-outs.-No workman who is employed in any industrial establishment shall go on strike in breach of contract and no employer of any such workman shall declare a lock-out-

(a)during the pendency of conciliation proceedings before a Board and seven days after the conclusion of such proceedings;

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(b)during the pendency of proceedings before.{Subs.by Act 36 of 1956,s.17,for "a Tribunal" (w.e.f.10.3.1957)} [a Labour Court,Tribunal or National Tribunal]and two months after the conclusion of such proceedings;.{Subs.by Act 36 of 1956,s.17,for "a Tribunal" (w.e.f.10.3.1957)}

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.{Subs.by Act 36 of 1956,s.17,for "a Tribunal" (w.e.f.10.3.1957)} [(bb)during the pendency of arbitration proceedings before an arbitrator and two months

after the conclusion of such proceedings, where a notification has been issued under sub-section(3A)of section 10A;or]

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(c) during any period in which a settlement or award is in operation in respect of any of the matters covered by the settlement or award.

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Section 2A of the Payment of Gratuity of Act - Continuous Service - For the purpose 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, rules or regulations governing the employees of the establishment, lay off, strike or a lock out or cessation of work nor due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act.

Section 4(6) of the Payment of Gratuity Act -

(a) the gratuity of an employee, whose services have been terminated for the act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee (may be wholly or partially forfeited)

(i) If the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) If the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

11. A close reading of the provisions of Section 2A of the Payment of Gratuity Act makes it clear that continuous service means (i) uninterrupted service, including services which is interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the same as break in service has been passed in accordance with law) (ii) lay off, strike or a lock out or cessation of work not due to any fault of the employee. If the said conditions are satisfied, the employee shall be treated in continuous service.

12. Section 2(n)(vi) of Industrial Disputes Act contemplates that industries specified in first Schedule which the appropriate government may, if satisfied that public emergency or public interest so requires, by notification in the official

gazzette, declare to be a public utility services for the purpose of this Act for such period as may be specified in the notification. The period shall be six months at the first instance to be extended from time to time, if in the opinion of the appropriate Government, public emergency or public interest requires such extension.

13. Section 4(6) of the Payment of Gratuity Act lays down that if an workman is guilty of serious misconduct such as acts of violation against the Management or other employees or riotous or disorderly behaviour in or near the place of employment, though not directly causing damage is conducive of grave indiscipline, then his gratuity can be forfeited. It is well settled that any decision to forfeit gratuity u/s 4(6)(b) of the Payment of Gratuity Act can be taken only after affording opportunity to the employee.

14. Section 22 of the Industrial Disputes Act relates to prohibition of strikes and lockouts. Sub-clause (1) of Section 22 contemplates that no person employed in a public utility service shall go on strike in breach of contract without giving notice of strike to the employer within six weeks before striking or within 14 days of giving such notice or before the expiry of the date of strike specify not only notice or during the pendency of any conciliation proceedings before a conciliation officer and 7 days notice after the conclusion of such proceedings. Sub-clause 3 of Sec. 22 of the Act defines that notice of strike or lockout shall not be necessary where there is already in existence of strike or lockout as the case may be. Sub-clause 4 of Sec. 22 relates to notice of strike to be given by such number of persons to such persons.

15. Section 23 of the Act contemplates general prohibition of strikes and lockouts. Section 24 speaks about illegal strikes, lockouts if it is commenced or declared in contravention of Sections 22 and 23 of the Act.

16. In this case, the original authority, in its order dated 31-12-1983 has held in Para Nos. 11 and 13 as follows:

"11.Now a period of absence without leave in respect of which no punishment or penalty has been imposed under the standing order or service rules or no order treating such period as break in service has been passed would not operate to interrupt the continuity of service for the purpose of payment of gratuity. Now unless an order in accordance with the standing orders or service rules authorising the management in this behalf has been passed either imposing a punishment or treating without leave as break in service, the period of such absence of the employee shall be deemed to be "continuous service" and will be counted as a part of uninterrupted service. Similar is the case where cessation of work is not due to any fault of the employee concerned. If the employee was willing to work but work was not given to him the period when he had no work cannot be considered as period of interrupted service. If the service is interrupted by lay-off, strike or lock out which was not due to any fault of the employee the period concerned is not excluded as a period of interrupted

service....."

13. Therefore, here in the instant case, it is seen that except for the averments made by the respondent by way of an Exhibit-Chart from wherein they reflected the break in service of the applicant due to sickness, lay off, strike, closure etc., the respondent at no stage had initiated any action for forfeiture of the past service and above all no speaking order was passed by them either under Act, Rules or under the Standing Orders or service regulations of the respondent mill and the Applicant was not given at any stage an opportunity to defend their act as under principles of natural justice....."

17. In this case, the appellate authority in its order dated 19-08-1994 has stated that

"the claim of the appellant that the respondent has actually worked for less than 240 days is not acceptable while calculating 240 days as per the definition u/s 2-A. The respondent has worked for more than the required number of days. No evidence was shown for disproving the respondent's continuous service".

18. It is seen from the order of both the authorities below that except the averments made by the petitioners herein by way of exhibit chart relating to the break in service due to sickness, lay off, strike, closure etc., no document was placed to justify that the cessation of work was due to the fault of the employee. It is also mentioned in the order of the original authority that the petitioner, at no stage had initiated any action for forfeiture of past service of the employee either under Act, Rules or Standing orders or Service Regulations of the Petitioners mill. No opportunity was given to the workman to defend which is violative principles of natural justice. The appellate authority has also confirmed the said findings of the original authority. Both the authorities held that the third respondents worked more than required number of days. It is rather strange that the period of strike alleged in the former writ petition is different in later.

19. Admittedly, the petitioners has not placed any records either before the authorities or before this Court to show that they treated the absence of the employees as break in service in accordance with the standing orders, rules or regulations. In the absence of such evidence, importing the provisions of Sections 22, 23 and 24 of the Industrial Disputes Act will not be of any use to the petitioners. Hence, the contention of the counsel for the petitioners that strike or lock out in the mill automatically disentitles the workman from claiming gratuity for the said period is untenable.

20. The learned counsel appearing for the respondents relied on the judgments of two learned single Judges of this Court and prayed for remittance of the matter to the authorities for deciding the issue whether the strike during the relevant period is illegal or not. I decline the said request as the authorities have rightly found that no documents were placed by the petitioners herein before them to justify that cessation of work was due to the fault of the employees. As rightly pointed out by the authorities below, except the document i.e., exhibit

chart relating to the break in service of the employees due to sickness, leave, strike or closure etc., nothing has been produced. Admittedly, no order has been passed either under the Act or Rules or standing orders forfeiting the services for the relevant period has been passed.

21. The authorities below have rightly pointed out the decisions of the Supreme Court in Dayal Saran Sanan Vs. Union of India (UOI) and Others, wherein it was held in para 2 as follows:-

"2.Admittedly, disciplinary action was not taken against the appellant in connection with his absence from duty without leave. Nor was any notice given to the appellant that his past service was proposed to be forfeited under Art. 420 of the Civil Services Regulations and his explanation sought....

...We consider that the respondents were not entitled to withhold the pension of the appellant unless the facts fell within the provisions of Arts. 352 and 353 of the Civil Services Regulations. It was not suggested by the learned counsel for the respondents that the case fell within either of these articles. The appellant was holding the post of Superintendent substantively and Art. 352 had no application whatsoever nor was the appellant dismissed or removed for misconduct, insolvency or inefficiency so as to attract Art. 352. We, therefore, hold that the appellant was entitled to be paid his pension and gratuity on the basis of his service upto February 12, 1965. Let a direction issue accordingly. The appeal is allowed with costs in these terms."

22. The above judgment was followed in Shiv Shanker and Another Vs. Union of India (UOI) and Others, wherein in page 732 it was held thus:-

"..... The question before us is whether the principles of natural justice should be observed when an order of forfeiture of service on the ground of participation in an illegal strike is to be made. Neither para 1301 nor para 1304 of the Railway Establishment Manual excludes the observance of the principles of natural justice either expressly or by necessary implication."

The ratio laid down by the Apex Court in the said two cases are squarely applicable to the fact and circumstances of the case on hand.

23. After attaining the superannuation, the workmen claimed gratuity and denial of the same amounts to forfeiture of past service. In any event, non-inclusion of the period covered by lock out or strike without notice, enquiry or disciplinary proceedings or orders visiting the workman with penalty of non-inclusion of the past services for that period is violative of principles of natural justice.

24. The orders passed by the authorities below are well considered on merits and in accordance with the relevant provisions of Act and Rules as such no interference is warranted.

In the result, the writ petitions are dismissed. No cost. Connected WMPs are also closed.