

(2003) 01 BOM CK 0032

In the Bombay High Court

Case No : Writ Petition No. 4998 of 1987

Maharashtra State Textile Corporation Limited

APPELLANT

Vs

Gopal Balu Saikar (since deceased by his heirs Smt. Rukmini Gopal Saikar, Ravindra Gopal Saikar, Gajanan Gopal Saikar, Smt. Shalini Tukaram Kelaskar and Smt. Kalpana Manohar Khedekar) and K.M. Desai, Appellate Authority, under the Payment of Gratuity Act, 1972

RESPONDENT

Date of Decision : 07-01-2003

Acts Referred:

Companies Act, 1956 — Section 445, 445(3)
Industries (Development and Regulation) Act, 1951 — Section 18FA, 18FA(10)
Nationalisation Act, 1982 — Section 10, 10(1), 10(2)

Citation : (2003) 2 ALLMR 47 : (2003) 4 BomCR 836 : (2003) 97 FLR 251 : (2003) 2 LLJ 313 : (2003) 3 MhLj 531

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : Meena Doshi, for the Appellant; N.M. Ganguli and K.S. Poojari for Respondent Nos. 1A to 1E, for the Respondent

Final Decision : Allowed

Judgement

S.A. Bobde, J.—By this Petition the Maharashtra State Textile Corporation Limited, challenges the order of the Appellate Authority passed under the Payment of Gratuity Act, 1972. By this Order the Appellate Authority has upheld the order of the Controlling Authority passed under the Payment of Gratuity Act dated 6th August, 1986 by which that Authority has held the Petitioner liable to pay gratuity to the Respondent No. 1 on the basis that he was in continuous service of 17 years, 7 months and 14 days for the purpose of calculating his gratuity.

2. The 1st Respondent was employed as a Weaver in Western India Spinning and Manufacturing Mills which owned a textile mill. That company ran into financial difficulty and the textile mill was closed from July, 1976.

3. The creditors of the mill moved a winding up petition before this Court. On 13th January, 1977 this Court ordered the winding up of the company and appointed the Official Liquidator as "Liquidator" of the Company. By an order dated 10th March, 1977 this Court ordered the Central Government to authorise a person or body of persons to take over the management of the said company for a period not exceeding five years and directed the Official Liquidator to handover management of the textile mill to the authorised person to be appointed by the Central Government under the Industries (Development and Regulation) Act, 1951.

4. On 11th March, 1977 the Central Government appointed the Petitioner, the Maharashtra State Textile Corporation as the authorised person u/s 18FA of the Industries (Development and Regulation) Act, 1951 to take over management of the textile mill. The Petitioner as an authorised person, took charge of the management of the textile mill and restarted the mill on 1st August, 1977. Upon restarting of the mill, the Petitioner employed afresh the erstwhile employees of the mill on different dates. The 1st Respondent was re-employed on or about 14th November, 1977.

5. Subsequently, while the Petitioner continued to be in charge of the management of the Western Indian Spinning and Manufacturing Mill, the Government of Maharashtra promulgated an Ordinance No. XII of 1982 acquiring the assets, rights and properties of the undertaking i.e. the mill. This Ordinance was replaced by Maharashtra Act No. XXXIII of 1982 under which the right, title and interest of the mill stood transferred to and vested absolutely in the Government of Maharashtra. The above facts are not in dispute.

6. It is not in dispute that the 1st Respondent was employed in the mill i.e. Western India Spinning and Manufacturing Mill from 23rd April, 1966 till 13th January, 1977 which is the date on which this court appointed the Official Liquidator in the aforesaid company petition for winding up. There is also no dispute about the fact that the Respondent was reemployed afresh on 14th November, 1977 i.e. after the Petitioner was appointed as an authorised agent on 11th March, 1977 u/s 18FA of the Industries (Development and Regulation) Act, 1951.

7. The 1st Respondent, however, disputes that his reemployment was a fresh employment in law. According to the learned Counsel appearing for the 1st Respondent, his services cannot be taken to have been terminated on 13th January, 1977 when the winding up order was passed, since the subsequent order u/s 18FA had the effect of staying the winding up order dated 13th January, 1977 by reason of Sub-section (10) of Section 18FA.

8. The 1st Respondent stood superannuated on 7th December, 1983.

9. In brief the controversy is: Whether in fact there was a break in the service of Respondent No. 1 from 13th January, 1977, the date of the order appointing the Official Liquidator till 14th November, 1977 when he was employed afresh.

Therefore whether the 1st Respondent, who has claimed gratuity is entitled to have his gratuity computed right from 24th April, 1966 till 7th December, 1983 as if there was no break and he was in continuous service.

10. The Authorities below have not treated the period from 13th January, 1977 till 14th November, 1977 as amounting to a break and have taken a view that there was a continuous employment. The Petitioners have disputed this position.

11. The Controlling Authority has held the Respondent entitled for gratuity on the basis that he was in continuous service for a period of 17th years, 7 months and 14 days and has held him entitled to Rs. 6,932.60.

12. Ms. Doshi, learned Counsel for the Petitioner submits that there was a break in service. A winding up order was passed on 13th January, 1977 which had the effect of terminating the services of the Respondent u/s 445 of the Companies Act. The Respondent was re-employed on 14th November, 1977 after the Petitioner was appointed as an authorised agent for the purpose of management of the mill u/s 18FA of the Industries (Development and Regulation) Act, 1951 on 11th March, 1977. Therefore, according to the learned Counsel for the Petitioner, the period from 13th January, 1977 to 14th November, 1977 was in fact a break in service and must be recognised as such for the purpose of computing gratuity.

13. Mr. Ganguli, the learned Counsel for the Respondent disputes the above contention since according to him though normally the consequences of a winding up order is the termination of employment, in the present case the application of Sub-section (10) of Section 18FA of the Industries (Development & Regulation) Act, 1951 had the effect of staying the proceedings in the winding up of the company from inspection. According to the learned Counsel for the Respondent, the stay on the winding up proceedings operates from the date of the winding up order and therefore since the termination alleged by the Petitioner is on account of the winding up order, the effect of the stay of the winding up order is not the termination is negated. Therefore the 1st Respondent has been in continuous service.

14. it is, therefore, necessary to set out the legislative scheme to examine the rival contention. Section 445 of the Companies Act is so far it is relevant, reads as follows:-

"(1) On the making of a winding up order, it shall be the duty of the petitioner in the winding up proceedings and of the company to file with the Registrar a certified copy of the order, within thirty days from the date of the making of the order.

.....

(1A)

(2)

(3) Such order shall be deemed to be notice of discharge to the officers and

employees of the company, except when the business of the company is continued."

The learned Counsel for the Respondent does not dispute the fact that Section 445(3) of the Companies Act would result in termination of employment. He, however, submits that since under Sub-section (10) of Section 18FA of the Industries (Development and Regulation) Act the winding up order stands stayed, the termination, which is purely the result of Section 445(3) of the Companies Act can have no effect.

15. Section 18FA of the Industries (Development and Regulation) Act, enables the Central Government to authorise, with the permission of the High Court a person or persons to take over management or control of an industrial undertaking. Sub-section (10) thereof provides as follows:-

"(10) The proceedings in the winding up of the company is so far as they relate to-

(a) the industrial undertaking, the management of which has been taken over by the authorised person under this section, or

(b) the concerned part in relation to which any function of control is exercised by the authorised person under this section.

shall, during the period of such management or control, remain stayed, and in computing the period of limitation for the enforcement of any right, privilege, obligation or liability in relation to such undertaking or the concerned part, the period during which such proceedings remained stayed shall be excluded."

16. On a plain reading of Sub-section (10) it is clear that the sub-section provides that the winding up of the company shall remain stayed "during the period of such management or control", and not from the inception of winding up. It is, therefore, not possible to accept the contention of the learned Counsel for the Respondent that the stay can be taken to be effective from the date the winding up order was passed on 13th January, 1977. It cannot be artificially taken to be a period prior or subsequent to the period of management or control. In the present case, the period of such management or control commenced on the date of the order u/s 18FA of the Industries (Development and Regulation) Act by which the Petitioner was appointed as an authorised person i.e. on 11th March, 1977 and not prior thereto. Therefore, it cannot be said that the winding up order dated 13th January, 1977 stood stayed from inception and the services of the Respondent was not terminated as a consequence thereof. It must therefore be held that the Respondent's service were terminated as a consequence of Section 445 of the Companies Act on 13th January, 1977 and the stay of winding up was only during the period of management and control beginning from 11th March, 1977.

17. The learned Counsel for the Petitioner next submitted that the Authorities under the Payment of Gratuity Act have erroneously construed Section 10 of the

Nationalisation Act No. XXXIII of 1982. Section 10 reads as follows:-

10. (1) Every person, who has been, immediately before the appointed day, employed in any undertaking of either of the two textile Companies shall become, on and from the appointed day, an employee of the State Textile Corporation, with the same rights and privileges as to pension, gratuity and other matters as would have been admissible to him if the rights in relation to the undertaking had not been transferred to, and vested in, the Corporation, and shall continue to do so unless and until his employment in the Corporation is duly terminated or until his remuneration and other conditions of service are duly altered by the Corporation.

(2) Notwithstanding anything contained in Sub-section (1), any liability accruing or arising as a result of continuance of any employee of a Company in the service of the Corporation under this section, shall be borne by the Corporation only in respect of any period on and after the date of taking over of the management of the undertaking u/s 18FA of the Industries (Development and Regulation) Act, 1951."

18. According to the Appellate Authority, an employee right to gratuity, pension, etc. commences from the appointed day. Therefore even though, Sub-section (2) posits that the liability arising out of continuance shall be borne by the Corporation only in respect of the period after the taking over, the sub-section has no application because the words pension, gratuity, and other matters are absent in that sub-section. This construction placed by the Appellate Authority on Section 10 is not sustainable. It must be seen that Sub-section (1) of Section 10 undoubtedly continues the employment of any person who was employed in the undertaking as an employee of the Corporation, if he was in employment on the appointment day i.e. 24th August, 1982. The continuation is "with the same rights and privileges as to pension, gratuity and other matters". Sub-section (2) which begins as a non-obstante clause provides that any such liability accruing or arising as a result of continuance of any employee of a company in the service of the Corporation shall be borne by the Corporation in respect of the period on and after the date of taking over of the management of the undertaking u/s 18FA of the Industries (Development and Regulation) Act. This sub-section, therefore, clearly shows the intention of the legislature to fasten the liability for the continuance of any employee in respect of the period after the taking over of management of the undertaking. The phrase "liability accruing or arising as a result of continuance of any employee in the service of the Corporation" certainly includes the liability as to pension, gratuity and other matters. It cannot be said that merely because the words pension, gratuity and other matters are absent in Sub-section (2), these are not liabilities as a result of continuance of an employee in the service of the Corporation, and therefore these liabilities became the liabilities of the Corporation from the appointed day. Such a construction would defeat the intention of the Legislature in enacting Sub-section (2) with a non-obstante clause, the intention being to fasten liability on the Corporation

only for the period on and after the taking over of management. In the present case, it is not in dispute that the taking over of the management took place u/s 18FA on 10th March, 1977. It is further not in dispute that the Petitioners have computed the Respondent's entitlement to gratuity from that date onwards and have paid gratuity to him accordingly.

19. In the result, I find that the impugned order is not sustainable since it imposes liability on the Petitioners to pay gratuity to Respondent No. 1 for a period of about 18 years right from April, 1966 till his superannuation in 1983. There is a clear break in service of Respondent No. 1 from 13th January, 1977 by reason of Section 445(3) of the Companies Act till he was re-employed on 14th November, 1977. Therefore, applying Section 10(2) of the Nationalisation Act the Petitioner cannot be held liable for payment of gratuity to the 1st Respondent for the period prior to the taking over of management of the undertaking u/s 18FA of the Industries (Development and Regulation) Act i.e. 11th March, 1977.

20. In the result, the Petition is allowed. The impugned order is quashed and set aside. Rule made absolute accordingly. There shall be no order as to costs.

21. It is made clear that the heirs of Respondent No. 1 shall be at liberty to resort to such proceedings for recovery of such sums of gratuity as may be due from the Official Liquidator from the funds made available by the State Government under the provisions of the Nationalisation Act No. XXXIII of 1982.

P.A. to give ordinary copy of this order to the parties concerned.

All Authorities concerned to act on an ordinary copy of this order duly authenticated as true copy by the Sheristedar of this Court.