
(2003) 07 KL CK 0075

In the High Court Of Kerala

Case No : W.A. No's. 2255, 1960 of 2002 and connected cases

Manager, Koney Estates

APPELLANT

Vs

Gnana Muthu

RESPONDENT

Date of Decision : 22-07-2003

Acts Referred:

Payment of Gratuity Act, 1972 — Section 2

Citation : (2004) 1 ILR (Ker) 454 : (2004) 1 KLT 319 : (2004) 2 LLJ 171

Hon'ble Judges : K.A. Abdul Gafoor, J;J.M. James, J

Bench : Division Bench

Advocate : Antony Dominic and A.K. Jayasankar Nambiar, for the Appellant; P. Balagangadhara Menon Sujith Mathew Jose and K.G. Bhaskaran, Government Pleaders, H.B. Shenoy, B. Ashok Shenoy, B. Reghunandanan, P. Ramakrishnan and T.C. Krishna, for the Respondent

Judgement

K.A. Abdul Gafoor, J.—All these cases, except O.P. No. 5547 of 1993, are at the instance of the employer. Few are appeals and few are Original Petitions. All these cases, except O.P. Nos. 13176/1996 and 13177/1996 relate to the question of calculation of wages for the purpose of payment of gratuity to Supervisors, whereas, the said two Original Petitions relate to the same issue with regard to the payment of gratuity to tappers, employed in the rubber estate.

2. Eligibility for gratuity to the employees concerned is not disputed. Both supervisors and the tappers are entitled to gratuity, it is concerned.

3. Based on certain settlements, both the categories of employees are being paid "Over-kilo wages" as incentive for the output of work in excess of the required minimum standard. In the settlement, it has been agreed that it will be reckoned for the purpose of payment of gratuity, in the case of tappers. But there is no/such corresponding clause in the settlement relating to supervisors.

4. We will consider first the case of supervisors. As the management did not reckon the over-kilo incentive for the purpose of calculating gratuity payable to

Supervisors on their retirement, they approached the controlling authority under the Payment of Gratuity Act, 1972. The Controlling Authority found that over-kilo incentive is a part of wages as defined u/s 2(s) of the Payment of Gratuity Act, except in one case. Aggrieved parties concerned, approached the appellate authority. The appellate authority took a uniform stand except in one case which gave rise to O.P. No. 5547 of 1993, that the management was liable to pay gratuity calculating the over-kilo wages as well. But in the order challenged in O.P. No. 5547/1993, the appellate authority took a just contrary stand. It is in the above circumstances, Writ Appeals and the Original Petitions, except O.P. Nos. 13176/1996 and 13177/1996, arise. O.P. No. 5547/1993 is by the workmen who is aggrieved by the different stand adopted by the appellate authority. So, in these cases, except that relating to the case of tappers, we have to consider whether the over-kilo incentive payable in terms of Ext. P3 in O.P. No. 11470/1993 (W.A. No. 2255/2002) can be reckoned as wages for the purpose of calculating gratuity. The relevant clause is as under,

"1 . With effect from 1st April, 1985, the formula will be as follows:

Formula:

The daily incentive per head each month

() No. of over-kilos for the () month x 3.75 paise_____

Total no. of working Supervisors X days in the month"

5. It is contended that when the settlement is so entered into, it was not specifically provided to reckon over-kilo incentive, which is an element in the emoluments, as wages for the purpose of payment of gratuity. Therefore, the authorities have erred in directing reckoning of this element as part of wages to calculate gratuity payable to the concerned employees. It is submitted that this forms part of other allowances, and therefore, excluded from the wages in terms of the definition as contained in Section 2(s) of the Act. To substantiate this contention, much reliance has been placed on the decision of the Supreme Court reported in *T.I. Cycles of India, Ambattur, Chennai v. M.K. Gurumani and Ors.* (2001 (2) LLJ 1068), which also refers to the decision of the Supreme Court in *Straw Board Manufacturing Co. Ltd. v. Its Workmen*, (1977) 1, LLJ 463), which was to the effect that "wages will mean and include basic wage and dearness allowance and nothing else". But in *T.I. Cycles*, it was held by the Supreme Court that "both the High Courts and the authority have incorrectly understood the position in law and have wrongly held that the concept of wages under the Act would include bonus and that even on facts, the scheme would attract Section 4(2) of the Act". Accordingly, the appeal by the employer was allowed. Thus, it is clear that *T.I. Cycles* was a case relating to inclusion of bonus as an element of wages for the purpose of reckoning the gratuity and taking that situation into consideration, it was held that the bonus will not come within the definition of wages. It has nothing to do with reckoning of "over-kilo wages".

6. The Straw Board Manufacturing Company's case referred in T.I. Cycle's case by the Supreme Court, reveals that it related to the period before the enactment of the Payment of Gratuity Act, 1972. Thus, it is obvious that the Supreme Court has not considered the impact of Section 2(s) as contained in the Payment of Gratuity Act, 1972. Therefore, these two rulings did not give any aid for us to consider whether the over-kilo wages made mention of in Ext. P3 can be excluded from out of the wages. Therefore, we have to consider the definition to arrive at a decision.

7. The wages to be reckoned for the purpose of calculating gratuity shall be considered in the light of the definition to that term contained in Section 2(s) of the Act, which reads as follows:-

"Section 2(s): "Wages" means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance".

8. Thus, wages means all emoluments payable in accordance with the terms and conditions of employment, paid or payable in cash, including dearness allowance. The definition excludes bonus, commission, HRA, overtime wages and any other allowance. The attempt of the appellant/employer is to canvass that over-kilo wages will come within other allowance. But the term of settlement as extracted above indicates that the payment thereof is in cash and is based on output, which is generated by the work performed by the employee concerned. Not only that, even the settlement indicates the term "over-kilo wages" and not the "over-kilo allowance". When it is termed as an element of wages in the settlement itself, necessarily, it cannot partake the character of other allowances mentioned in Section 2(s) which stands excluded from wages. On the other hand, over-kilo wages being paid based on the output, necessarily, it varies in accordance with the production, and therefore, will come within the definition of wages as contained in Section 2(s) of the Payment of Gratuity Act. In such circumstances, the appellate authority was perfectly justified in all these cases except O.P. No. 5547/1993 to adopt that view.

9. The over-kilo wages payable in terms of Ext. P3 in O.P. No. 11470/93 (W.A. 2255/2002) will form part of the wage element as defined in Section 2(s) of the Act. When we take that view, necessarily, we have to set aside the view taken by the appellate authority in Ext. P2 in O.P. No 5547/1993. Accordingly, these appeals and Original Petitions relating to the Supervisors are disposed of holding that the over-kilo wages payable in terms of Ext. P3 in O.P. No. 11470/93 (W.A. 2255/2002) as applicable to the respective employees, shall have to be taken note of in computing the gratuity payable to the respective employees.

10. Now we will come to the case of tappers, namely, O.P. Nos. 13176 & 13177 of 1996. The conciliation settlement in question is Ext. P4 marked in O.P. No.

11470/1993 (W.A. No. 2255/2002). In the case of tappers, the management does not have a case that "over-kilo wages" do not form part of the wages or that it cannot be reckoned for the purpose of gratuity. But their case is that the over-kilo wages vary from month to month depending upon the performance of the tappers concerned. In order to have a definite and uniform standard, for calculating the same for the purpose of payment of gratuity, 12 months average shall be taken, as made mention of in Clause (1) of the said settlement. Clause (1) reads as follows:

"1. Reckoning of over-kilos for gratuity and bonus :

It is agreed that over-kilo wages would be taken into account for the calculation of gratuity as from 1.1.77 subject to the following conditions:-

"Daily wages" for this purpose would be the average of the workers wages for the actual days worked during the period of 12 months immediately preceding the termination of employment, and"

11. It is contented by the employer petitioner that if one particular tapper superannuates in a month when the production is high, he may get higher rate of gratuity, where as if any worker who had performed more work in good season retires in an off season, when over-kilo wages may be at a low rate, he will be prejudiced, as the gratuity payable, if reckoned on the basis of the direction given by the appellate authority will be at a lower rate. It was in the above circumstances, Ext. P4 settlement in O.P. No. 11470/1993 (W.A. 2255/2002) was arrived at as mentioned above. The Unions representing the whole workmen have aggrieved to the term contained in Ext. P4 settlement. According to us, the said terms agreed to by the union after the enforcement of the Payment of Gratuity Act, 1972, shall have pre-dominance, as it reflects the will of the workmen, which is beneficial to the majority. Therefore, we are of the view that while calculating the wages for the purpose of gratuity payable to the tappers, the over-kilo wages shall have to be computed taking into account the aforesaid settlement. Accordingly, we set aside Exts. P3 and P6 in O.P. No. 13177/1996 and Exts. P4 and P6 in O.P. No. 13176/1996.

The Writ Appeals and the Original Petitions are accordingly disposed of.