
(2015) 02 BOM CK 0324
In the Bombay High Court
Case No : Writ Petition No. 777 of 2014

Managing Director (MSCTDC Ltd.) and Others	APPELLANT
Vs	
Purushottam Asaram Raut and Others	RESPONDENT

Date of Decision : 26-02-2015

Acts Referred:

Payment of Gratuity Act, 1972 — Section 14, 4(6), 5, 7(1), 7(2)

Citation : (2015) 4 BomCR 365

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

Bench : Single Bench

Advocate : Neeta Jog, for the Appellant; A.N. Vastani, Advocates for the Respondent

Final Decision : Disposed off

Judgement

A.S. Chandurkar, J—Rule. Heard finally with the consent of the learned Counsel for the parties. The petitioners-employer take exception to the order passed by the Appellate Authority under the Payment of Gratuity Act, 1972 (for short the said Act) directing payment of a sum of Rs. 1,80,000/- to the respondent No. 1 with interest @ 10% per annum. This order has been confirmed in appeal by the Appellate Authority on 17-1-2014.

2. The facts in so far as the same are relevant for adjudicating the challenge as raised are that the respondent No. 1 was employed as a Grader with the petitioners since 4-11-1978. He came to be dismissed from service on 23-5-2000. On 18-4-2011, he filed an application before the Controlling Authority praying that the employer be directed to pay him gratuity under provisions of the said Act. The employer opposed the aforesaid application on the ground that the same was time barred. The entitlement of the respondent No. 1 to receive gratuity was also disputed. The Controlling Authority - respondent No. 2 held that the respondent No. 1 was entitled to receive the amount of gratuity by treating the amount of Rs. 9000/- as last drawn salary. Hence, by order dated 1-6-2013, the petitioners were directed to pay an amount of Rs. 1,80,000/-

towards gratuity within a period of 30 days with interest at the rate of 10% per annum from 23-6-2000 till its realization. In appeal preferred by the petitioners under section 7(7) of the said Act, the Appellate Authority negated the challenge to aforesaid order and dismissed the appeal.

3. Smt. Neeta Jog, the learned Counsel appearing for the petitioners made twofold submissions. According to her, in terms of Rule 83 of the Maharashtra State Co-operative Tribal Development Corporation Service Rules if an employee was dismissed or removed from service, he was not eligible to receive amount of gratuity. It was submitted that as the respondent No. 1 was governed by service conditions of the petitioner - Corporation, he was not entitled to receive the amount of gratuity. It was then submitted that on account of considerable delay in seeking payment of gratuity, the respondent No. 1 was disentitled for any relief. It was submitted that though the respondent No. 1 ceased to be in service from 23-5-2000, the application for payment of gratuity was filed on 18-4-2011. It was, therefore, urged that on account of aforesaid delay, the claim as made was barred by limitation and hence, both the authorities erred in holding that the respondent No. 1 was entitled for grant of gratuity. In support of her submissions, the learned Counsel placed reliance upon judgment of the learned Single Judge of the Karnataka High Court in Shivalingappa Vs. Management of Minerva Mills and Others, (2001) 90 FLR 382 : (2001) 1 KCCR 27 SN : (2001) 2 LLJ 451 . The learned Counsel, therefore, submitted that orders under challenge deserve to be set aside.

4. Per contra, Shri A.N. Vastani, the learned Counsel appearing for the respondent No. 1 supported the impugned orders. He submitted that provisions of section 14 of the said Act have an overriding effect over anything that was inconsistent with provisions of the said Act. According to him, the entitlement of the respondent No. 1 to receive gratuity which was a statutory right could not be taken away by relying upon provisions of Rule 83 of the Service Rules. In that regard he placed reliance upon judgment of the Supreme Court in Jaswant Singh Gill Vs. Bharat Coking Coal Ltd. and Others, (2007) 112 FLR 196 : (2007) 1 JT 6 : (2007) 2 LLJ 206 : (2006) 11 SCALE 624 : (2007) 1 SCC(L&S) 584 : (2006) 8 SCR 1064 Supp . He then submitted that the services of the respondent No. 1 had been dispensed with on account of absentism and it was not the case of the employer that the services of the respondent No. 1 had been terminated for any act, willful omission or negligence that caused any damage or loss to the employer. Hence, according to him, provisions of section 4(6) of the said Act were inapplicable to the facts of the present case and the respondent No. 1 could not be deprived of the amount of gratuity. In that regard, he placed reliance on the judgment of the Division Bench in Vinod Jinturkar Vs. State of Maharashtra and Others, (2011) 128 FLR 618 : (2011) 2 LLJ 659 : (2011) LLR 343 : (2011) 1 MhLj 843 .

He further submitted that under provisions of section 7(2) of the said Act, it is the duty of the employer to determine the amount of gratuity and also give

notice in writing to the person to whom gratuity is payable. Said statutory duty was required to be complied with even if no application in terms of section 7(1) of the said Act was made by the person entitled to receive gratuity. He also referred to provisions of Rule 10 of the Payment of Gratuity (Maharashtra) Rules 1972 in that regard. To buttress his submission that if the employer fails to give any notice under section 7(2) of the said Act, there is no question of limitation applying, the learned Counsel placed reliance on the judgment of learned Single Judge in *The Transport Manager, Kolhapur Municipal Transport Undertaking Vs. Pravin Bhabhutulal Shah, Controlling Authority under Payment of Gratuity Act, 1972 and Appellate Authority under Payment of Gratuity Act, 1972*, (2004) 4 ALLMR 297 : (2004) 5 BomCR 10 : (2005) 104 FLR 1009 : (2005) 2 LLJ 104 : (2005) 1 MhLj 497 : (2005) 1 SLJ 485 . He also urged that the plea regarding bar of limitation had been raised vaguely by the petitioners and the same was not pursued before the Appellate Authority. He submitted that as said point was not agitated by the petitioners, consideration of said aspect does not find place in the order of the Appellate Authority. He relied upon judgment of the Division Bench in *Chairman/President, Rotary Charitable Trust and Principal, Pratapsingh Morarji Memorial Inner Wheel School Vs. Nagendra Pratapsingh and Education Officer, Secondary Division*, (2003) 4 ALLMR 888 : (2003) 5 BomCR 12 : (2004) 1 MhLj 191 to submit that in absence of there being any reference to the contention regarding bar of limitation in the order passed by the Appellate Authority, it was clear that such contention was not advanced. He finally submitted that discretion having been exercised by the statutory authorities in favor of the respondent No. 1 by directing payment of gratuity, there was no reason to interfere with such discretion. He placed reliance on judgment of learned Single Judge in *(Dena Bank Vs. Manjulaben Thakur)*, 2012 (11) C.L.R. 250 in that regard. He thus sought dismissal of the writ petition.

5. Before considering the contentions as raised, it is to be noted that the right to receive gratuity is a statutory right governed by provisions of said Act. It is in the nature of a social welfare legislation enacted to provide for a scheme for payment of gratuity to employees. The denial of amount of gratuity is restricted by provisions of section 4(6) of the said Act and in case of any exemption granted by the appropriate Government under section 5 of the said Act. It is further well settled that under provisions of section 7(2) of the said Act, an obligation has been cast on the employer to determine the amount of gratuity that is payable irrespective of whether any application in terms of section 7(1) of the said Act has been made by the person eligible or not. Breach on the part of the employer to comply with such obligation has been held to provide a recurring and continuous cause of action to the person entitled to receive gratuity and reference in that regard can be made to the observations of learned Single Judge in para 11 of the decision in *H. Jayarama Shetty Vs. The Sangli Bank Ltd.*, (2005) 3 ALLMR 10 : (2005) 3 BomCR 10 : (2005) 106 FLR 357 : (2005) 3 LLJ 637 : (2005) 3 MhLj 609 . It was observed therein that the stand of the employee that failure to pay him gratuity resulted in a continuing and recurring cause of action

was held to be justified. With aforesaid position in mind, it would be necessary to consider the challenge to the impugned order.

6. According to the learned Counsel for the petitioner, the claim for gratuity as made was barred by limitation inasmuch as the respondent No. 1 ceased to be in employment on 23-5-2000 and the application for payment of gratuity was made on 18-4-2011. It was also urged that demand for gratuity was not made within a reasonable period. In *Shivlingappa (supra)*, the employee therein had resigned from service in the year 1972 and he had made a claim for payment of gratuity in the year 1984. In that context, it was observed by learned Single Bench of Karnataka High Court that even if limitation was not specifically prescribed, the claim ought to have been made within a reasonable time. It was also noted that after resigning from dues, the dues of the employee had been settled and belatedly a claim was being agitated. Another consideration was inability of the employer to lay its hands on old records. It was, therefore, held that the period of 13 years in said case was not reasonable or justifiable and the claim was not entertained as it was not made within a reasonable period.

To get over said position, the learned Counsel for the petitioner relied upon decision of learned Single Judge in *Transport Manager (supra)* wherein it was held that in absence of any notice being given by the employer under section 7(2) of the said Act, the question of limitation would not arise.

It has been consistently held by this Court that on failure on the part of the employer to comply with its obligation under section 7(2) of the said Act, the question of limitation would not arise. Reference in that regard can also be made to the decision in *H. Jairama Shetty (supra)*. It is, therefore, clear that even in the present case the employer - petitioner having failed to issue notice to the respondent No. 1 under section 7(2) of the said Act, question of limitation for claiming gratuity would not arise.

7. It is now necessary to consider the submission of the learned Counsel for the petitioners that the application for payment of gratuity was required to be moved at least within a reasonable time. It was urged that though the respondent No. 1 ceased to be in employment on 23-5-2000, the application for being paid gratuity was filed on 18-4-2011. As noted above, there is no period of limitation prescribed for moving an application to receive gratuity especially when the employer has not discharged its obligation under section 7(2) of the said Act. At this stage, it is necessary to take into consideration the decision of the Supreme Court in *Uttam Namdeo Mahale Vs. Vithal Deo and others*, AIR 1997 SC 2695 : (1997) 5 JT 632 : (1997) 4 SCALE 337 : (1997) 6 SCC 73 : (1997) 1 SCR 257 Supp : (1997) 2 UJ 303 : (1997) AIRSCW 2663 : (1997) 5 Supreme 578 . In said case, an order of eviction under the Mamlatdar Court's Act 1906 came to be passed. After more than 12 years, said order was sought to be executed. It was held by this Court that under section 21 of the Mamlatdar Courts Act 1906, no period of limitation had been prescribed for executing orders passed under provisions of the Act of 1906. In challenge to aforesaid order, the Supreme Court

held that in absence of any specific limitation being provided under the Act of 1906, the implied power of exercise of said right within reasonable limitation would not arise. It is, therefore, clear that in absence of there being any specific period of limitation prescribed for making an application to receive gratuity, the concept of reasonable period cannot be imported in such situation.

The decision in the case of Shivlingappa (supra) that was pressed into service by the learned Counsel for the petitioners in that regard had held that the period of 13 years delay therein was not justifiable in facts of said case. It is to be noted that in said case the employee had accepted certain amounts after he ceased to be in employment and then after about 13 years had sought to repaginate his claim. The Court also noted that it was likely that the employer could not lay hands on old records. Considering the facts, aforesaid decision would not apply to the case in hand. In the present case, the respondent No. 1 was not paid any amount whatsoever and it is not the case of the petitioners that the old records pertaining to the respondent No. 1 were not traceable. Hence, the claim of the respondent No. 1 cannot be defeated on the ground that same was not made within reasonable time.

8. Though there is some substance in the submission of the learned Counsel for the respondent No. 1 that the objection as regards limitation was not specifically pursued by the petitioners before the Appellate Authority by relying upon the decision in the case of Chairman/President Rotary Charitable Trust (supra), nevertheless, I have considered said aspect of challenge on its own merits.

9. Considering the other submission that as the respondent No. 1 was dismissed from service, he was not entitled to be paid amount of gratuity under Rule 83 of the Service Rules, it is to be noted that the services of the respondent No. 1 came to be terminated on the ground of absenteeism. Under Rule 83 of the Service Rules, an employee who has rendered service for not less than five years was entitled to receive gratuity but an employee who was dismissed or removed from service was not entitled to receive the same. Provisions of Rule 83 and effect of the same would have to be considered along with provisions of section 4(6) of the said Act. Under said provision, it is only if services of an employee are terminated for any act, willful omission or negligence resulting in any damage or loss to the employer, then gratuity to the extent of damage so caused is liable to be forfeited. Provisions of section 4(6) of the said Act along with Service Rules of similar nature framed by Coal India Limited were considered by the Supreme Court in Jaswant Singh Gill (supra). It was held that the Service Rules not being statutory Rules, the same would not have the force of statute and a statutory right conferred by section 4(6) cannot be impaired by reason of such Rule. Ratio of aforesaid decision would apply on all fours to the facts of the present case. Provisions of Rule 83 of the Service Rules cannot have the effect of nullifying provisions of section 4(6) of the said Act. It is not the case of the petitioners that the services of respondent No. 1 came to be terminated on account of any act, willful omission or negligence resulting in causing any damage or loss or

destruction of property belonging to it. The respondent No. 1 was dismissed from service on account of his absenteeism. Moreover, section 14 of the said Act provides that provisions of said Act or any Rules made there under would have overriding effect over any other instrument or contract. Hence, there is no justification whatsoever on the part of the petitioners in denying the claim of the respondent No. 1 to receive amount of gratuity. In view of aforesaid discussion, it is clear that the orders impugned do not suffer from any jurisdictional error to Warrant interference in writ jurisdiction. There is no ground made out to deny the respondent No. 1 his entitlement to receive gratuity. Hence, there is no merit in the writ petition. The same is, therefore, dismissed. Rule is discharged with no order as to costs.