
(2012) 02 KAR CK 0064

In the Karnataka High Court

Case No : Writ Petition No. 31840 of 2011 (L-PG)

Manipal University

APPELLANT

Vs

Sri. Vasantha Kotian Poojary

RESPONDENT

Date of Decision : 29-02-2012

Acts Referred:

Payment of Gratuity Act, 1972 — Section 2 (c), 2 (s), 4

Citation : (2012) 4 KarLJ 429

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : S.N. Murthy, for the Appellant; H. Mangalamba Rao, Adv, for the Respondent

Final Decision : Allowed

Judgement

Aravind Kumar

1. Petitioner-management is calling in question the order dated 19.07.2010 in Gratuity Application No. 48/534/2009-A/M at Annexure-D, passed by the Controlling Authority under the Payment of Gratuity Act, 1972 (hereinafter referred to as "Act" for sake of brevity) and order dated 11.03.2011 passed in Appeal No. 292/2010-B2 at Annexure-G passed by the Appellate Authority. Heard Sri. S.N. Murthy, learned Senior Counsel appearing for petitioner and Smt. Mangalamba Rao. learned counsel appearing for respondent-workman. Perused the impugned order as also the documents filed by learned counsel for petitioner along with a memo.

2. Facts in brief leading to filing of this writ petition are as under:

(i) Respondent-workman was working in petitioner organisation as driver. On attaining age of superannuation on 27.11.2008 and on his retirement petitioner-Management determined Gratuity amount payable to respondent at Rs. 81,663/- by taking 19 years as continuous service and said amount was credited to respondent's Savings Bank Account at Syndicate Bank. Respondent filed an

Application before the Controlling Authority under the Payment of Gratuity Act, 1972 and the Assistant Labour Commissioner (Central), Mangalore (hereinafter referred to as "Controlling Authority") claiming that "variable allowance" and "conveyance allowance" has not been included for the purposes of computation of the Gratuity by the management and he is entitled to payment of Gratuity u/s 4 of the Act and accordingly sought for payment of Gratuity amount.

3. Said Application being taken on record Controlling Authority issued notice to the management, who appeared and filed detailed statement of objections contending that workman was paid basic salary along with special pay, variable allowance, conveyance allowance, and special allowance and for the purposes of calculating Gratuity, variable allowance and conveyance allowance were not taken into account since these were not part of Gratuity within the meaning of Section 2(s) of the Payment of Gratuity Act, and respondent was entitled for the payment of gratuity only in respect of basic pay and special pay and special allowance. It was contended in the statement of objections filed that management had sanctioned variable allowance to the non-teaching staff with effect from 01.04.2007 as per the notification issued by the University and it is based purely on assessment of performance of the employees. It was contended that on the basis of said system every employee would be assessed, on his individual performance at the end of every year and variable allowance would be paid as per their assessment. It was contended that respondent herein was "entitled for variable allowance of Rs. 822/- per month and the said variable allowance and conveyance allowance of Rs. 300/- paid to him was not part of Wages under the Payment of Gratuity Act, 1972.

4. The Controlling Authority after considering rival contentions raised by parties and on appreciation of arguments advanced arrived at a conclusion that management has changed the nomenclature of dearness allowance into variable allowance and has excluded the same from the term "wages" as defined under the Payment of Gratuity Act. It was also held by the Controlling Authority, on appreciation of facts that the contention of management that "Variable Allowance" which is paid to the respondent is not based on the assessment of the performance of employees on the following grounds:

I. Any payment related to performance can be considered as a general rule termed as "Pay" and not as "Allowance", since the word "Pay" is used as distinct as "Allowance". Accordingly, the payment related to performance should have been termed as "Variable Pay" which would be included for the purposes of computation of Gratuity being "Wage".

II. There is no component of "Dearness Allowance" in the salary paid to the applicant which would only suggest that "Variable Allowance" is nothing but a camouflaged term for "Variable Dearness Allowance"

III. Nothing has been brought on record that each of the employees are being assessed and the said Variable Allowance is being realised according to their

performance.

5. On these grounds Controlling Authority has held that contention of management cannot be accepted that it is paying Variable Allowance to these employees and it is a misnomer and held that it is a deliberate attempt on the part of management to exclude said component from the purview of "wages" as defined under Payment of Gratuity Act. However, claim of the employee, that "Conveyance Allowance" as part of wages, was not accepted and it was rejected. On the basis of the said conclusion arrived at, the Controlling Authority added the Variable Allowance and Special Allowance component to the basic pay salary plus special pay and special allowance to arrive at the total wages and ordered for payment of difference of Gratuity amount. On account of such inclusion of "variable allowance" to the component of wages and directed a sum of Rs. 9,011/-with interest per annum is to be paid by the Management from the date on which the difference of Gratuity became payable i.e., 15.12.2008 till the date of payment of the said amount.

6. Aggrieved by the said order management preferred an appeal before the Appellate Authority in Appeal No. 292/2010-B2. The respondent-employee filed objections to the said Appeal and Appellate Authority held that management had failed to convincingly establish that an employee was assessed based on his individual performance and any reduction having been made in their allowances and held in the absence thereof held component of variable Allowance in the pay structure has to be construed dearness allowance and it is nothing but a misnomer for Variable Dearness Allowance and accordingly held that order of Controlling Authority is not liable to be interfered and affirmed the same by dismissing the Appeal No. 292/2010 B2 by order dated 11.3.2011 at Annexure-G.

7. Sri S.N. Murthy, learned senior counsel appearing for petitioner would contend that u/s 2(s) of Payment of Gratuity Act, the component of wages would include all such emoluments which is earned by an employee while on duty or on leave in accordance with the terms and conditions as agreed to between the employer and employee and includes Dearness Allowance also but does not include components of Bonus, Commission, House Rent Allowance, Overtime wages "and any other allowance" that may be payable to the employee and contends that inclusive and exclusive words used in said section has to be understood in the manner as defined thereunder and contends that no other allowance other than Dearness Allowance can be brought within the inclusive definition. Elaborating his submission, he contends that "Variable Allowance" paid by the petitioner to the respondent is based on the performance of an employee and it depends entirely on the individual efforts of employees like overtime wages which is paid only to an employee when they perform overtime work and as such in order to encourage the employees such variable allowance is extended depending on the merits. He submits that conclusion arrived at by the controlling authority that on account of Dearness Allowance not being paid variable allowance has to be construed as "Dearness Allowance" in disguise is wholly erroneous and contends

that payment of Dearness Allowance is not mandatory and he contends that there is no law which mandates that Dearness Allowance should be paid as a component of wages. He submits that Controlling Authority having accepted the plea of management with regard to conveyance allowance ought to have extended the same benefit in so far as Variable Allowance is concerned.

8. He further contends that pay structure of non-teaching staff of University was re-structured with effect from 1.4.2005 and during this restructuring of pay, basic pay was revised by merging Dearness Allowance and wherever the said amount has exceeded the corresponding basic pay at the respective stage, the said differential amount was to be paid as "Special Pay" and one more component called as "Special Allowance" was also introduced and these two components namely "Special pay" and "Special Allowance" was taken into consideration for the purposes of computation of PF and Gratuity by Management as consequence to restructuring of the basic pay by merging Dearness Allowance as such, the component of Dearness Allowance was discontinued and in its place. Special Pay was introduced which at the most can be construed as Dearness Allowance and it is in this background, Special Pay was also taken into consideration for the purposes of bringing it within the purview of wages and within the ambit of PF and Gratuity Act and as such, he contends that Variable Allowance was never meant to replace Dearness Allowance component. On these grounds, he seeks for setting aside the orders passed by the authorities and allowing the Writ Petition.

9. Per contra, Smt. Mangalamba Rao. learned counsel appearing for respondent-workman would support the order passed by the authorities and contend that when employer adopts a method to avoid and evade the wage components being brought within the scope of wages by giving different nomenclature then authorities are empowered to look into the transaction to ascertain as to whether such allowance is to be excluded from the purview of definition clause of "wages" or to be included and in the instant case such an exercise was undertaken by the authority and it was found that in so far as conveyance allowance is concerned was permissible to be excluded from the component of wages whereas the management had failed to prove Variable Allowance is paid only to those employees who had performed and when there being a uniform application of payment of variable wages, the authorities have rightly concluded that said Variable Allowance cannot be excluded from the component of wages. She would contend that it is an admitted fact that Variable Allowance and Conveyance Allowance are paid to every employee and along with leave salary which fact had been suppressed by the management and it would go to show that it is universally paid to all the employees and as such, it forms part of wage component. On these grounds, she supports the order passed by the authority and seeks for dismissal of Writ Petition.

10. Having heard learned advocates appearing for parties, I am of the considered view that following points arise for my consideration:

(1) Whether "Variable Allowance" in the instant case is to be excluded or included in the component of wages as defined u/s.2(s) of Payment of Gratuity Act.?

(2) Whether the order passed by the controlling authority as affirmed by the appellate authority deserves to be affirmed, set aside or modified.?

(3) What order.?

RE POINT NO. 2:

11. In order to adjudicate this issue, it would be necessary to extract the definition of the word "wages" as defined under the Payment of Gratuity Act, 1972 and it reads as under:

"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 employments 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"

12. The word "Wages" as defined under the Act was the subject matter of consideration by the Hon"ble apex court in the following two judgments:

(i) The Straw Board Manufacturing Co. Ltd. Vs. Its Workmen, .

"26. Decisions have been brought to our notice some of which refer to basic wages and others to consolidated wages as the foundation for computation of gratuity. These are matters of discretion and the "fee" of the circumstances prevalent in the industry by the Tribunal and. unless it has gone haywire in the exercise of its discretion the award should stand. We see that in the Payment of Gratuity Act also, not basic wages but "gross wages" inclusive of Dearness Allowance, have been taken as the basis. This incidentally, reflects the industrial sense in the country which has been crystallised into legislation.

(Emphasis supplied)

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28. We clarify that wages will mean and include basic wages and Dearness Allowance and nothing else. This corresponds to Sec. 2(s) of the Act. Likewise, we declare that qualifying service is continuous service (counted with reference to completed years) as defined in Sec. 2(c). We hold that the award will operate as directed therein i.e. from the date of reference of the dispute. Both sides agree, in their statement of the case, that in clause (a) of the award the expression due to continued ill-health or on being incapacitated" governs only resignation although we feel on compassionate grounds it should govern both situations. The ambiguity must be resolved in favour of the workers. In regard to the other conflicts of construction possible, as set out in grounds 7 and 8 of the appellant's statement of case, we resolve them in favour Of the workmen,

abandonment of service being too recondite and the amount involved too trivial for variation by this Court."

(Emphasis supplied)

This judgment came to be considered with affirmation by the apex court in the case of T.I. Cycles of India Ambattur, Chennai, Vs. M.K. Gurumani & Others reported in 2001 (2) LLJ 1068 whereunder it is held as follows:

8. Again this Court in Bridge and Roof Co. (India) Ltd. Vs. Union of India (UOI), , examined the scope of the term basic wages as defined in PF Act and as to whether bonus would be included in the same and it was explained that the word bonus, not having been qualified in any manner in Section 2(b)(ii) of the PF Act, would not include only profit bonus but every other kind of bonus amounts paid by way of bonus under the scheme and held to be excluded from the definition of basic wages covered by the exception to Section 2(b) of the PF Act. Therefore, these two decisions make it clear that bonus stands excluded from the purview of wages for the purpose of calculating the contribution to be made in the provident fund or the gratuity payable under the Act. These decisions could not have been brushed aside or explained away in the manner done by the High Court, one by stating that the decision has no bearing after the Act came into force and the other that the enactment is different. The essence of wages was explained in Straw Boards case (supra) with reference to gratuity and the Act was relied upon to state what the law on the matter stood then is reflected in the Act, while in Bridge & Roof Company (India) Ltd. (supra) this Court explained the scope of definition of basic wages which we have held to be identical with the term wages used in the Act."

13. Incentive payment is based on two components: group performance index and individual/sectional performance index. It was made clear that no incentive will be payable to workmen on leave, absent, away from duty or on holidays. The minimum performance level is indicated in each sectional incentive table and below which no incentive will be paid for any reason whatsoever. If a person works for more than one group during the month, he will be awarded incentive as per the performance of each group in the respective periods. Clause 9.1 also sets out incentive payment payable under the scheme will not be regarded as wages and, therefore, the payment shall not be taken into account for the purpose of leave wages, overtime wages, wages in lieu of notice, provident fund contributions, bonus, gratuity or any other allowance. However, this clause is subject to review in case of statutory amendments if any.

14. The Authorities were carried away by considering that the bonus is payable on the basis of output equivalent to certain pieces per man-day. But it is made clear in the scheme that each payment will be made not on the basis of pieces of per man-day nor is it a piece rate work for which wages are paid but it is an additional incentive for payment of bonus in respect of extra work done. The measure of extra work done is indicated by pieces and not wages as such that

are paid on that basis. It is not that in respect of each piece any wages are paid but altogether if certain number of pieces are produced, additional incentive will be payable at a particular rate. Therefore, the authorities have completely missed scope of the scheme and have incorrectly interpreted the same. Inasmuch as both the High Court and the authorities 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. Proviso to Section 4(2) of the Act is to the effect that in case of a piece-rated employee, daily wages shall be computed in a particular manner but that is not the rate at which the wages are paid in the present case at all. Therefore, Section 4(2) of the Act is not attracted in the case of the present scheme with which we are concerned."

13. To understand the true meaning of the word "Wages" as defined under the Act, I am of the view that it is to be judged by the company of the word it keeps namely the doctrine of *noscitur a sociis* would be applicable and it can be pressed into service. In such circumstances, as stated by the Privy Council: "it is a legitimate rule of construction to construe the words in an Act of Parliament with reference to words found in immediate connection with them". In 11th Edition of SALMOND Jurisprudence at page 153 under the Chapter of Law and other things at page 166, this aspect has been explained in detail which was considered, examined and applied by the Hon'ble apex court in the case of *M/s. Rohit Pulp and Paper Mills Ltd. Vs. Collector of Central Excise, Baroda*, . The said doctrine has been applied in catena of decisions and some of the decisions which can be looked up on this issue are *C.B.I., A.H.D., Patna Vs. Braj Bhushan Prasad and Others*, , *Bank of India Vs. Vijay Transport and Others*, . A doubtful word may be ascertained by reference to the meaning of the word associated with it. Such doctrine is higher than "*ejusdem generis*". Keeping the principles enumerated or laid down in the decisions referred to above, when the words used for defining the word "wages" are examined in the present context, it can be safely held that it branches out into two headings namely inclusive definition and exclusive definition. In so far as inclusive definition is concerned, it encompasses within its sweep all emoluments which an employee earns while on duty or on leave in accordance with the terms and conditions of his employment and would also include Dearness Allowance. However, the exclusive clause excludes the components of bonus, commission, HRA, overtime wages and any other allowance which the employee may earn. The words "any other allowance" used in section is the contentious issue in the present Writ Petition. It is in this back ground doctrine of *noscitur a sociis* which comes to the forefront and same will have to be applied and it is to be examined as to whether "Variable Allowance" which is to be construed part of wages or not. If the words "any other allowance" is excluded from the definition clause and is read and it would mean and include only those allowances as enumerated therein which would gets excluded and no other allowances. Likewise when the inclusive clause is applied and definition of wages is examined, it would be all emoluments including Dearness Allowance. If

the intention of the legislature was to include any other component within definition clause, it would have found a place in the enactment or in other words, the legislature would have also used the word "any other allowance" in the inclusive definition. Thus, any other allowance" not being found in the inclusive definition, the one and the only conclusion which can be drawn is that other allowances" like bonus, commission, house rent allowance, overtime wages and any other allowances would get excluded from the purview of the definition of wages. To understand the word "any other allowance" used in section 2(s) of the Act, it would be of benefit to note the judgements of Hon"ble apex court where the words "any other" came to be considered and have been the subject matter of interpretation namely "any other law" and "any other matter" in following two cases:

(1) Tata Davy Ltd., Vs. State of Orissa & Others reported in AIR 1998 SC 2928

(2) Union of India (UOI) Vs. Shri Harbhajan Singh Dhillon, .

14. In Tata Davy's case, Section 22(1) of Sick Industrial Companies (Spl. Provisions) Act, namely Section 22(1) of the Act was the subject matter of consideration wherein, effect of pending legal proceedings of sick company was being considered with reference to the words used therein namely "any other law" and in this, back ground, Hon"ble apex court while considering as to whether it would exclude of State laws enacted by the State under entry No. 54 List II of Schedule 7 was the subject matter and it was held in the negative namely it was held that "any other law" does not exclude the State Acts.

15. In Harbhajan Singh Dhillon's case, while considering the Residuary powers of Parliament to legislate entry 97 of List 1 namely the words "any other matter", it was held that if a Central Act is challenged as being beyond the legislative competence of Parliament, it is enough to enquire if it is a law with respect to matters or taxes enumerated in List-II and if it is not, no other question arises and concluded that the words "any other matter" occurring any entry 97 cannot be interpreted to mean a topic mentioned by way of exclusion.

16. Thus, reading of the above judgments would clearly go to show that it is to be construed as the inclusive definition namely such of those allowances which would follow the bonus, commission, HRA. Overtime wages would come within the purview of "any other allowance".

17. In that view of the matter, I am of the considered view that point No. 1 formulated herein above is to be answered by holding that "Variable Allowance" in the instant case has been erroneously brought within the purview of the component "wages" by the authorities.

18. The petitioner by way of revision of pay scale in the year 2005 to the non teaching staff of its constituted colleges, associated hospitals, institutions and centers with effect from 1.4.2005 revised their pay scales. On such revision taking place, Dearness Allowance was merged with the basic pay and revised pay

scales was brought in and on account of revised scales coming into effect wherever the amount of Dearness Allowance had exceeded the corresponding basic pay stages in the revised pay scale, the differential amount was paid by way of "Special Pay" and new pay role component "special allowance" was also introduced with effect from 1st Jan. 2005. Petitioner management itself included the "special pay" and "special allowance" to the component of wages for the purposes of computation of PF & Gratuity. The two components Variable Allowance" and "conveyance allowance" was excluded from the purview of payment of Gratuity and EPF & MP Act in view of definition clause. The controlling authority, agreed with the contention raised by the petitioner management in so far as conveyance allowance is concerned and held that the same is to be excluded from the purview of definition of Section 2(s) of the Act.

19. It is an undisputed fact that respondent-workman has agreed for the Variable Allowance for enhanced salary payable with effect from 1st April 2005 though it is contended by the learned counsel appearing for respondent that this fact is not admitted and the employee was asked to sign on the dotted line this court is not inclined to accept the same inasmuch as at no point of time, respondent has raised his little finger by bringing it to the notice of the management about his grievance with regard to Variable Allowance for being excluded from the purview of PF and Gratuity. It is to be further noticed that controlling authority has assigned the reason of management not being able to demonstrate that each of the employees were paid based on performance to uphold the contention of the respondent employee. As observed hereinabove, employee has not disputed with regard to Dearness Allowance having been merged with the salary or wages after restructuring of salary/wages done in the year 2005 and without any demur, it has been accepted and it is only after attaining age of superannuation he has raised this contention. This Court while answering point No. 1 hereinabove has already taken a view that "variable allowance" cannot form part of basic wages.

20. The appellate authority while considering the grounds urged by the petitioner-establishment has not examined the grounds urged in this regard and has concurred with the views expressed by the controlling authority. Coming back to the order of the controlling authority, it looks that it has sat in the arm chair of an employer to decide as to whether the said component is to be excluded from the purview of wages or included without considering the factual aspect namely restructuring of the salary having been taken place in the year 2005. Merely because the management-employer has adopted a policy of extending Variable Allowance, even assuming uniformly that by itself would not be sufficient to arrive at a conclusion that it necessarily has to form part of component of wages and there is no doubt burden is cast on the employer also to discharge that it does not form to be so. This interpretation to the word "variable allowance" to be given has been discussed hereinabove, and held that it would be applicable only in so far as Payment of Gratuity Act alone is concerned inasmuch as definition of the word "Wages" as defined under the EPF & MP Act is quite distinct and different from the definition as found in the Payment of Gratuity Act.

21. In view of the discussion made hereinabove, I am of the considered view that order passed by the controlling authority as affirmed by the appellate authority cannot be sustained. Though in normal circumstances and course, this court would have remanded the matter back to the controlling authority for re-examination. I desist from doing so inasmuch as this court being a court of record, documents produced by the learned counsel for petitioner along with a memo would clearly establish the fact that wage restructuring took place in the year 2005 and as to the mode and method in which Variable Allowance was to be paid was decided and as such matter is not being remanded to Controlling Authority.

RE POINT NO. 3:

In view of the discussions made hereinabove, I pass the following:

ORDER

- (1) Writ Petition is allowed.
- (2) Order dated 19.07.2010 in Gratuity Application No. 48/534/2009-A/M at Annexure-D, and order dated 11.03.2011 passed in Appeal No. 292/2010-B2 at Annexure-G are hereby quashed.
- (3) No order as to costs.